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NORTH CAROLINA REPORTS
VOL. 217

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1939
SPRING TERM, 1940

REPORTED BY
JOHN M. STRONG

RALEIGH
BYNUM PRINTING COMPANY
PRINTERS TO THE SUPREME COURT
1940

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

JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

FALL TERM, 1939 AND SPRING TERM, 1940.

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OF THE

SUPERIOR COURTS OF NORTH CAROLINA

EASTERN DIVISION

Name	*District*	*Address*
C. E. Thompson	First	Elizabeth City.
Walter J. Bone	Second	Nashville.
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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.
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SPECIAL JUDGES

G. V. Cowper	Kinston.
W. H. S. Burgwyn	Woodland.
Luther Hamilton	Morehead City.

WESTERN DIVISION

John H. Clement	Eleventh	Winston-Salem.
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F. Donald Phillips	Thirteenth	Rockingham.
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Frank M. Armstrong	Fifteenth	Troy.
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N. A. Sinclair	Fayetteville.
Henry A. Grady	New Bern.
*W. F. Harding	Charlotte.
E. H. Cranmer	Southport.

*Deceased

SOLICITORS

EASTERN DIVISION

Name	*District*	*Address*
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D. M. CLARK	Fifth	Greenville.
J. ABNER BARKER	Sixth	Roseboro.
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L. SPURGEON SPURLING	Sixteenth	Lenoir.
AVALON E. HALL	Seventeenth	Yadkinville.
C. O. RIDINGS	Eighteenth	Forest City.
ROBERT M. WELLS	Nineteenth	Asheville.
JOHN M. QUEEN	Twentieth	Waynesville.
R. J. SCOTT	Twenty-first	Danbury.

SUPERIOR COURTS, SPRING TERM, 1940

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

THIS CALENDAR IS UNOFFICIAL

EASTERN DIVISION

FIRST JUDICIAL DISTRICT

Spring Term, 1940—Judge Burney.

Beaufort—Jan. 15* (2); Feb. 19† (2); Mar. 18* (A); April 8†; May 6† (2); June 24.
Camden—Mar. 11.
Chowan—April 1.
Currituck—Mar. 4.
Dare—May 27.
Gates—Mar. 25.
Hyde—May 20.
Pasquotank—Jan. 8†; Feb. 12* (2); Mar. 18†; May 6† (A) (2); June 3*; June 10† (2).
Perquimans—Jan. 15† (A); April 15.
Tyrrell—Feb. 5†; April 22.

SECOND JUDICIAL DISTRICT

Spring Term, 1940—Judge Nimocks.

Edgecombe—Jan. 22; Mar. 4; April 1† (2); June 3 (2).
Martin—Mar. 18 (2); April 15† (A) (2); June 17.
Nash—Jan. 29; Feb. 19† (2); Mar. 11; April 22† (2); May 22.
Washington—Jan. 8 (2); April 15†.
Wilson—Feb. 5* (2); May 13* (2); June 24†.

THIRD JUDICIAL DISTRICT

Spring Term, 1940—Judge Carr.

Bertie—Feb. 12; May 6 (2).
Halifax—Jan. 29 (2); Mar. 18† (2); April 29*; June 3† (2).
Hertford—Feb. 26; April 15‡ (2).
Northampton—April 1 (2).
Vance—Jan. 8*; Mar. 4*; Mar. 11†; June 17*; June 24†.
Warren—Jan. 15 (2); May 20 (2).

FOURTH JUDICIAL DISTRICT

Spring Term, 1940—Judge Thompson.

Chatham—Jan. 15; Mar. 4†; Mar. 18†; May 13.
Harnett—Jan. 8*; Feb. 5† (2); Mar. 18* (A); April 1† (A) (2); May 6†; May 20*; June 10† (2).
Johnston—Jan. 8† (2) (A); Feb. 12 (A); Feb. 19† (2); Mar. 4 (A); Mar. 11; April 15 (A); April 22† (2); June 24*.
Lee—Jan. 29† (A) (2); Mar. 25 (2).
Wayne—Jan. 22; Jan. 29†; Feb. 5† (A); Mar. 4† (A) (2); April 8; April 15†; April 22† (A); May 27; June 3†; June 10† (A).

FIFTH JUDICIAL DISTRICT

Spring Term, 1940—Judge Bone.

Carteret—Mar. 11; June 10 (2).
Craven—Jan. 8*; Jan. 29† (3); April 8‡; May 13†; June 3*.
Greene—Feb. 26 (2); June 24.
Jones—April 1.
Pamlico—April 29 (2).
Pitt—Jan. 15*; Jan. 22; Feb. 19; Mar. 18† (2); April 15 (2); May 6† (A); May 20† (2).

SIXTH JUDICIAL DISTRICT

Spring Term, 1940—Judge Parker.

Duplin—Jan. 8† (2); Jan. 29*; Mar. 11† (2).
Lenoir—Jan. 22*; Feb. 19† (2); April 8; May 13† (2); June 10† (2); June 24*.
Onslow—Mar. 4; April 15† (2).
Sampson—Feb. 5 (2); Mar. 25† (2); April 29† (2).

SEVENTH JUDICIAL DISTRICT

Spring Term, 1940—Judge Williams.

Franklin—Feb. 5*; Mar. 18† (A) (2); April 15* (A).
Wake—Jan. 8*; Jan. 15† (3); Feb. 5* (A); Feb. 12† (3); Mar. 4* (2); Mar. 18† (2); April 8*; April 15† (3); May 6*; May 13† (3); June 3* (2); June 17† (2).

EIGHTH JUDICIAL DISTRICT

Spring Term, 1940—Judge Frizzelle.

Brunswick—Jan. 8†; April 8; June 17†.
Columbus—Jan. 29; Feb. 5 (A); Feb. 19† (2); April 29 (2); June 24*.
New Hanover—Jan. 15*; Feb. 5† (2); Mar. 4† (2); Mar. 18*; April 15† (2); May 13*; May 27† (2); June 10*.
Pender—Mar. 25 (2).

NINTH JUDICIAL DISTRICT

Spring Term, 1940—Judge Stevens.

Bladen—Jan. 8; Mar. 18*; April 29†.
Cumberland—Jan. 15*; Feb. 12† (2); Mar. 4* (A); Mar. 11*; Mar. 25† (2); May 6† (2); June 3*.
Hoke—Jan. 22; April 22.
Robeson—Jan. 15† (A) (2); Jan. 29* (2); Feb. 26† (2); Mar. 18* (A); April 8* (2); April 22† (A); May 6* (A) (2); May 20† (2); June 10†; June 17*.

TENTH JUDICIAL DISTRICT

Spring Term, 1940—Judge Harris.

Alamance—Jan. 29† (A); Feb. 26*; April 1†; May 13* (A); May 27† (2).
Durham—Jan. 8† (3); Feb. 19*; Feb. 26† (A); Mar. 4† (2); Mar. 18† (A); Mar. 25*; April 22† (A); April 29† (2); May 20*; May 27† (A) (3); June 24*.
Granville—Feb. 5 (2); April 8 (2).
Orange—Mar 18; May 13†; June 10; June 17†.
Person—Jan. 22 (A); Jan. 29†; April 22.

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT

Spring Term, 1940—Judge Nettles.

Ashe—April 15*; May 27† (2).
Alleghany—April 29.
Forsyth—Jan. 8 (2); Jan. 22† (2); Feb. 5 (2); Feb. 19† (2); Mar. 4 (2); Mar. 18† (2); April 1 (2); April 15† (A); April 22†; May 6 (2); May 27† (A) (2); June 10 2); June 24† (2).

TWELFTH JUDICIAL DISTRICT

Spring Term, 1940—Judge Alley.

Davidson—Jan. 29*; Feb. 19† (2) April 1† (2); May 6*; May 27†; June 3† (A); June 24*.
Guilford—Jan. 1*; Jan. 8† (2); Jan. 22*; Feb. 5† (2); Feb. 19† (A) (2); Mar. 4* (2); Mar. 18† (2); Mar. 25* (A); April 1† (A); April 15† (2); April 29*; May 13† (2); May 27* (A); June 3† (2); June 17*.

THIRTEENTH JUDICIAL DISTRICT

Spring Term, 1940—Judge Clement.

Anson—Jan. 15*; Mar. 4†; April 15 (2); June 10†.
Moore—Jan. 22*; Feb. 12†; Mar. 25† (A) (2); May 20*; May 27† (A).
Richmond—Jan. 8*; Feb. 5†; Mar. 18†; April 8*; May 27; June 17†.
Scotland—Mar. 11; April 29†.
Stanly—Feb. 5† (A) (2); April 1; May 13†.
Union—Jan. 29*; Feb. 19† (2); Mar. 25†; May 6†.

FOURTEENTH JUDICIAL DISTRICT

Spring Term, 1940—Judge Sink.

Gaston—Jan. 15*; Jan. 22† (2); Mar. 11† (A); Mar. 18† (2); April 22*; May 20† (A) (2); June 3*.
Mecklenburg—Jan. 8*; Jan. 8† (A) (2); Jan. 22*; (A) (2); Jan. 22† (A) (2); Feb. 5† (3); Feb. 5† (A) (2); Feb. 19† (A) (2); Feb. 26*; Mar. 4† (2); Mar. 4† (A); Mar. 18* (A) (2); Mar. 18† (A) (2); April 1† (2); April 1† (A) (2); April 15†; April 22† (A); April 29† (2); April 29† (A) (2); May 12*; May 12† (A) (2); May 20† (2); May 27† (A) (2); June 10*; June 10 (2); June 24† (2).

FIFTEENTH JUDICIAL DISTRICT

Spring Term, 1940—Judge Phillips.

Alexander—Feb. 5 (A) (2).
Cabarrus—Jan. 8 (2); Feb. 26†; Mar. 4† (A); April 22 (2); June 10† (2).
Iredell—Jan. 29 (2); Mar. 11†; May 20 (2).
Montgomery—Jan. 22*; April 8† (2).
Randolph—Jan. 29† (A) (2); Mar. 18† (2); April 1*; June 24*.
Rowan—Feb. 12 (2); Mar. 4†; Mar. 11† 20* (2); June 10† (2).
Stokes—Jan. 1*; April 1*; April 8†; June 24*.
(A); May 6 (2).

SIXTEENTH JUDICIAL DISTRICT

Spring Term, 1940—Judge Gwyn.

Burke—Feb. 19; Mar. 11† (2); June 3 (3).
Caldwell—Feb. 26 (2); May 20† (2).
Catawba—Jan. 15† (2); Feb. 5 (2); April 8† (2); May 6† (2).
Cleveland—Jan. 8; Mar. 25 (2); May 20† (A) (2).
Lncoln—Jan. 22‡ (A); Jan. 29†.
Watauga—April 22 (2); June 10† (A) (2).

SEVENTEENTH JUDICIAL DISTRICT

Spring Term, 1940—Judge Bobbitt.

Avery—April 8*; April 15†.
Davie—Mar. 18; May 27†.
Mitchell—Mar. 25 (2).
Wilkes—Mar. 4 (2); April 29† (2); June 3† (2).
Yadkin—Feb. 26*; May 13† (2).

EIGHTEENTH JUDICIAL DISTRICT

Spring Term, 1940—Judge Armstrong.

Henderson—Jan. 8† (2); Mar. 4 (2); April 29† (2); May 27† (2).
McDowell—Jan. 1*; Feb. 12† (2); June 10 (2).
Polk—Jan. 29 (2).
Rutherford—Feb. 26†; April 15† (2); May 13 (2); June 24† (2).
Transylvania—April 1 (2).
Yancey—Jan. 22†; Mar. 18 (2).

NINETEENTH JUDICIAL DISTRICT

Spring Term, 1940—Judge Warlick.

Buncombe—Jan. 1‡; Jan. 8† (2); Jan. 22‡ (2); Feb. 5† (2); Feb. 19; Mar. 4† (2); Mar. 18; April 1† (A); April 1† (2); April 15; April 29; May 6† (2); May 20; June 3† (2); June 17 (2).
Madison—Feb. 26; Mar. 25; April 22; May 27.

TWENTIETH JUDICIAL DISTRICT

Spring Term, 1940—Judge Rousseau.

Cherokee—Jan. 22† (2); April 1 (2); June 17† (2).
Clay—April 29.
Graham—Jan. 8† (A) (2); Mar. 18 (2); June 3† (2).
Haywood—Jan. 8† (2); Feb. 5 (2); May 6† (2).
Jackson—Feb. 19 (2); May 20† (2); June 10* (A).
Macon—April 15 (2).
Swain—January 15† (A) (2); Mar. 4 (2).

TWENTY-FIRST JUDICIAL DISTRICT

Spring Term, 1940—Judge Pless.

Caswell—Mar. 18 (2).
Rockingham—Jan. 22* (2); Mar. 4†; Mar. 11*; April 15†; May 6† (2); May
Surry—Jan. 8*; Jan. 15†; Feb. 12*; Feb. 19† (2); April 22*; April 29†; June 3†.

*For criminal cases.
†For civil 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.

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.

CASES REPORTED

CASES CITED

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1939

EDNA R. LEAK BRUTON AND EDNA R. LEAK BRUTON, TRUSTEE FOR JAMES A. LEAK, JR., AND JAMES A. LEAK, JR., v. CAROLINA POWER & LIGHT COMPANY, A CORPORATION.

(Filed 2 February, 1940.)

1. Nuisances § 5: Waters and Water Courses § 11—

Where, in an action for damages to plaintiff's land resulting from a permanent nuisance which is protected by the power of eminent domain or because of the exigent public interest may not be abated, award of permanent damages is made upon demand of plaintiff, defendant acquires a permanent easement entitling him to continue to maintain the nuisance in the same manner.

2. Judgments § 32—

A judgment estops the parties and their privies as to all issuable matters which are contained in the pleadings or which are within the scope of the pleadings and should have been brought forward in the exercise of reasonable diligence, and plaintiff will not be allowed to separate items of damage, but must sue in one action to recover all the damages resulting from a single wrongful act.

3. Same—Judgment for permanent damages resulting from operation of dam held to bar subsequent action for another item of damage resulting from same cause.

A lower riparian owner instituted action and recovered permanent damages for the acts of an upper proprietor in interfering with the normal flow of water of the river by the operation of its hydroelectric dam, which interference with the normal flow of the stream rendered the operation

of the lower riparian owner's ferry, used by him in going to and from his lands, and as a public ferry, impossible. At the time of the institution of this action, any injury to the land of the lower proprietor by erosion resulting from the regular operation of the dam was apparent. This action was instituted by the heirs of the deceased plaintiff in the former action to recover damages to the land from erosion resulting from the regular operation of the dam. *Held:* The erosion of the lower lands was merely an item of damage resulting from the regular operation of the dam, and should have been brought forward and asserted in the prior action for damages from the same wrongful act, and therefore the prior action bars plaintiffs from maintaining the subsequent action, plaintiffs being in privity with the plaintiff in the former action.

4. Judgments § 35—

Written prayers for instructions become a part of the record and judgment roll, and are admissible on the plea of *res judicata.*

5. Same: Evidence § 34—

Where the record in a former action is in existence and is before the court upon the plea of *res judicata* and discloses the identity of the actions within the rule of estoppel by judgment, the granting of defendant's plea of estoppel without findings of fact is not error, the record in the former action being the only evidence admissible to prove its contents.

6. Waters and Water Courses § 7—Duties and liabilities of operator of dam during ordinary freshets.

While the owner of a dam is not required to anticipate and is not ordinarily liable for damages resulting from unprecedented storms and floods, it is required to exercise ordinary care in anticipating flood conditions from an ordinary freshet such as might be reasonably expected or foreseen, and may be held liable for damages resulting from its negligence in failing to guard against any undue acceleration or retardation of the flood water.

7. Same—Duties and liabilities of operator of dam during period of unprecedented flood.

While the owner of a dam is not liable for damages arising from an unprecedented storm or flood, it may be held liable for damages resulting from its negligence in manipulation of the dam causing undue acceleration or retardation of the flood water, the lower proprietors being entitled not to have the flood waters substantially augmented by the sudden release of large quantities of flood water from the dam, and the upper proprietors being entitled not to have flood damage increase by any undue retardation of the flood water, but the owner of a dam may not be held liable for damages resulting from an unprecedented flood when it neither unduly accelerates in speed nor increases the quantity of water flowing from the dam, nor unduly retards the water above the dam, but manipulates the dam so that the water flowing from the dam is equal to that flowing into the pond above the dam.

8. Same—Evidence held insufficient to show that damages to plaintiffs' land during unprecedented flood resulted from any negligent operation of defendant's dam.

Plaintiffs' expert witness, who had no personal knowledge of the conditions existing at the time, testified that in his opinion the flooding of plaintiffs' land resulted from the opening of a large number of gates in

defendant's dam, suddenly releasing a large quantity of water during an unprecedented flood. All the evidence, considered in the light most favorable to plaintiffs, tended to show that the sudden release of water from defendant's dam would cause a crest which would reach plaintiffs' land in about four hours, which crest would adjust itself in six or eight hours; that on the day prior to the greatest flooding of plaintiffs' land defendant had thirteen or fourteen of the gates in its dam open; that on the date of the greatest flooding defendant had fourteen of its gates open, and that at all times while the gates were open water was flowing over the top of the unopened gates, thus showing that defendant was not discharging any considerable water in excess of that which was coming in. *Held:* The expert opinion evidence is unsupported and amounts to nothing more than a speculation, and there being a total absence of evidence that defendant suddenly released a large volume of water on either the day before or the day of the maximum flooding of plaintiffs' land, defendant's motion for judgment as of nonsuit was properly granted.

9. Trial § 21—

The trial court denied defendant's motions to nonsuit at the close of plaintiffs' evidence and at the close of all the evidence, but during the progress of the argument reversed itself and entered judgment as of nonsuit. *Held:* The matter was *in fieri* until rendition of a verdict, and the plaintiffs' contention that the court, having denied the motion at the conclusion of all the evidence, was without power to grant it thereafter, is untenable.

CLARKSON, J., concurs in result.

APPEAL by plaintiffs from *Grady, Emergency Judge,* at June Term, 1939, of ANSON. Affirmed.

This is a civil action instituted by the plaintiffs, lower riparian owners, against the defendant, an upper riparian owner, to recover damages alleged to have been caused by certain negligent and wrongful acts of the defendant.

The defendant has constructed a concrete dam across Yadkin River and has erected a hydroelectric generating plant adjacent to said dam, the dam and plant being known as the Tillery Hydroelectric Generating Station. The defendant, as a public utility corporation, has been operating said plant since 1928 for the generation of electricity for distribution and sale.

Prior to his death, James A. Leak was the owner of 1,350 acres of land on the east side of Pee Dee (Yadkin) River and the islands therein formed by the thoroughfare of said river, which lands are located approximately six miles below the Tillery Dam and between the Tillery Dam and the Blewett Falls Dam.

During his lifetime and after the construction of the Tillery Dam, on 1 August, 1929, the said James A. Leak instituted an action against the defendant for damages on two causes of action set out in his complaint. The first cause of action was bottomed upon allegations that

the defendant, during a period of freshet, negligently and without warning, suddenly opened up the gates of the Tillery Dam, causing an unnatural and excessive volume of water to flow down the Yadkin River, greatly accelerating and increasing the volume of the natural flow of the river and causing the crops of the plaintiff to be damaged and destroyed to his great hurt. In his second cause of action the said plaintiff alleged that the defendant, by obstructing the natural flow of water in said river and by materially and substantially cutting off and depriving the plaintiff of the normal use of the flow of the stream and by the unreasonable use of said water by the defendant in raising and lowering the gates of the dam in disregard of the rights of the plaintiff, the lower riparian owner, causing the flow of water to be irregular and not in accordance with its normal and natural flow, and by the taking and use by the defendant of an unreasonable quantity of the normal and natural flow, the plaintiff has suffered substantial and permanent damage in that the continued operation of a ferry then being operated by the plaintiff in going to and from his lands and as a public ferry was thereby made impossible.

There was a verdict for the plaintiff on each cause of action. The amount allotted to the plaintiff on the second cause of action as permanent damages has been paid and satisfied in full by the defendant.

Thereafter, in 1934, James A. Leak died testate, devising said lands to the plaintiff Edna R. Leak Bruton, for herself and in trust for the plaintiff James A. Leak, Jr.

The plaintiffs instituted this action 19 January, 1938, to recover damages caused by the alleged negligent and wrongful operation of the Tillery Dam on or about 7 April, 1936, in wrongfully manipulating the flood water during a period of freshet and by suddenly discharging an excessive and unreasonable quantity of water so as to bring about the existence of high and exceedingly rapid and destructive water in the Pee Dee River below said dam, causing an overflow which resulted in washing away the top soil of the plaintiffs' lands and destroying its value for agricultural purposes. Plaintiffs also allege that in the construction of the Tillery Dam in the manner described, and in the manipulation of the natural flow of the stream, and by interfering with the normal and natural flow thereof, and by creating a reservoir or basin in which large quantities of water were impounded, the defendant wrongfully invaded the right of the plaintiffs to the natural and normal flow of said stream; and that by the impounding of an unreasonable quantity of water in said reservoir the defendant created, in times of freshet or high water, a highly damaging condition which unlawfully injured the property of the plaintiffs and has deprived them of the beneficial use of a large part thereof; that in the manipulation of said dam the flow of water in said stream

is at times practically cut off and at other times materially and injuriously accelerated and increased so that the plaintiffs are deprived of their rights to the natural flow of said stream and which has resulted in eroding and washing away and greatly damaging plaintiffs' lands.

At the conclusion of all the evidence the defendant renewed its motion to dismiss as of nonsuit first entered at the conclusion of the plaintiffs' evidence. At the time the motion was overruled and the defendant excepted. Thereafter, during the progress of the argument, the court, having decided that it was in error in overruling the motion of nonsuit, reversed itself and entered judgment dismissing the action as of nonsuit. The plaintiffs excepted and appealed.

Vann & Milliken and B. M. Covington for plaintiffs, appellants.

Taylor & Thomas, Robinson, Pruette & Caudle, W. H. Weatherspoon, and A. Y. Arledge for defendant, appellee.

BARNHILL, J. While the complaint does not undertake to state two separate and distinct causes of action, it, in fact, alleges two causes of action and was so interpreted and treated by the court below.

The first cause of action alleges the wrongful use of the water of the Yadkin River by the defendant, an upper riparian owner, which deprives the plaintiffs of their right to the natural and uninterrupted flow of the stream and which has caused the erosion and washing away of the plaintiffs' land—a continuing wrong which amounts to a taking of plaintiffs' land or substantial interest therein.

As to this cause of action the defendant pleaded *res judicata* and in support thereof offered in evidence the judgment roll in the case of James A. Leak *v.* Carolina Power & Light Co., instituted 1 August, 1929, and which was terminated at the November Term, 1930, by final judgment awarding the plaintiff therein permanent damages on his second cause of action as stated in his complaint. This plea was sustained by the court below.

From an examination of the second cause of action set out in the complaint in the James A. Leak case and of the complaint in this cause, it appears that plaintiffs' first cause of action herein and the second cause of action as set out in the James A. Leak complaint are stated in substantially identical language. The alleged wrongful conduct of the defendant, as pleaded by James A. Leak, as the basis for a second cause of action is identically the same wrong set forth and described by these plaintiffs in their complaint. As to this phase of the case the causes of action are the same. But, in the James A. Leak action he sought to recover damages for the destruction of his ferry rights only and the plaintiffs contend that the judgment in said action is not a bar to their

right to recover damages to the land itself. They insist, therefore, that their exception to the order of the court sustaining the plea of *res judicata* should be upheld.

This exception to the ruling of the court on the plea of *res judicata* presents but one question. Where two actions are based on the same cause or right of action bottomed on the same alleged wrong, does the fact that in the first action the plaintiff sought to recover a part of the damages to which he was entitled bar that plaintiff's successors in title from maintaining an identical action for the recovery of damages to the land itself?

Our decisions are to the effect that where the injuries complained of result from structures or conditions permanent in their nature and their existence and maintenance is guaranteed or protected by the power of eminent domain or because the interest of the public therein is of such exigent nature that the right of abatement at the instance of an individual is of necessity denied it is open to either plaintiff or defendant to demand that permanent damages be awarded; the proceedings in such case, to some extent, taking on the nature of condemning an easement. *Rhodes v. Durham,* 165 N. C., 679, 81 S. E., 938; *Clinard v. Kernersville,* 215 N. C., 745, 3 S. E., 267. An action by landowners against a corporation possessing the right of condemnation for the maintenance of a continuing nuisance which adversely affects the value of plaintiff's land is, by demand for permanent damages either by the plaintiff or by the defendant, converted into an action in the nature of a condemnation proceedings for the assessment of damages for the value of the land or easement taken. The assessment of permanent damages and the payment thereof vests in the defendant an easement entitling it to the continued use of the property in the same manner. *Clinard v. Kernersville, supra.* In those cases wherein it is alleged that lands have been subjected to an additional burden, the question of negligence is not involved. *Clinard v. Kernersville, supra.*

The wrong complained of by James A. Leak in his second cause of action, as stated in his complaint, was continuing in its nature, resulting from the construction and maintenance of a permanent plant, the operation of which adversely affected and damaged the property of said plaintiff, a lower riparian owner. The prayer for an award of permanent damages therein converted the cause into an action for damages resulting from the wrongful taking, in part, of plaintiffs' property, which taking amounted in law to the imposition of an easement. The assessment and payment of permanent damages vested in defendant an easement in plaintiffs' land entitling it to continued use of the property in the same manner. *Clinard v. Kernersville, supra,* and cases there cited.

By the verdict and judgment in the former action the defendant is estopped to deny that by the construction, maintenance and manner of operation of its Tillery Dam it wrongfully interfered with and permanently damaged the plaintiff therein in his property right as a lower riparian owner. Likewise, the plaintiff therein and his successors in title are estopped to deny that the defendant, by payment of the permanent damages assessed, acquired an easement in plaintiffs' land, at least as to his ferry rights, permitting the continued use of its plant in the same manner without further rights on the part of James A. Leak, or his successors in title, to complain.

A judgment rendered in an action estops the parties and their privies as to all issuable matters contained in the pleadings, including all material and relevant matters within the scope of the pleadings, which the parties, in the exercise of reasonable diligence, could and should have brought forward. *Distributing Co. v. Carraway,* 196 N. C., 58, 144 S. E., 535; *Garrett v. Kendrick,* 201 N. C., 388, 160 S. E., 349. The whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time. He can neither split up his claim nor divide the grounds of recovery. *Power Co. v. Power Co.,* 188 N. C., 128, 123 S. E., 312; *Winslow v. Stokes,* 48 N. C., 285; *U. S. v. Land Co.,* 192 U. S., 355, 48 L. Ed., 476; *Eller v. R. R.,* 140 N. C., 140. Where a party brings an action for a part only of the entire indivisible demand and recovers judgment, he cannot subsequently sue for another part of the same demand. *Baird v. U. S.,* 96 U. S., 432, 24 L. Ed., 703. As stated by *Walker, J.,* in *Eller v. R. R., supra,* "The general rule in the law of damages is that all damage resulting from a single wrong or cause of action must be recovered in one suit. The demand cannot be split and several actions maintained for the separate items of damage. Plaintiff recovers one compensation for all loss and damage, past and prospective, which were the certain and proximate results of the single wrong or breach of duty. The rule is different where there is a continuing wrong or the wrong is repeated as in the case of a nuisance or trespass, or where there is a new trespass distinct from the original one . . . Where there is an invasion of another's right, the cause of action is the wrong, or what we technically call 'the injury,' which entitles him at least to nominal recompense to vindicate his right, and the consequences which immediately flow from the injury, in the way of loss or damage, are but matters of aggravation. . . . She (plaintiff who was held to be barred) could carve out as large a slice as the law allowed, but she could cut but once. No one should be twice vexed for the same cause is a maxim of the law we are not disposed to disregard and which it is well strictly to enforce." See also *Lightner v. Raleigh,* 206 N. C., 496, 174 S. E., 272; *Webb v. Chemical Co.,* 170

N. C., 662, 87 S. E., 633; *Baltimore S. S. Co. v. Phillips,* 274 U. S., 316, 71 L. Ed., 1069; *Stern v. Richies,* 111 Wis., 591, 87 N. W., 555; *Kline v. Stein,* 46 Wash., 546, 90 Pac., 1041; 1 R. C. L., 341; *Barcliff v. R. R.,* 176 N. C., 39, 96 S. E., 644; *Bank v. Schruben,* 125 Kan., 417.

The cause of action set out in the former suit is based on the conduct of the defendant in wrongfully interfering with the rights of the plaintiff therein as a lower riparian owner by the erection of a permanent structure for use in serving the public and in interfering with the normal flow of the water of Yadkin River in connection therewith. If any damage to his land resulted therefrom said plaintiff was advertent thereto at the time. That he had in mind resulting damages to his land is made to appear by written prayers for instructions he tendered in that case in which he states in part: "That the intermittent wetting and drying of the banks by the defendant's operation of its turbines and gates causes the banks of the river to crack and facilitates erosion of same not only by the irregular flow caused by the defendant but also by floods, both natural and artificial, in said river, all to such an extent that even large trees which withstood larger floods than any on the river since the dam was constructed have been undermined and have died and fallen in the river, and that the banks of the river are gradually widening and the substance thereof carried down the river and deposited in the defendant's pond at Blewetts' Fall." If he considered such resulting damage more than inconsequential it was his duty to seek to recover compensation therefor in that action. His failure to do so estopped him and his privies from thereafter asserting any right thereto.

But the plaintiffs contend that the written prayers for instructions were improperly admitted and should not be considered. While it sufficiently appears without reference to the prayers for instruction that the former judgment is *res judicata* as to the plaintiffs' first cause of action, we may say that when the plaintiff in the former action tendered written prayers for instructions they became a part of the record and judgment roll and were admissible on the plea of *res judicata* as a part thereof.

There was no error in the judgment of the court in sustaining the plea of *res judicata* on the cause of action set out by plaintiffs for the taking of their property without compensation through the wrongful interference with the right of plaintiffs, as lower riparian owners, in the manipulation of the waters of Yadkin River. Nor was there any error in the failure of the court to find the facts on the plea of *res judicata.* The record in the former action being in existence is the only evidence admissible to prove its contents. *Gauldin v. Madison,* 179 N. C., 461, 102 S. E., 851; *Little v. Bost,* 208 N. C., 762, 182 S. E., 448; *Gibson v. Gordon,* 213 N. C., 666, 197 S. E., 135; *Whitaker v. Garren,* 167 N. C., 658, 83 S. E., 759. That action was pursued to final judgment

and the jury verdict discloses the material facts. What the evidence was is unimportant. The plaintiffs cannot now pursue the same cause of action for the recovery of further damages.

Was there error in the judgment dismissing the action on the plaintiffs' second cause of action based on allegations of negligent operation of defendant's dam and floodgates during a period of excessive rains? We are of the opinion that this question likewise must be answered in the negative.

This cause of action is predicated upon the assumption that the defendant, during flood time, so unreasonably operated the floodgates to its dam that the flood water below the dam was suddenly accelerated and the quantity flowing from the dam was so excessively increased as to cause the lands of the plaintiffs to overflow, resulting in extensive damage to the lands and the crops thereon. This is a sound legal premise and, if supported by the facts, is sufficient to sustain a recovery. As was said in *Dunlap v. Power Co.,* 212 N. C., 814, 195 S. E., 43, "A lower riparian owner has the right only to insist that the water shall not be unreasonably withheld or let down by the owner above or withheld for an unreasonable length of time. The upper riparian owner has no right by virtue of his position unreasonably to interfere with the natural flow of the stream so as to give the riparian owner below a great deal more than the usual quantity of water during a part of the year, or at stated periods, and little or none during the remainder of the year or during intervals of unreasonable length . . . a riparian proprietor has a right to make all the use he can of the stream so long as he does not pollute it or divert it from its natural channel and abstract so much as to prevent other people from having equal enjoyment with himself, or does not use the same in such an unreasonable manner as to materially damage or destroy the rights of other riparian owners."

Although the works of the defendant were lawfully and rightfully in the stream and the defendant had the right to make reasonable use of the water thereof in the operation of its plant, it should be held for such damages as results from its negligent and careless manipulation of the unusual flow of water during a freshet or its negligent failure to use reasonable care in anticipating flood conditions or in failing to use reasonable diligence in guarding against any undue acceleration or retardation of flood water resulting from an unusual rainfall.

An actionable injury arises when the consequence of the detention of water by a dam is the flooding of the lands of owners either upstream or downstream. 67 C. J. (Water's), p. 702. However, the owner of a dam may permit water to flow from a dam if the waters coming to the dam are neither accelerated in speed or increased in quantity, so long as ordinary care is exercised in the discharging of the water ponded behind

the dam. *Crawford v. Cobb's & Mitchel Co.,* 121 Ore., 628, 253 Pac., 3, and 257 Pac., 16; *Wixon v. Water, etc., Co.,* 24 Cal., 367; *Wilson v. Campbell,* 76 Me., 94. Nothing appears to be more settled than that the owner of a dam is not bound to anticipate unprecedented storms or rainfalls. *Palmyra v. Woolen Co.,* 99 Me., 134, 58 Atl., 674; *Radburn v. Lumber Co.,* 83 Wash., 634, 145 Pac., 632; and is not liable for damages resulting from extraordinary storms and floods. *Steel Co. v. Law,* 224 Ala., 667, 141 So., 641; *Duncan v. Power Co.,* 250 Mass., 228, 145 N. E., 427; *Town of Bennington v. Fillmore & Slade,* 98 Vt., 405, 130 Atl., 137; *City of Portsmouth v. Weiss,* 145 Va., 94, 133 S. E., 781. *Rector v. Power Co.,* 180 N. C., 622, is to like effect. But where the negligence of the defendant in the operation of its plant during unprecedented and unforeseeable storm or rainfall is a contributing factor in producing injury—that is when the injury resulted from a combination of the defendant's negligence acting in concert with some natural force such as an unprecedented storm (*Comrs. v. Jennings,* 181 N. C., 393) the defendant is not relieved from liability, since an act of God which exculpates the owner of a dam must be such an act as constitutes the sole cause of the injury. *Water Works Co. v. Holliday,* 214 Ky., 762, 45 S. W. (2d), 9; *Walsh v. Copper Mining Co.,* 66 Mont., 592, 214 Pac., 641.

Likewise, a defendant power company is required to exercise ordinary care in anticipating flood conditions from an ordinary freshet such as might be reasonably expected or foreseen and to use reasonable care in the manipulation thereof and in guarding against any undue acceleration or retardation of the flood water. It may be held accountable for any damages for its failure to exercise such care. However, in determining whether the owner of a dam has failed to exercise ordinary care to protect the rights of a lower riparian owner due regard must be had for its correlative duty to protect upper riparian owners against any undue retardation of the flood water. The owner must pay due regard to the rights of the upper, as well as of the lower, riparian owner.

From a consideration of all the evidence offered in the light most favorable to the plaintiffs the following facts may be adduced:

(1) The defendant's power plant and dam is located 4.8 miles above the point where Rocky River empties into Yadkin (Pee Dee) River and another smaller stream known as Clark Creek empties into Yadkin River about 2,000 feet below the dam. The land of the plaintiffs is located approximately 1 mile below the mouth of Rocky River;

(2) The rainfall in the water sheds or basins of Yadkin and Rocky Rivers which produced the condition about which the plaintiffs complain, began on 1 April, 1936, and continued with varying degrees of intensity through 7 April, 1936;

(3) There have been freshets prior to the construction of the dam producing a larger flowage of water;

(4) There was an extensive rise in the water of Rocky River and in Yadkin River on the morning of 7 April. The rise in Pee Dee River was from 8 to 10 feet between 9 a.m. and 2 p.m. on that day, with a total rise of 11 feet during the day. Rocky River rose 32 feet (from its bed) and held a sustained height of 30 feet for approximately 30 hours. The crest of the rise of Rocky River some distance up the river occurred about 8 a.m. and on plaintiffs' land on Pee Dee River about 11 a.m. on the morning of the 7th;

(5) At the rate the water was flowing it took two to four hours for it to pass from the defendant's dam to the plaintiffs' land;

(6) The land of plaintiffs began to overflow on the late afternoon or night of 6 April and was completely inundated on the 7th. The water began to recede on the 8th and the river was within its banks on the 9th;

(7) The extent of the flow and the rapidity of the water caused considerable damage to the lands of plaintiffs;

(8) If a maximum number of the gates to the defendant's dam are opened suddenly it will cause a high crest of water which will adjust itself in 6 or 8 hours.

(9) The total rainfall beginning 1 April was considerably in excess of the rainfall which occurred in 1928 but if the rainfall is considered from the 4th to the 7th there was less;

(10) On 6 April defendant had 13 or 14 of its gates open and on 7 April it had 14 gates open; and,

(11) Gates such as are used by the defendant are a necessary part of the construction of that type of dam and the type of dam used by the defendant is in common use in the South.

In addition, the plaintiffs' witness Holland, who was tendered and examined as an expert and who had no personal knowledge of the condition existing on the day the lands of the plaintiffs were flooded, testified at considerable length as to the rainfall, the flowage of the streams, the volume of water discharged by Rocky River and like matters, all of which testimony was based on records maintained by the Federal Government at its several rainfall and river gauge stations. He further testified that during freshets water would naturally flow more rapidly since the dam was built than before; that the damage was caused by the heavy rains and the fast rise in the water; that the dam would naturally feed out water more rapidly during flood stage; that if the pond is maintained at the same level after the gates are open it is not discharging any more water than comes in but just the same quantity that is coming in—nothing coming out but flood water—and that in giving his testimony he did not take into consideration the storage basins up the Pee Dee. He then stated that in his opinion the rapidly rising

flood which produced the overflow on the lands of plaintiffs was caused by "the opening of a large number of gates in the dam of the defendant and particularly releasing suddenly a large volume of water, a volume which I can't measure, haven't attempted to measure by the opening of the gates, but which I have attempted to measure and have measured with a fair degree of accuracy by starting at the station below the dam and working back."

The witness was qualified and permitted to testify as an expert. His statement as to the cause of the flooding of the land, if supported by evidence, is sufficient to take the cause to the jury. If not supported by evidence, it is a mere surmise or conjecture.

While the plaintiffs offered evidence tending to show that on the afternoon of the 6th there were 13 or 14 gates open and that on the 7th 14 gates were open, they offered no evidence as to the manner in which the gates were opened—whether one at a time, gradually, or all at one time. As bearing on this, however, the evidence of the plaintiffs does disclose that at all times while the gates were open water was flowing over the top of the unopened gates, thus showing that the defendant was not discharging any considerable amount of water in excess of that which was coming in.

As there is a total absence of evidence in the record that the defendant released suddenly a large volume of water either on the 6th or on the 7th, the day of the flood, we are compelled to the conclusion that the opinion evidence of the plaintiffs' expert witness is unsupported by evidence and amounts to nothing more than speculation.

In support of this conclusion it may be well to note that the evidence of the defendant and its charts disclose that the defendant began to release the water before it had completely reached the crest of the dam and that it so controlled its gates that after the water began to flow over the dam the pond was maintained at approximately the same level until the water below the dam receded within the banks of the river.

But the plaintiffs insist that as the judge did not grant the motion of nonsuit when made at the conclusion of all the evidence he was without power to do so thereafter. This position cannot be sustained. The matter was *in fieri* until verdict was rendered. *Batson v. Laundry Co.*, 202 N. C., 560, 163 S. E., 600; *Godfrey v. Coach Co.*, 200 N. C., 41, 156 S. E., 139; *Price v. Ins. Co.*, 200 N. C., 427, 157 S. E., 132, and 201 N. C., 376, 160 S. E., 367; *Lee v. Penland*, 200 N. C., 340, 157 S. E., 31.

A careful perusal and consideration of all the evidence leads us to the conclusion that the judgment below must be

Affirmed.

CLARKSON, J., concurs in result.

HARRY ROTH v. GREENSBORO NEWS COMPANY.

(Filed 2 February, 1940.)

1. Libel and Slander § 13—Evidence held sufficient to be submitted to jury on question of whether words libelous per se were spoken of and concerning plaintiff.

The evidence disclosed that a person of a certain name was arrested in New York City for violation of the Mann Act and that defendant newspaper published an Associated Press account thereof, that an F. B. I. agent informed one of defendant's reporters that the man had formerly been in the city in North Carolina in which the paper was published, and had been formerly prosecuted there on a similar charge, that the reporter found in the city directory for prior years an identical name with statement that such person was employed in a local theatre, giving his business and residential address at that time, and that the paper then carried a news story stating that the person arrested in New York was the same person who had formerly resided in the city and was connected with the local theatre. Plaintiff, the person who had formerly resided in the city and was employed by the theatre, instituted this action for libel and testified that his acquaintances had joked him in regard to the publication. *Held:* The evidence discloses not only that plaintiff's acquaintances understood that plaintiff was the person referred to in the article but also that defendant, under a mistake of fact, intended to refer to plaintiff, and therefore the evidence is sufficient to be submitted to the jury on the question of whether the words libelous *per se* were spoken of and concerning plaintiff, and defendant's motion to nonsuit was properly denied.

2. Libel and Slander § 12—

Evidence of the financial worth of defendant is competent upon the issue of punitive damages.

3. Libel and Slander § 16—

Punitive damages may be awarded in an action for libel and slander only upon a showing that the publication was prompted by actual malice as distinguished from malice implied from the intentional doing of an act which would have a natural tendency to injure, but oppression, gross or willful wrong, or a wanton, reckless or criminal disregard or indifference to plaintiff's rights will support an issue of punitive damages.

4. Same—Evidence held sufficient to sustain submission of issue of punitive damages.

The evidence disclosed that a person of a certain name was arrested in New York City for violation of the Mann Act and that defendant newspaper published an Associated Press account thereof, that an F. B. I. agent informed one of defendant's reporters that the man had formerly been in the city in North Carolina in which the paper was published and had been formerly prosecuted there on a similar charge, and that he had been engaged in the amusement business, that the reporter found in the city directory for prior years an identical name with statement that the person of that name was employed in a local theatre, giving his business and residential address at that time, and that the paper published a news story stating that the person arrested in New York was the same person

who had formerly resided in the city and was connected with the local theatre. *Held:* The F. B. I. agent did not state that the man arrested had formerly resided in the city or had been employed by the local theatre, and the publication of the news story as to the identity of the two persons without checking with plaintiff's business or residence address as given in the city directory constitutes more than a scintilla of evidence that defendant published the libelous article concerning plaintiff with reckless disregard of plaintiff's rights, and is sufficient to support the issue of punitive damages notwithstanding that defendant may have acted through an honest mistake, and therefore evidence of the financial worth of defendant is competent.

5. Libel and Slander § 6—Mere statement that defendant had come in possession of information contra to prior libelous article held insufficient retraction.

Defendant published an article identifying plaintiff as the person who had committed and who was then charged with committing violations of the Mann Act. Thereafter it published a statement that it was informed that plaintiff was not the person who had been arrested on the charge. Upon plaintiff's demand for a retraction, defendant sent him the second article and requested him to advise defendant if this was not satisfactory. *Held:* While C. S., 2430, does not prescribe any particular form of retraction, it does require a categorical retraction and apology, and the mere statement that defendant had come into possession of information *contra* to that theretofore published is insufficient to meet the requirements of the statute, nor was it incumbent on plaintiff to approve or disapprove thereof, and his failure to do so does not exculpate defendant or preclude the submission of an issue of punitive damages.

6. Same—

Under C. S., 2430, the publication of an apology and retraction is not in itself sufficient, but it must be made to appear also that the libelous article was published in good faith, that its falsity was due to an honest mistake of fact, and that there were reasonable grounds for believing the statements in the article were true.

7. Libel and Slander §§ 2, 16—

The law presumes that general damages actually, proximately and necessarily result from an unauthorized publication which is libelous *per se* and therefore has the immediate tendency to injure plaintiff's reputation, and such damages arise by inference of law even in the absence of actual pecuniary loss, and therefore need not be proved by plaintiff.

8. Same—

The fact that the law presumes that general damages result from the publication of a libel *per se* does not preclude the plaintiff from offering evidence of damages both general and special.

9. Same—

Evidence of the unauthorized publication of words libelous *per se*, raising the presumption of general damages, with testimony by plaintiff to the effect that he had suffered mental anguish, humiliation and embarrassment as a result thereof, entitles plaintiff to the award of some damages, the amount thereof being for the determination of the jury.

APPEAL by defendant from *Erwin, Special Judge,* at May Term, 1939, of GUILFORD. No error.

Civil action to recover damages resulting from the publication of a libel.

The defendant is a corporation which publishes and circulates *The Greensboro Daily News* and *The Greensboro Record,* two daily newspapers published in the city of Greensboro. On 30 August, 1937, it published in *The Greensboro Daily News* an Associated Press dispatch from Atlantic City, N. J., under date of 29 August, reciting the round-up and arrest of alleged members of a vice ring which was operating in several cities of the United States. It stated that Harry L. Roth, who was arrested in New York, was listed by the Assistant U. S. District Attorney as a principal defendant; that Roth was released from the Federal Penitentiary 9 February after serving two years on a Mann Act conviction and that his record showed arrests in New York, Philadelphia and Detroit on Mann Act and other charges. On 31 August, 1937, it carried another Associated Press dispatch in which, among other things, it was stated that "Harry Roth 42 year old New Yorker who was linked to Luciano by J. Edgar Hoover, Chief of the Federal Bureau of Investigation, was committed to Mercer County Jail today in default of $25,000 bail." It was stated that "Roth was charged with transporting a girl identified as Teddy Blaine from Philadelphia to Atlantic City for immoral purposes."

This article repeated that Roth was charged with transporting a girl from one State to another for immoral purposes and that the raids were part of the concerted drive by the F. B. I. to stamp out the White Slave Traffic.

The Greensboro Record, in its edition of 30 August, 1937, carried an Associated Press dispatch under Trenton, N. J., date line, containing, among other things, the statement that "Federal agents plan to bring here from New York for questioning today a man identified by Hoover as Harry Roth who he said was reputedly a member of the Charles (Lucky) Luciano Gang."

This article quoted the Federal Agent as stating that 37 prisoners arrested were "principals, procurers and madames."

On the night of 31 August, one Morgan, F. B. I. agent stationed at Greensboro, telephoned J. N. Benton, engaged by the defendant as a newspaper reporter on *The Record,* and told him that he, Morgan, had just returned from Newark where he had engaged in the raids and that he thought there was a local story in connection with this raid in Jersey City and surrounding New York and that one of the men referred to in the Associated Press dispatch carried that morning was named Harry Roth and that he understood that Roth was formerly in Greensboro;

that Roth had been tried here (Greensboro) some two or three years previous on a white slavery charge similar to the one he had just been arrested for and that he (Benton) could check up on it and get a local story probably. Benton, whose duty it was in part to prepare the column of the events of 10, 20 and 30 years ago carried by *The Record,* was aware of the fact that Roth Brothers had purchased the Palace Theatre in Greensboro in 1927. He mentioned that fact to Morgan and Morgan in reply stated that he understood that Roth, who was arrested in New York, "had been in the entertainment business."

The next morning Benton examined the Greensboro City Directory. In the 1928 directory he found listed, "Harry Roth, Palace Theatre, residence Y. M. C. A."; in each of the 1929 and 1930 directories he found, "Harry Roth (Palace Theatre) r Asheville, N. C." The name Harry Roth did not appear in either the 1931 or 1932 directory. Benton then went to the office of the Clerk of the United States District Court where he ascertained that one Harry Roth was tried at the June Term, 1935, under the Mann Act and sentenced to three years imprisonment.

Thereupon, without any investigation at the Palace Theatre or at the Y. M. C. A. and without any further inquiry, Benton wrote for publication and the defendant published in its *Greensboro Record,* on 1 September, 1937, under the large type headlines, "VICE RING MAN IS KNOWN HERE" the following article: "Harry Roth One of Men Taken at Atlantic City in Roundup, Once Lived Here. The recent raid of the federal investigators in Atlantic City, N. J., and other cities that resulted in the arrest of Harry Roth on Monday night, is of local interest as Roth formerly resided in Greensboro. He is now under $25,000 bond, being charged with complicity in gigantic vice operations in violation of the Mann White Slave Law. Between 125 and 150 men were taken into custody as a result of the drive, headed by J. Edgar Hoover. Roth is regarded as one of the higher-ups in the conspiracy.

"Roth, 42, listed as a resident of New York, was for a time connected with the Palace Theatre in Greensboro, it is understood. In June, 1935, he was tried in United States Court for violation of the Mann White Slave Act and given two years in Atlanta on each of four counts, the sentences to run concurrently. It will be recalled that he was arrested in San Francisco, Calif., after federal officers had traced him to various parts of the country. He was specifically charged with inducing young women to go from Greensboro to New York, promising employment. Arriving in the metropolis, it was brought out during the trial, the true motive of the journey was revealed and several girls testified to their experiences after making the trip to New York on the promise of employment.

"After Roth was arrested in San Francisco it was necessary to have one of the prosecuting witnesses taken to the Pacific coast city for purpose of identification, the prisoner resisting removal.

"R. L. Morgan, of the Greensboro office of the F. B. I., was among the number summoned to New York and Atlantic City to assist in the vice gang roundup. He returned home Tuesday."

On the afternoon of 1 September, after the issue of *The Record* containing said article was put in circulation, Max Zager, who operates the Palace Theatre in Greensboro under lease from plaintiff and his brother, after reading the article, called *The Greensboro Record* and asked them how they knew it was the Harry Roth that was formerly connected with the Palace Theatre. Defendant's agent in answer advised him that the information they got was from the F. B. I. man who told him he was; that the F. B. I. man had questioned this man and he told them he formerly lived in Greensboro and he operated the Palace Theatre. Zager then advised the defendant through its agent that the Roth who was formerly connected with the Palace Theatre was much younger than 42 years of age, that he was a man of good character and good habits and that he was sure that he was not linked up in that affair. The agent of the defendant then advised Zager that that was the information they received from the F. B. I. man. Zager then called plaintiff's brother at Harrisburg, Va., and inquired if the report was true. He was advised that it was not, that plaintiff resided in Suffolk, Va. On the same afternoon Mr. Stern likewise phoned the defendant relative to the article and advised the defendant that it had made a mistake.

Upon receiving the information from Zager and Stern, Benton advised the managing editor of the *News* of the mistake and suggested that the article be not published in the morning edition of the *News*. Thereafter, there was no further publication in either *The Greensboro News* or *The Greensboro Record* in anywise referring to plaintiff except that *The Greensboro Record* in its issue of 2 September, carried the following article:

"ANOTHER HARRY ROTH FIGURES IN AFFAIR.

"*The Greensboro Record* was informed Wednesday afternoon that the Harry Roth, arrested in the vice raids in Atlantic City and other northern cities Monday night, was not the Harry Roth who some years ago was connected with the Palace Theatre, as was stated in the article in Wednesday's *Record*. The Harry Roth who was engaged in business here was a much younger man, it was said, and he was a young man of exemplary habits and character, according to citizens who were personally acquainted with him.

"The statement in Wednesday's paper was based on information that the prisoner, following arrest in New Jersey, had indicated to officers he was at one time in the movie business in Greensboro."

On 11 September, 1937, plaintiff wrote *The Greensboro Record* calling attention to the article of 1 September and its contents and demanding a retraction in the following language:

"Said statements as appeared in your paper are false and untrue and I hereby demand a full and fair correction, apology and retraction published in your paper and in as conspicuous a place and type as was the article published by you on September 1, 1937." The letter was received by the managing editor of defendant and he, in reply, in behalf of *The Greensboro Record,* wrote the plaintiff enclosing a copy of the article which appeared in *The Greensboro Record* of 2 September and requested that if said article did not meet with plaintiff's approval he so inform *The Greensboro Record.* The defendant received no reply, published no retraction and took no further action in respect thereto.

Plaintiff instituted this action 20 October, 1937, to recover damages, both compensatory and punitive.

In answer to appropriate issues submitted, the jury found that the article published by defendant 1 September, 1937, was published of and concerning the plaintiff Harry Roth and assessed compensatory damages, but answered the issue as to punitive damages in the negative. There was judgment on the verdict and the defendant excepted and appealed.

Stern & Stern for plaintiff, appellee.

Douglass & Douglass, Hobgood & Ward, and Chas. M. Ivey, Jr., for defendant, appellant.

BARNHILL, J. On this appeal the defendant presents a number of questions for determination: (1) Did the court err in overruling the defendant's motion for judgment as of nonsuit on plaintiff's first cause of action for compensatory damages? (2) Did the court err in overruling defendant's motion for judgment as of nonsuit on plaintiff's second cause of action for punitive damages? (3) Was it error for the court to admit evidence of defendant's financial worth? (4) Did the court err in refusing to charge the jury that it would be warranted in awarding only nominal damages as prayed by the defendant? And, (5) Did the court err in failing to give the defendant's special prayer for instructions to the effect that the jury should answer the first issue "No"?

The article not only states that Roth was arrested on a charge of violating the White Slave Act and with imprisonment in default of bond but it likewise attributes to him conduct of such vile baseness and depravity as to indicate a total lack of any sense of the social duty that a man owes to his fellow man and to society. If it had reference to the plaintiff it was false. This is conceded by the defendant. Being false

it is a libel *per se*. *Flake v. News Co.*, 212 N. C., 780, 195 S. E., 55. The court below so instructed the jury, to which there is no exception.

On the defendant's motion to nonsuit on the first cause of action and its prayer for a directed verdict, on the first issue then, the only question to be determined is as to whether there was sufficient evidence that the publication was "of and concerning the plaintiff."

The testimony of the witness Benton clearly indicates that he wrote the article because of its supposed local interest and concerning the Roth who formerly operated the Palace Theatre and resided at the Y. M. C. A. It was so understood by the witness Zager and by Mr. Stern and by others who accosted and joked the plaintiff in respect thereto. After receiving a phone call from Zager, Benton informed the managing editor that there had been a mistake. The managing editor wrote the plaintiff that the information was obtained from the Federal investigator Morgan stating "Investigator Morgan told this newspaper that Roth stated he has been connected with the Palace Theatre in Greensboro." In the publication attempting to correct the false impression made the defendant stated that: "Another Harry Roth Figures in Affair;" and that it was informed "That the Harry Roth arrested in the vice raids in Atlantic City and other northern cities Monday night was not the Harry Roth who some years ago was connected with the Palace Theatre." Benton likewise testified that when he wrote the article "he was under the impression that the man referred to therein was formerly connected with the Palace Theatre."

It would seem, therefore, that the article was not only understood by those who read it as being of and concerning the plaintiff but that the defendant, by mistake of fact, so intended it. In any event, the evidence raises an issue of fact which was properly submitted to the jury. On the issue so submitted the court charged the jury fully in the language of special instructions prepared by learned counsel for the defendant. Naturally the charge on this aspect of the case was as favorable to the defendant as the law would permit. At least there is no exception thereto.

Under the view we take of the evidence the second and third questions may be treated as one.

When the allegations of the complaint are sufficient to support a demand for punitive damages, and there is testimony tending to support the allegations, evidence of the pecuniary circumstances and wealth of the defendant is competent on the issue thereby raised. *Adcock v. Marsh*, 30 N. C., 360; *Reeves v. Winn*, 97 N. C., 246, 1 S. E., 448; *Baker v. Winslow*, 184 N. C., 1, 113 S. E., 570, and authorities therein cited at p. 10.

In some jurisdictions it is held that where malice exists exemplary damages may be given, and that it is immaterial whether the malice is actual or such as is implied in law for the publication of a libel *per se.* 25 Cyc., 536, *et seq.* In this jurisdiction punitive damages may not be awarded on a showing of implied malice only. To support an award of vindictive damages it must appear that the publication was prompted by actual malice (as contra-distinguished from imputed malice, or malice implied by the law from intentionally doing that which in its natural tendency is injurious), or that the defamation was recklessly or carelessly published. *Baker v. Winslow, supra; Gilreath v. Allen,* 32 N. C., 67; *Bowden v. Bailes,* 101 N. C., 612; *Upchurch v. Robertson,* 127 N. C., 127. Such damages may be awarded when there is evidence of oppression, or gross and willful wrong; *Reeves v. Winn, supra;* or a wanton and reckless disregard of the plaintiff's right; *Fields v. Bynum,* 156 N. C., 413, 72 S. E., 449; or of gross indifference; *Woody v. Bank,* 194 N. C., 549, 140 S. E., 150; or reckless and criminal indifference to plaintiff's rights; *Hall v. Hall,* 179 N. C., 571, 103 S. E., 136.

The F. B. I. agent stated to the defendant's news agent that he understood the Roth arrested "was formerly in Greensboro and had been tried in Greensboro," and that "he had been in the entertainment business." He did not state that he was formerly a resident of Greensboro or that he had ever been connected with the Palace Theatre. The reporter ascertained a man by the name of Roth had been for an undisclosed length of time, in Greensboro pursuing his vocation as a professional pimp and had been arrested and tried in the United States District Court. He further ascertained that Roth, the plaintiff, formerly resided in Greensboro at the Y. M. C. A. and was connected with the Palace Theatre. He published the article without investigation either at the place of employment or at the place of residence of the Roth about whom he wrote when such an investigation before the publication would have disclosed the true facts. The managing editor stated to Zager that the F. B. I. agent had told him that the Roth who was arrested was a man who formerly lived in Greensboro and operated the Palace Theatre. The record fails to disclose that such information was received from the F. B. I. agent.

"A good name is rather to be chosen than great riches." A good reputation, when based on sound character, is a man's most precious possession. No publication, the tendency of which is to seriously impair or destroy a good name, should be permitted without most careful investigation. The failure to go to a known and easily available source of information, coupled with other facts and circumstances which appear in this record and considered in connection with the presumption of legal malice arising from the publication of a libelous article, constitutes more

than a scintilla of evidence tending to show that in publishing the article the defendant acted with reckless disregard of plaintiff's rights and is sufficient to support the submission of an issue of punitive damages. This is all we are required to determine.

A consideration of the whole record leads to the conclusion that the defendant acted through an honest mistake. The jury accepted that view of the evidence and answered the issue on punitive damages in the negative. But, an honest mistake will not protect the defendant. *Washington Post v. Kennedy,* 3 F. (3d), 207, 41 A. L. R., 483; also see Anno. 26 A. L. R., 464, *et seq.*

As there is sufficient evidence to be submitted to the jury on the issue of punitive damages there was no error in the admission of testimony relating to the defendant's financial condition.

Nor is the defendant protected by its publication of 2 September in which it corrects, on information, the publication of 1 September. The plaintiff duly served notice on the defendant by letter, the receipt of which is admitted, demanding a retraction as provided by ch. 557, Public Laws 1901; C. S., 2430. If the defendant desired to avail itself of the provisions of this statute it was its duty to publish an apology and retraction as prescribed by statute. This it did not do.

While the statute, C. S., 2430, does not require the retraction to be in any particular form or couched in any particular language, it does require "a full and fair correction, apology and retraction" which must clearly refer to and admit the publishing of the article complained of and directly, fully and fairly, without any uncertainty, evasion or subterfuge, retract and recall the alleged false and defamatory statements and apologize therefor. *Oray v. Times Co.* (Minn.), 77 N. W., 204. The alleged correction falls far short of this requirement. It neither retracts nor apologizes therefor, but merely states that the defendant is then in possession of information *contra* that contained in the original publication. See *Osborn v. Leach,* 135 N. C., 627; *Paul v. Auction Co.,* 181 N. C., 1, 105 S. E., 881.

The demand for the apology gave the defendant the election of complying therewith or risking the consequence of noncompliance. It was not the duty of the plaintiff to approve or disapprove the article already published. Failure to do so does not exculpate the defendant or protect it against the submission of any issue of punitive damages on a proper showing.

It may be noted that under express terms of C. S., 2430, the publication of the apology and retraction standing alone is not sufficient. It must be made to appear further in the trial that "said article was published in good faith, that its falsity was due to an honest mistake of fact,

and that there were reasonable grounds for believing that the statements in said article were true."

While the court declined to charge the jury in substance that it would be warranted in awarding only nominal damages as prayed by the defendant, it did charge the jury on the issue of damages that "if the plaintiff would recover more than nominal damages under the second issue, he must satisfy you by the greater weight of the evidence in this case that he is entitled to recover actual damages of the defendant . . . your award of damages to plaintiff under the second issue will be confined to nominal damages unless the plaintiff establishes by the greater weight of the evidence that he has suffered actual damages as the direct and proximate result of the wrongful acts and conduct of the defendant." If there was any error in this charge it was favorable to the defendant.

When an unauthorized publication is libelous *per se,* malice and damage are presumed from the fact of publication and no proof is required as to any resulting injury. The law presumes that general damages actually, proximately and necessarily result from an unauthorized publication which is libelous *per se* and they are not required to be proved by evidence since they arise by inference of law, and are allowed whenever the immediate tendency of the publication is to impair plaintiff's reputation, although no actual pecuniary loss has in fact resulted. *Flake v. News Co., supra; Bowden v. Bailes, supra; Fields v. Bynum, supra; Hamilton v. Nance,* 159 N. C., 56, 74 S. E., 627; *Barringer v. Deal,* 164 N. C., 246, 80 S. E., 161; *Paul v. Auction Co., supra; Baker v. Winslow, supra; Jones v. Brinkley,* 174 N. C., 23, 93 S. E., 372; *N. Y. Evening Post Co. v. Chaloner,* 265 F., 204, 36 C. J., 1150; *Oates v. Trust Co.,* 205 N. C., 14, 168 S. E., 869.

In the *Bowden case, supra,* a charge that "the plaintiff is entitled to some damages" resulting from a slander *per se* was affirmed. In the *Barringer case, supra,* citing the *Hamilton* and *Fields cases, supra,* it was held that on a slander *per se* compensatory damages which embrace compensation for those injuries which the law will presume must naturally, proximately and necessarily result, including injuries to the feelings and mental suffering endured in consequence, should be awarded; and that it is not required that the plaintiff introduce evidence that he has suffered special damage. In the *Fields case, supra,* the court declined to charge the jury "It is incumbent on the plaintiff to show to the jury evidence that he has suffered damage before he can ask you to award any to him." This Court held that the refusal to give the requested instruction was proper. The other cited cases are to like effect.

"Where the facts and nature of the action so warrant, actual damages include pecuniary loss, physical pain, and mental suffering . . . compensatory damages include all other damages than punitive, thus

embracing not only special damages as direct pecuniary loss but injury to feelings, mental anguish, etc." *Baker v. Winslow, supra.* "Compensatory damages include (1) pecuniary loss direct or indirect, *i.e.*, special damages; (2) damages for physical pain and inconvenience; (3) damages for mental suffering; and (4) damages for injury to reputation." *Osborn v. Leach, supra; Fields v. Bynum, supra; Barringer v. Deal, supra.*

However, the fact that the law presumes that general damages result from the publication of a libel *per se* does not preclude the plaintiff from offering evidence of damages both general and special.

The plaintiff testified in substance that he had suffered mental anguish, humiliation and embarrassment as a result of the publication complained of. This evidence, together with the presumption of general damages resulting from the publication of the libel, entitled the plaintiff to the award of some damages, the amount of which it was the duty of the jury to determine.

A careful examination of the record and the briefs filed leads us to the conclusion that the exceptive assignments of error are without substantial merit.

No error.

L. B. McCORMICK, TRADING AS McCORMICK VENDING MACHINE COMPANY, v. J. KNOTT PROCTOR, SHERIFF OF PITT COUNTY, AND G. A. CLARK, CHIEF OF POLICE OF THE CITY OF GREENVILLE, N. C.

(Filed 2 February, 1940.)

1. Appeal and Error § 40a—

Ordinarily, when there are no findings of fact in the record it will be presumed that the court found facts supporting its judgment, but when the record discloses that the court refused to hear evidence and find facts on a material point, the presumption cannot be indulged.

2. Injunctions § 7—

The general rule is that courts of equity will not interfere with the enforcement of the criminal laws of the State, but will remit the person charged to setting up his defense or attacking the constitutionality of the statute in a prosecution thereunder.

3. Gaming § 2b—

Sheriffs, constables and police officers are authorized by statute, Michie's Code, 4435, to seize and destroy all slot machines not expressly permitted by section 130, chapter 158, Public Laws of 1939, and may hold such machines as evidence for criminal prosecutions under the statute.

4. Injunctions § 7—

As an exception to a general rule, equity will interfere with the enforcement of a criminal law when injunction is necessary to protect effectually property rights and to prevent irremedial injuries to the rights of persons.

5. Injunctions §§ 7, 11—Held: Court should have found whether slot machines were illegal in determining plaintiff's right to enjoin officers from interfering with his business.

Plaintiff, the owner of certain slot machines which had been seized by officers of the law, instituted this action to restrain the officers from interfering with the operation of the said machines, alleging that plaintiff had paid State and county licenses thereon and that the machines were lawful under the provisions of section 130, chapter 158, Public Laws of 1939, and that if defendants were not restrained plaintiff would be forced out of his lawful business. The court dissolved the temporary restraining order theretofore issued on the ground that it was without jurisdiction to interfere with the enforcement of the criminal laws of the State in any event, and refused to hear evidence or to find facts as to whether the machines in question were lawful. *Held:* It was error for the court to dissolve the temporary order without finding whether the machines were lawful, since in the absence of such finding the Supreme Court is unable to determine whether the case falls within the general rule that courts of equity will not interfere with the administration of the criminal laws of the State or whether it comes within the exception to that rule that the enforcement of a criminal law may be enjoined when necessary to protect constitutional rights and prevent irremedial injury.

STACY, C. J., concurring.

BARNHILL and WINBORNE, JJ., join in concurring opinion.

APPEAL by plaintiff from *Frizzelle, J.*, at Chambers in Snow Hill, N. C., 16 September, 1939. From PITT. Error and remanded.

The plaintiff in this action seeks to restrain the defendants, sheriff of Pitt County, N. C., and the chief of police of the city of Greenville, N. C., from interfering with certain slot machines in his possession, contending that taxes have been paid on the machines and they are legal slot machines. The prayer for relief is as follows: "(1) That the defendants, sheriff of Pitt County and chief of police of the city of Greenville, their officers, deputies, agents, employees and attorneys, be restrained and enjoined from in any wise interfering with the operation of any of plaintiff's machines described in the petition anywhere within the limits of the city of Greenville or county of Pitt, and that they be restrained and enjoined from removing or attempting to remove said machines from such place or places where they may be now or hereafter located. (2) For such other and further relief as may be necessary and proper, and the nature of the petition demands, and for costs."

The defendants in answer say: "That all of the machines owned, sold, rented or distributed by said plaintiff are illegal, except those machines commonly known as mechanical clerks or vending machines, which give the same fixed return each and every time a coin is placed or inserted in same and, except of course music machines. . . . Defendants admit that plaintiff owns 100 and more slot machines in Pitt County, and that same are distributed throughout Greenville and Pitt County,

but it is expressly denied that said machines have been legalized under sec. 130, of ch. 158, of the North Carolina Laws of 1939, or under any other law; and, further answering said paragraph, defendants, upon information and belief, allege and say: That the machines to which plaintiff refers are illegal, operated as gambling devices and/or are capable of being operated as gambling devices, and that plaintiff, in defiance of the law, has distributed said machines throughout Greenville and Pitt County, and that same are being operated in violation of the law, and to the detriment of public morals, and especially to the detriment of the morals of the youth of the town and county. . . . Defendants say that even if license taxes have been paid on said machines as alleged by plaintiff, that same does not legalize the operation of illegal machines, for that the licensing department of the State, county or town has no authority to license crime in any form. . . . Defendants admit that the machines which they intended to seize under the law and under instruction of the court, and by direction of the grand jury, are the property of the plaintiff, but defendants deny that they intended to confiscate said machines, or to do anything with same other than hold them as evidence and subject to the orders of the court of competent jurisdiction; and defendants further deny, upon information and belief, that said machines come within the classification of subsection 1 of section 130 of chapter 158 (Laws of 1939), or any other legal classification. . . . Defendants allege and say that if plaintiff's continuance in business is dependent upon his being able to circumvent and defy the law by the operation of unlawful slot machines prohibited by statute, he should be forced out of such business, certainly in so far as said business is unlawful or of a criminal nature, but it is expressly denied that defendants intend in any way to interfere with any lawful business that plaintiff may be conducting. . . . Defendants allege and say that they have no intention of interfering with any legal machines, slot or otherwise, owned by the plaintiff or anyone else, and that they have no intention of confiscating any machines—but only intend to hold same as evidence—subject to the orders of the court, and that they have made no unlawful threats against the defendants or anyone else, and that they have not and do not intend to infringe upon any of the constitutional or legal rights of plaintiff, and that their only intention is to enforce the law under instruction of the court and on recommendation of the grand jury; and defendants, on information and belief, and upon such information and belief, aver: That plaintiff, who is conducting an illegal slot machine business and racket, is attempting to enjoin and prevent them from properly performing their duties as officers of the law. . . . Wherefore, defendants pray the court: (1) That the temporary injunction or restraining order issued in this cause on the 4th day of Septem-

ber, 1939, by Hon. Leo Carr, one of the judges of the Superior Court, be dissolved and dismissed to the end that defendants may proceed unhampered and unfettered in the performance of their duty as law enforcement officers. (2) That the court hold, as a matter of law, that it is without authority to enjoin and restrain law enforcement officers from enforcing the criminal law of the State," etc.

A temporary restraining order was duly issued, but dissolved by his Honor, J. Paul Frizzelle, on the hearing. In the judgment, in part, is the following: "The court being of the opinion that it is without jurisdiction or authority in this cause to restrain the sheriff of Pitt County and the chief of police of Greenville, G. A. Clark, in the performance of their duty as law enforcement officers in enforcing the criminal laws of the State of North Carolina involved in this matter, but if the court does have such jurisdiction or authority, that the restraining order heretofore issued herein should in any event be dissolved, and, being of such opinion, announced that the court did not care to hear evidence as to the legality or illegality of said machines involved in the controversy. . . . It is further considered, ordered and adjudged that the plaintiff have until September 23rd to take and remove from their present locations all machines referred to in the petition and he shall be permitted to store said machines if he so desires, pending the appeal herein to the Supreme Court, without molestation of the defendants, their agents or servants."

To the foregoing judgment the plaintiff excepted and assigned error and appealed to the Supreme Court. The exception and assignment of error and other necessary facts will be set forth in the opinion.

Albion Dunn for plaintiff.
D. M. Clark and Harding & Lee for defendants.

CLARKSON, J. Did the court below commit error in refusing to hear evidence and to find facts, as to the legality of the machines involved in the controversy? We think so, under the facts and circumstances of this case.

Chapter 158, Public Laws 1939, expressly prohibits certain types of slot machines and permits other types of slot machines as lawful. Plaintiff claims his machines are of those types made lawful by this act, whereas defendant officers contend that these machines are illegal and, as such, may be seized and destroyed under C. S., 4435. Plaintiff announced that he was prepared to offer evidence as to the legality of the machines here involved, but, the court below, being of the opinion that it was without jurisdiction to restrain defendants in the enforcement of the criminal law, refused to hear evidence and dissolved the temporary restraining order.

In *Hinkle v. Scott,* 211 N. C., 680, the court presumed that the trial court found sufficient facts, since there were no findings of fact in the judgment and no request for such findings. Here, however, we are not able to indulge in this presumption, as it appears affirmatively in the judgment that "the court did not care to hear evidence as to the legality or illegality of said machines involved in the controversy." Further, in *Hinkle v. Scott, supra,* it was pointed out that since the operation of the machines was permitted pending the appeal, no "substantial loss" was caused the owners of the machines; in the instant case the machines were ordered removed from operation and placed in storage pending the appeal, thus resulting in the discontinuance of plaintiff's business in the county pending the appeal.

Generally, the equitable powers of the courts may not be invoked to prevent the enforcement of a criminal law where the basis of the petition in equity constitutes a valid defense to an indictment for the violation of the law in question. This principle appears in our cases as early as *Cohen v. Comrs.,* 77 N. C., 2 (3), where, in refusing to allow an injunction to restrain town commissioners from enforcing an ordinance, *Reade, J.,* speaking for the Court, pointed out that the plaintiff if injured had redress in an action for damages and declared, ". . . We are aware of no principle or precedent for the interposition of a court of equity in such cases." In *Paul v. Washington,* 134 N. C., 363, in declaring that the validity of an ordinance cannot be tested by injunction, the principle that the courts cannot enjoin the enforcement of the criminal law or of municipal ordinances was clearly enunciated; the reason assigned for the rule being that "the State cannot be enjoined from the execution of its criminal laws." This case was followed with approval, the additional reasons and further citations in support of the rule given, in *S. v. R. R.,* 145 N. C., 495, where, at p. 522, it was stated: "The doctrine may be considered as settled in this State against the right of a court exercising equitable jurisdiction to interfere by injunction with other courts in the due course of administering and enforcing the criminal laws of the State." This principal was reiterated in *Express Co. v. High Point,* 167 N. C., 103, where at p. 105, *Brown, J.,* for the Court, wrote: "The courts of this State will not undertake by injunction to enjoin the enforcement of the criminal law. The party charged with crime must make this defense and plead to the indictment, and if convicted, he may, by appeal, bring his case to this Court."

In *Turner v. New Bern,* 187 N. C., 541 (548), speaking to the subject, it is said: "The same ruling that an injunction will not lie against the enforcement of a city ordinance when there is a remedy by defense on the trial of an indictment for the misdemeanor for violation of the ordinance or by action for damages, has been recognized in all jurisdictions.

21 L. R. A., 86, and notes; 38 L. R. A., 328, and notes; and 2 L. R. A. (N. S.), 632, and notes, and in other cases in our own reports. Indeed, the whole matter has been very recently discussed and the same proposition asserted, citing the above and other cases, in *Thompson v. Lumberton,* 182 N. C., 260, where it is held that 'The enforcement of the criminal law, whether by statute or valid ordinance, made punishable as a misdemeanor under general statute, cannot be interfered with by the equitable remedy of injunction. When its violation is made a misdemeanor its validity may be tested by the one who is tried for violating it as a matter of defense, and we cannot invoke the equity jurisdiction of the court by an injunction on the ground that his remedy is inadequate, because an incorporated city or town cannot be made liable in damages in such matters.' It has been often and fully settled that an injunction will not lie against the enforcement of an ordinance that we might well have been content to rest the decision in this case entirely upon that proposition, which has always been asserted and never denied by any decision in this State." This principle has been approved by the Supreme Court of the United States in *R. R. Co. v. Raleigh,* 219 Fed., 573, affirmed 242 U. S., p. 15.

It has been the law and custom immemorially to hold as evidence to the trial of a criminal case, pistols, alleged illicit liquor, etc.

N. C. Code, 1935 (Michie), sec. 4435, *supra,* is as follows: "All justices of the peace, sheriffs, constables and officers of police are hereby authorized and directed, on information made to them on oath that any gaming table prohibited to be used by this article, or any illegal punchboard or illegal slot machine is in the possession or use of any person within the limits of their jurisdiction, to destroy the same by every means in their power; and they shall call to their aid all the good citizens of the county, if necessary, to effect its destruction."

In *Daniels v. Homer,* 139 N. C., 219 (225), is the following: "The U. S. Supreme Court further says: 'It is said, however, that the nets are not in themselves a nuisance, but are perfectly lawful acts of manufacture and are ordinarily used for a lawful purpose. This, however, is by no means a conclusive answer. Many articles, such, for instance, as cards, dice and other articles used for gambling purposes, and perfectly harmless in themselves, but may become nuisances by being put to an illegal use, and in such cases fall within the ban of the law and may be summarily destroyed. . . . The power of the Legislature to declare that which is perfectly innocent in itself to be unlawful, is beyond question. (*People v. West,* 106 N. Y., 293), and in such case the Legislature may annex to the prohibited act all the incidents of a criminal offense, including the destruction of property denounced by it as a public nuisance.'"

The law imposes on sheriffs, constables, and police officers, the duty of taking cognizance of the possession and use of illegal slot machines and other gambling devices, and of seizing and destroying them. Diligent performance of this duty on the part of enforcement officers is to be highly commended and, only by a vigorous assertion of all the lawful means available, may we eradicate this persistent evil. In addition to indictment, the summary processes of the law, which in themselves recognize the unusual character and effect of the evil, must be upheld when applicable, and it should be the duty of the court to encourage, rather than embarrass, the efforts made by administrative officers to suppress such affronts to public decency, morals and good order.

In this case, however, the plaintiff protests that he is engaged in a lawful business and that the coin-slot devices used are not of an illegal type. The trial judge declined to hear evidence or make any findings of fact, and dissolved the injunction against their seizure, or further molestation of plaintiff's business.

It does not directly appear from the record that defendants were acting under authority of a warrant or by virtue of any specific criminal prosecution against plaintiff, although defendants answered by way of defense that their action in seizing said slot machines was an official action in the prosecution of their duties as law-enforcing officers. Thus, it may be open to doubt whether defendants have brought themselves squarely within the protection of the principle discussed at some length above. On the other hand, plaintiff has alleged that he has paid taxes to the State on said machines as legal slot machines, that the Attorney-General of North Carolina has given as his opinion that said machines are legal, and that he has been advised that the acts of defendants are "oppressive, prohibitive and confiscatory, and without warrant of law" and "that if defendants are not restrained, this plaintiff will be forced out of business and deprived of his statutory and Constitutional right to sell, distribute, lease and put on location in various places of business for amusement, his property will be confiscated without due process of law and he will be deprived of a lawful business, which he is entitled to pursue." In thus invoking equity he is supported by numerous cases setting forth the exception to the general rule previously discussed, that exception being that equity will interfere, even to prevent criminal prosecutions, when this is necessary to protect effectually property rights and to prevent irremediable injuries to the rights of persons. *Advertising Co. v. Asheville,* 189 N. C., 737; *Terrace v. Thompson,* 263 U. S., 197; *Truax v. Raich,* 239 U. S., 33; Note, 25 L. R. A. (N. S.), 193. However, it is the duty of plaintiff who invokes the action of equity to bring himself within the exception to the general rule, this Court having the power to examine the evidence to determine whether the facts are suffi-

cient to bring him within the protection of the exception. *Advertising Co. v. Asheville, supra* (739). As the court below has failed to find the facts, this Court is unable to determine whether the instant case falls within the general rule or the exception thereto.

For the reasons given, and to the end that the facts may be found, the cause is remanded.

Error and remanded.

STACY, C. J., concurring: The question for decision is whether a court of equity has the authority to hear the plaintiff on his allegation that the defendants herein, sheriff and chief of police, respectively, have, without warrant of law, threatened to destroy his legitimate business and will destroy it, to plaintiff's irreparable damage, unless restrained. The answer is "Yes."

The plaintiff alleges that he is engaged in a lawful business, operating and renting in Pitt County 100 vending machines, or amusement machines and coin-in-the-slot machines, "such as are legalized under section 130, chapter 158, Public Laws of 1939"; that the reasonable value of said machines is $9,000; that he has paid State, county and municipal taxes amounting to $3,600 for the privilege of engaging in the business; that the Attorney-General of the State has, in a formal opinion, declared the business of the plaintiff to be legal, and pursuant to this opinion the State Commissioner of Revenue has duly licensed the machines in question; that the defendants herein have threatened to seize the plaintiff's machines "on sight" and will seize and confiscate them, to plaintiff's irreparable injury, unless restrained by a court of equity to which he appeals for the protection of his property rights, and that plaintiff has no adequate remedy at law.

The court declined to hear any evidence, and the plaintiff's appeal is from the refusal of the court to hear him. The judgment recites: "The court being of the opinion that it is without jurisdiction or authority in this cause . . . announced that the court did not care to hear evidence as to the legality or illegality of said machines involved in the controversy."

The case, then, comes to this: The State of North Carolina, by act of Assembly, authorizes the use and operation of certain slot machines (while prohibiting the use of others) and imposes a number of taxes for the privilege of engaging in such business. The plaintiff applies for licenses to engage in this business. They are granted to him on the advice of the Attorney-General of the State that his business is legal. He pays his taxes amounting to $3,600. The officers of the law threaten to seize his machines "on sight" and to confiscate his property. He appeals to the courts of the State for the protection of his property

rights. If the taxing authorities can afford to accept the plaintiff's money and license his business as legitimate, it seems only just and fitting, *ex æquo et bono,* for the courts to say whether they are right or wrong. *Advertising Co. v. Asheville,* 189 N. C., 737, 128 S. E., 149; *Crawford v. Marion,* 154 N. C., 73, 69 S. E., 763; *Terrace v. Thompson,* 263 U. S., 197; *Dobbins v. Los Angeles,* 195 U. S., 223. See dissenting opinion in *Hinkle v. Scott,* 211 N. C., 680, 191 S. E., 512, and concurring opinions in *Turner v. New Bern,* 187 N. C., 541, 122 S. E., 469; and *R. R. v. Goldsboro,* 155 N. C., 356, 71 S. E., 514.

While the defendants do not allege that they are acting under authority of any warrant or by virtue of a criminal prosecution instituted against the plaintiff, still, as the trial court apparently thought otherwise, or so apprehended the record, it may not be amiss to observe that it is not after the manner of the courts of equity to close their doors on allegations of irreparable property loss, even in the face of a criminal prosecution, actual or threatened. *Advertising Co. v. Asheville, supra; Clinard v. Winston-Salem, post,* 119. The general rule is, that equity will not interfere with a criminal prosecution, merely as such, *In re Sawyer,* 124 U. S., 200, but it will enjoin a criminal prosecution, actual or threatened, where the accused is about to be deprived of the right to conduct a lawful business or when necessary to protect property rights from irreparable injury. *Truax v. Raich,* 239 U. S., 33; *Morrow v. Atlanta,* 162 Ga., 228, 133 S. E., 162; *Shellman v. Saxon,* 134 Ga., 29, 67 S. E., 438, 27 L. R. A. (N. S.), 452. "And a similar injury may be inflicted, and there may exist ground for equitable relief, when an officer, insisting that he has the warrant of the statute, is transcending its bounds, and thus unlawfully assuming to exercise the power of government against the individual owner, is guilty of an invasion of private property." *Philadelphia Co. v. Stimson,* 223 U. S., 605.

The right to conduct a lawful business, or to earn a livelihood, is regarded as fundamental. *S. v. Harris,* 216 N. C., 746; 19 Am. Jur., 144. The plaintiff is entitled to be heard. We are not now concerned with whether he can make good his charge. If he can, he is entitled to relief. If he cannot, the defendants will be vindicated.

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

C. M. SHEETS AND WIFE, NORA J. SHEETS, v. JAMES T. WALSH.

(Filed 2 February, 1940.)

1. Dedication § 5—Claimant under dedicator is entitled to revoke dedication notwithstanding the fact that he owns only part of the land embraced in the subdivision.

The owner of lands subdivided and sold same with reference to a plat showing certain streets. Plaintiffs are the successors in title from the dedicator of lots embracing certain of the streets so dedicated, which streets had never been opened or used by the public. *Held:* Plaintiffs claim under the dedicator and are authorized by statute to file and have recorded a declaration withdrawing the streets embraced within their lands from dedication. Michie's Code, 3846 (rr), (ss), (tt); chapter 174, Public Laws of 1921, as amended by chapter 406, Public Laws of 1939.

2. Deeds § 11—

In construing a deed, the position of the different clauses is not controlling, but the courts will look at the whole instrument, without reference to formal divisions, in order to ascertain the intention of the parties.

3. Same—

When the language of a deed is doubtful it must be construed most favorably to the grantee.

4. Deeds § 12—Deed held to convey all grantor's rights in lands in which easement had been dedicated to the public.

The deed conveying all lands owned by the grantor in its subdivision described the property conveyed by block and lot number in accordance with the recorded plat, and then excepted from the conveyance lots theretofore sold by the grantor and referred to its deeds conveying such lots to third persons, and then recited: "Also all the right, title, interest and estate of every nature and description which the party of the first part has to streets and alleys designated upon said map." *Held:* Construing the instrument as a whole to effectuate the intent of the parties, and construing doubtful language in favor of the grantee, the deed *is held* to convey the grantor's title and interest in the streets and alleys and not to except or reserve them therefrom.

5. Dedication § 5—

When a person claiming under the dedicator revokes the dedication in accordance with the statute, the corporation making the dedication being no longer in existence, chapter 406, Public Laws of 1939, he thereby becomes vested with all title and right in the streets embraced within his land.

6. Dedication § 5—Withdrawal of dedication in conformity with statute terminates easement of public and of purchasers of lots.

The streets in question were dedicated to the public more than twenty years prior to the institution of this action by the sale of lots in a subdivision with reference to a plat showing the streets. The streets were never actually opened or used at any time, and no person asserted any

public or private easement therein within two years from the passage of chapter 174, Public Laws of 1921 (Michie's Code, 3846 [rr], [ss], [tt]), or at any other time. The streets in question are not necessary to afford convenient ingress or egress to any other lots in the subdivision. The corporation making the dedication no longer exists. Plaintiffs, claimants under dedicator, filed and recorded a declaration withdrawing said streets from the dedication. *Held:* The revocation of the dedication terminated the easement of the public and of the purchasers of lots in the subdivision, and therefore plaintiffs own the fee in the said land and can convey same free of the easements.

7. Same—Statute providing for revocation of dedication affords reasonable time to purchasers for assertion of rights, and is constitutional.

The right of those purchasing lots in a subdivision with reference to a plat to assert easements in the streets shown by the plat is dependent upon the doctrine of equitable estoppel, and the statute, Michie's Code, 3846 (rr), (ss), (tt), providing for the termination of their easements by revocation of the dedication when they have failed to assert same within two years from the effective date of the statute, affords them a reasonable time in which to assert their rights, and therefore does not deprive them thereof without due process of law. Constitution of North Carolina, Art. I, sec. 17; 14th Amendment to the Federal Constitution.

8. Constitutional Law § 19—

The Legislature may limit the time for the assertion of a property right provided it affords those vested with the right a reasonable time to assert same after the enactment of the statute, since there is no vested right in procedure. Constitution of North Carolina, Art. I, sec. 17; 14th Amendment to the Federal Constitution.

APPEAL by defendant from *Alley, J.*, at November Term, 1939, of FORSYTH.

Spruill Thornton for plaintiffs, appellees.
Buford T. Henderson for defendant, appellant.

SCHENCK, J. This is an action for specific performance of a contract to purchase the following described tracts of land, to wit: "First tract: Lying and being in the city of Winston-Salem and beginning at a point on the east side of Holton Street in Efird's line; thence northwestwardly with Holton St. 503.8 feet to the line of the property formerly belonging to George Holton; thence northwardly along the line of the property formerly belonging to George Holton 250.81 feet more or less to the branch; thence eastwardly with the various meanderings of the branch to a stake on the west side of the old Lexington Road; thence southwardly with the old Lexington Road 1,030 feet more or less to a point, corner of the lot belonging to C. D. Hall; thence westwardly along Hall's line 400 feet to Hall's corner; thence southwardly with Hall's line 150 feet to a point in Efird's line; thence westwardly with Efird's line 850 feet more or less to the beginning.

"Second tract: Beginning at a stake in the east line of Holton Street, five feet north of the concrete bridge south of Hollyrood Street; thence on a new line N. 79 Deg. 25′ E. 51.1 feet to an iron stake in the center of a branch in the west line of Southern Realty Co.; thence with the line of said Southern Realty Co. S. 1 deg. 10′ W. 250.81 feet to an iron stake in the east line of Holton St., said stake being N. 1 deg. 10′ E. 247.7 feet from an old iron stake in the west line of Holton St., corner of Southern Realty Co. and formerly George Holton; thence with the east line of Holton St. No. 10 deg. 35′ W. 245.55 feet to the place of beginning, containing 6,274 square feet, more or less."

The contract to purchase and the tender of a deed in proper form is admitted. The defendant refused to accept the deed and pay the agreed purchase price for the alleged reason that the plaintiffs could not "show, furnish and convey a good merchantable title in fee" to the *locus in quo*.

An agreed statement of facts was entered into by the parties and the case submitted to the judge without the intervention of a jury. The agreed statement of facts is as follows:

"That on the 18th day of April, 1939, the plaintiffs entered into a legal and binding 'contract to sell,' under seal, certain parcels of land located in Forsyth County, North Carolina, to the defendant, on or before the 20th day of April, 1939, for the purchase price of $5,000.00. It was understood and agreed by the terms of said contract that plaintiffs 'will show, furnish and convey a good merchantable title in fee to the defendant.'

"The parcels of land described in the said contract are parts of property which were shown on certain plats recorded in the office of the register of deeds of Forsyth County, North Carolina. In 1892, the Winston-Salem Land & Investment Company, a predecessor in title, had caused to be recorded a certain plat of property, including the instant premises, which plat revealed the location of certain streets and blocks on said instant premises, which streets and blocks are identified on the accompanying map by the heavier and thicker lines. In 1898, a subsequent predecessor in title, the New York and New Jersey Land & Development Company, had caused to be recorded another plat of property, which also included the instant premises, which plat revealed another and different set of streets, blocks and even numbered lots, which set of streets, blocks and lots may be identified on the accompanying map by dotted lines. From each of the plats, lots, not lying within the bounds of the instant premises, were sold off by various owners. Dedicating corporations no longer exist.

"On the 18th day of April, 1939, proceeding under chapter 174 of the Public Laws of North Carolina enacted by the General Assembly in Regular Session of 1921, as amended by House Bill No. 1167 (ch 406),

enacted by the General Assembly in Regular Session of 1939, the plaintiffs filed and recorded a declaration of withdrawal of said instant land from public and/or private use in the office of the register of deeds of Forsyth County, North Carolina.

"On the 20th day of April, 1939, and subsequent thereto, the plaintiffs tendered a deed for said premises to the defendant, who refused to accept same, for that the plaintiffs were not in position to show or convey a good merchantable title in fee to said premises to the defendant; plaintiffs are still ready and willing to tender a deed at any time upon the receipt of the purchase price.

"There have been no streets physically laid off, cut through, or planned for construction within the bounds of said premises; over twenty years have elapsed from the date of the aforesaid recordings of plats, and no one has sued to enforce any public or private easement within the bounds of the instant premises within the two years following March 8, 1921, or at any time subsequent to that date. The streets so designated upon the plats are not necessary for ingress, egress or regress to any part of the land conveyed by the parties recording the plats or by subsequent grantees of the parties recording the plats, or to any parts of any of the property shown on the plats.

"There is a provision in a certain deed in the chain of title to the instant premises, executed by the Winston-Salem Land & Investment Company to the Southside Land & Investment Company, October 30, 1893, which is as follows: 'Reference to all of which deeds is hereby made for a better description of said premises and each part or parcel of land described in the foregoing deeds having been conveyed by the Winston-Salem Land and Investment Company is hereby excepted and reserved. Also all of the right, title, interest and estate of every nature and description which the party of the first part has to streets and alleys designated upon said map, to the street railway and station houses and lots whereon said houses stand, electric lights, poles and wires, the iron bridges over Wachovia Brook, and all abutments thereto and all fixtures and belongings of every description.'

"It is agreed that defendant's Exhibit A is a true copy of said deed, and is hereby incorporated by reference.

"The conveyance of said instant premises, from the time of the recording of plats, carry the descriptions in terms of lots with the exception of the last two conveyances, which carry descriptions in terms of metes and bounds.

"There has been no actual acceptance of any dedication by the city or public, nor any control or authority exercised by either over said property, which is an open acreage field; predecessors in title have always maintained notorious, adverse and continuous possession of premises under known and visible boundaries.

"The plaintiff can show, furnish and convey a good merchantable title in fee to the defendant, if the plaintiff has title in fee to property shown as streets on aforesaid and accompanying plats. The plaintiffs are record owners of said property, under a chain of title from dedicators. Said declaration of withdrawal from use, in accordance with statutes, has been filed, registered and recorded in the office of the register of deeds, Forsyth County, North Carolina, by plaintiffs, who claim under said dedicators.

"The premises were outside city limits at time of recording said plats but now are within said city limits. The aforementioned streets on said plats do not even afford a convenient ingress or egress to other properties on said maps (or) to any other opened street or highway.

"Plaintiffs are claimants under dedicators."

The trial judge found that the plaintiffs had complied with the provisions of ch. 174, Public Laws of 1921, as amended by ch. 406, Public Laws 1939, and thus effected a withdrawal of any sort of dedication of any property within the boundary of the *locus in quo;* and further that the deed in the plaintiffs' chain of title from the Winston-Salem Land & Investment Company to the Southside Land & Investment Company conveyed to the grantee all right, title, interest and estate in the streets shown on the plat filed and recorded by the grantor, and did not except such streets from the conveyance of said deed; and further, that even if said streets were excepted and reserved from such conveyance, the plaintiffs having complied with the aforesaid statutes, now possess all right, title, interest and estate in said streets; and upon such findings, his Honor adjudged the specific performance of the contract of purchase. To these findings and the adjudication thereupon the defendant preserved exceptions and appealed to the Supreme Court.

The statutes relied upon by the plaintiffs, known as section 3846 (rr), (ss), (tt), North Carolina Code of 1935 (Michie), are as follows:

"Section 1. That every strip, piece, or parcel of land which shall have been at any time dedicated to public use as a road, highway, street, avenue, or for any other purpose whatsoever, by any deed, grant, map, plat, or other means, which 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 purposes for which same shall have been dedicated; and no person shall have any right, or cause of action thereafter, to enforce any public or private easement therein, unless such right shall have been asserted within two years from and after the passage of this act: Provided, that no abandonment of any such public or private right or easement shall be presumed until the dedicator or those claiming under him shall file and cause to be recorded in the register's office of the county

where such land lies a declaration withdrawing such strip, piece, or parcel of land from the public or private use to which it shall have theretofore been dedicated in the manner aforesaid.

"Sec. 2. The provisions of section one of this act shall have no application in any case where the continued use of any strip of land dedicated for street or highway purposes shall be necessary to afford convenient ingress, egress, and regress to any lot or parcel of land sold and conveyed by the dedicator of such street or highway prior to the passage of this act.

"Sec. 3. That this act shall be in force from and after its ratification, and shall apply to dedications made after as well as before its passage.

"Ratified this the 8th day of March, A.D. 1921," *and*

"Section 1. That chapter one hundred and seventy-four of the Public Laws of one thousand nine hundred twenty-one, being an act to regulate the dedication of streets, highways, etc., and to limit the time within which such dedication shall be accepted by the public, shall be amended by adding the following proviso at the end of section one:

" 'Provided further, that where any corporation has dedicated any strip, piece, or parcel of land in the manner herein set out, and said dedicating corporation is not now in existence, it shall be conclusively presumed that the said corporation has no further right, title, or interest in said strip, piece, or parcel of land, regardless of the provisions of conveyance from said corporation, or those holding under said corporation, retaining title and interest to said strip, piece, or parcel of land so dedicated; the right, title and interest in said strip, piece, or parcel of land shall be conclusively presumed to be vested in those persons, firms, or corporations owning lots or parcels of land adjacent thereto, subject to the provisions set out hereinbefore in this section: Provided further, that nothing in this act shall apply to pending litigation.'

"Sec. 2. That this act shall be in full force and effect from and after its ratification.

"In the General Assembly read three times and ratified, this the 4th day of April, 1939."

The agreed statement of facts reveals that the land within the *locus in quo* dedicated to the public use as roads, highways, streets and avenues by the maps filed and recorded by the plaintiffs' predecessors in title was not actually opened and used within twenty years after the dedication thereof, or at any subsequent time, and that no person has asserted any public or private easement therein within two years from the passage of the act (8 March, 1921), or at any other time; and that the plaintiffs, being those persons claiming under the dedicators of such streets, have filed and caused to be recorded a declaration withdrawing the land constituting such streets from the public and private use to which it thereto-

fore had been dedicated; that the land constituting the streets in the *locus in quo* is not necessary to afford a convenient ingress, egress, or regress to any lot or parcel of land sold and conveyed by the dedicators prior to the passage of the act; and further, the corporations which dedicated the land constituting the streets involved do not now exist, and that the plaintiffs own all of the lots or parcels of land adjacent to said streets.

The first contention of the defendant, appellant, that the plaintiffs were not authorized to file and have recorded the declaration withdrawing the land involved from public and private use to which it had theretofore been dedicated is untenable, since it appears from the agreed statement of facts that "plaintiffs are claimants under dedicators," and the statute provides no abandonment of any public or private right or easement shall be presumed until "the dedicator or those claiming under him shall file and cause to be recorded" such declaration.

The second contention made by the defendant, appellant, that the clause in a deed from the Winston-Salem Land & Investment Company to the Southside Land & Investment Company, quoted in the agreed statement of facts, which deed is a link in the chain of title of the plaintiffs, excepted from the conveyance and reserved the title to the streets involved in the grantor, and prevented the passing of such title to the grantee, and for that reason such title never passed to the plaintiffs, is not in accord with our construction of said clause.

It is true that under the modern rule of construction, little importance is attached to the position of the different clauses in a deed, and the courts look at the whole instrument, without reference to formal divisions, in order to ascertain the intention of the parties. *Thomas v. Bunch,* 158 N. C., 175, and cases there cited, and when the language of a deed is doubtful it must be construed most favorably to the grantee, *Benton v. Lumber Co.,* 195 N. C., 363; *Cox v. McGowan,* 116 N. C., 131. Applying these two simple rules of construction, we think, and so hold, that the quoted clause was intended to include in the conveyance the "streets and alleys designated upon said map" rather than to except and reserve them therefrom. And further, we concur with the finding of the trial judge that even if the effect of the quoted clause was to reserve the title to the streets in the grantor, instead of conveying the same to the grantee, the plaintiffs having proceeded under the aforesaid statutes, now possess all right, title, interest and estate in said streets.

The third contention of the defendant, appellant, that the statutes relied upon by the plaintiffs are ineffective cannot be successfully maintained. This contention is that since the dedicators, predecessors in title of the plaintiffs, sold and conveyed lots to others by reference to the maps filed and recorded by them, the grantees in the deeds for such

lots, and those claiming under them, were thereby vested with easements over all the streets shown on said maps, *Sexton v. Elizabeth City,* 169 N. C., 385; *Stephens Co. v. Homes Co.,* 181 N. C., 335, and cases there cited, and that to allow those vested rights to be taken from them by legislative enactment would be to allow persons to be deprived of their property otherwise than by "the law of the land" and "without due process of law" in violation of Article I, section 17, of the Constitution of North Carolina and of the 14th Amendment of the Constitution of the United States.

Any rights to enforce any easements which the grantees in the deeds made with reference to the maps, and of those claiming under them, may have had was clearly preserved for two years after its passage by the act itself. No vested right was destroyed by the act, only the remedy by which such rights might be enforced was changed, and when this was done these grantees, and those claiming under them, were left with a remedy reasonably adequate to afford relief, namely, two years after the passage of the act in which to assert their rights. These rights are "dependent on the doctrine of equitable estoppel." *Irwin v. Charlotte,* 193 N. C., 109.

"It is well settled that the Legislature may change the remedy, and as the statute of limitations applies only to the remedy, that it may also change that, either by extending or shortening the time; provided, in the latter case a reasonable time is given for the commencement of an action before the statute works a bar." *Strickland v. Draughan,* 91 N. C., 103.

"Whatever pertains to the remedy may be modified or altered at the pleasure of the Legislature, if the obligation of the contract is not thereby impaired nor any substantial right affected, provided a sufficient remedy is left to the parties, according to the course of justice as it existed at the time the contract was made.

"Procedure is always subject to change by the Legislature, with the limitation that one, having a vested right in a cause of action, must be left with some remedy reasonably adequate to afford relief.

"When a limitation of time for bringing an action is shortened by statute, there must be a 'reasonable time' given, notwithstanding the statute, in which to bring the action." The Constitution of North Carolina, Connor & Cheshire, p. 70. *Hinton v. Hinton,* 61 N. C., 410; *Durham v. Speeke,* 82 N. C., 87; *Whitehead v. Latham,* 83 N. C., 233; *Williams v. Weaver,* 94 N. C., 134; *Bost v. Cabarrus County,* 152 N. C., 531; *Statesville v. Jenkins,* 199 N. C., 159.

The grantees in the deeds in which conveyances were made with reference to the maps filed and recorded, and those claiming under them, were fixed by law with notice of the statutes, and it was incumbent upon

them within the two years allowed by the statutes (a reasonable time) to take themselves out of the bar put upon them by asserting their right of easements over the streets involved. *Matthews v. Peterson,* 150 N. C., 132, and cases there cited.

Chief Justice Waite, speaking for the Supreme Court of the United States, says: "This Court has often decided that statutes of limitation affecting existing rights are not unconstitutional, if a reasonable time is given for the commencement of an action before the bar takes effect. *Hawkins v. Barney,* 5 Pet., 457; *Jackson v. Lamphire,* 3 Pet., 280; *Sohn v. Waterson,* 17 Wall., 596; *Christmas v. Russell,* 5 Wall., 290; *Sturges v. Crowninshield,* 4 Wheat., 122." *Terry v. Anderson,* 95 U. S., 628 (24 Law Ed., 365).

"Under this provision of the Federal Constitution it is well settled that the Legislature may prescribe a limitation for the bringing of suits where none previously existed, as well as shorten the time within which suit to enforce existing causes of action may be commenced, provided, in each case a reasonable time, taking all the circumstances into consideration, be given by the new law for the commencement of suit before the bar takes effect. *Wheeler v. Jackson,* 137 U. S., 255; *Turner v. New York,* 168 U. S., 94; *Saranac Land Co. v. Comptroller,* 177 U. S., 318." *Blevins v. Utilities, Inc.,* 209 N. C., 683.

We are of the opinion that since the plaintiffs have complied with the requirements of valid statutes, that the judgment of the Superior Court should be affirmed, and it is so ordered.

Affirmed.

G. T. CARSWELL v. MRS. BUENA E. CRESWELL, MRS. MARY B. HUNTER, MRS. JENNIE G. KIRKPATRICK, MRS. MATTIE E. WASHAM, H. G. ASHCRAFT, AND W. F. GRAHAM, AS TRUSTEES OF THE PARK ROAD COMMUNITY HOUSE; HARVEY HUNTER, SID WASHAM AND A. L. PARKER, FOR AND ON BEHALF OF THEMSELVES AND ALL OTHER PERSONS RESIDING IN THE PARK ROAD COMMUNITY OF MECKLENBURG COUNTY, NORTH CAROLINA; AND J. R. HARRIS.

(Filed 2 February, 1940.)

1. Adverse Possession § 3—

Adverse possession is actual possession in the character of owner, evidenced by making the ordinary uses and taking the usual profits of which the property is susceptible in its present state, to the exclusion of all others, including the true owner.

2. Adverse Possession § 13c—

Adverse possession under color of title for a period of seven years ripens title in claimant. Michie's Code, 428.

3. Adverse Possession § 11—

The property in question was conveyed to trustees for the benefit of members of the community for use as a community house or playground. *Held:* The statute, Michie's Code, 435, precluding acquisition of title in any public way by adverse possession does not apply to adverse possession of the *locus in quo.*

4. Adverse Possession § 4b—

Title by adverse possession may be acquired against religious, charitable or educational corporations or trusts.

5. Same—

When the trustee is barred the *cestuis* are also barred, since ordinarily the *cestuis* are bound by the acts or the failure to act on the part of the trustee.

6. Judgments § 29—

Property was conveyed to trustees for use as a community house or playground for the benefit of the residents of the community. Action was instituted involving title to the property in which representative members of the community were made parties. *Held:* Judgment in the action is binding upon the minors and all members of the community not made parties, under statutory provision for class representation. Michie's Code, 457.

7. Adverse Possession § 4b—Held: Under facts of this case, plaintiff obtained title by possession under color of title against trustees and beneficiaries of charitable trusts.

A vacant lot was conveyed to trustees for use as a community house or playground. The trustees borrowed money upon a deed of trust on the property and erected a community house thereon with the proceeds. Thereafter the community stopped using the *locus in quo* for any purpose, and after an invalid attempt of the lender to foreclose his deed of trust, a community meeting was called, which meeting authorized the trustees to sell. In accordance with this authorization the trustees executed a deed to plaintiff and used the purchase price to repay the money borrowed. Plaintiff took possession under his deed and remained in continuous possession for over seven years. *Held:* Under the facts and circumstances of this case, plaintiff acquired the fee simple title to the *locus in quo* by adverse possession under color of title and the trustees and all the beneficiaries of the charitable trust are bound thereby and are estopped from asserting any interest in the land, and plaintiff may convey the fee simple title to the *locus in quo.*

APPEAL by defendants from *Johnston, Special Judge,* at October, 1939, Extra Term, of MECKLENBURG. Affirmed.

This is an action instituted by plaintiff against the defendants, who are surviving trustees of an express trust for community purposes, three out of a number of resident beneficiaries of the trust, and one who has contracted to purchase the land involved from the plaintiff. All of the defendants filed a demurrer to the complaint, and from the judgment of the Superior Court overruling the demurrer, the defendants appealed.

The facts: On 22 January, 1920, J. K. Wolfe and wife, being then seized in fee simple and in possession of the premises therein described, conveyed a lot of land near Charlotte, in a section known as the Park Road Community, to the defendant trustees and to one other trustee, since deceased, in trust, that said trustees and their successors "shall hold, use, occupy and enjoy the same for the purpose of establishing, maintaining and carrying on as a community building, buildings and grounds for the benefit of persons of the white race owning land or living within the community," describing same. Among the conditions set forth in said deed were the following:

1. The said premises shall be called "The Park Road Community House";

3. The said parties of the second part or their successors shall have entire control of said property and premises for the purposes hereinbefore stated, and they shall also have entire control, disposal and management of any and all property whether real or personal, which shall at any time be given or conveyed to the said parties of the second part for the said community house, or of the income or profits of such money or property as may be given for the endowment or furtherance of any of the activities of the said community house;

6. If at any time it shall become impossible or impracticable to carry on the trust hereby created according to the true intent and purpose thereof, then the said premises shall be used for public playgrounds or recreation grounds for the white persons living in the said community until such time as the parties of the second part, or their successors, may find it possible and to resume the use of said premises for the purposes herein stated.

Said lot of land was vacant lot. About 8 April, 1921, and 8 January, 1922, said trustees borrowed from B. J. Summerow the sums of $1,000 and $1,250—total of $2,250—which was used with other funds to erect a building on said lot, securing each of said loans by deeds of trust to F. M. Shannonhouse, Trustee.

For a year or more the people living in said community did use said community house, but that from 1923 to 1926 the persons of said community failed to use said community house and abandoned the same and at no time since 1923 have the persons of said community evidenced any interest whatsoever in using said property for any purpose.

In March, 1926, F. M. Shannonhouse, Jr., administrator of F. M. Shannonhouse, deceased trustee, upon request of the owner and holder of the notes secured by said two deeds of trust, undertook to sell the land in question under the power of sale contained in said deeds of trust, at which time said J. K. Wolfe became the last and highest bidder for said land.

J. K. Wolfe refused to accept the deed which was tendered to him by F. M. Shannonhouse, Jr., administrator of F. M. Shannonhouse, deceased trustee, and at the March Term, 1926, of Mecklenburg Superior Court, submitted to Honorable William F. Harding, judge presiding, a controversy whether J. K. Wolfe was required to accept said trustee's deed. The court adjudged that J. K. Wolfe was not required to accept said trustee's deed and the Supreme Court of North Carolina affirmed that judgment in the opinion of *Shannonhouse v. Wolfe,* 191 N. C., 769. In that opinion, the Supreme Court declared the trust in question to be a charitable trust and set forth the terms and conditions under which property of a charitable trust may be disposed of.

In September, 1926, after due notice was published in *The Mecklenburg Times,* a newspaper published in Mecklenburg County, North Carolina, and after personal notice was given to representative members of a large majority of the families of said community, there was held in said community house a well attended meeting of the beneficiaries of said trust, presided over by H. G. Ashcraft, as chairman, and C. M. Creswell, as secretary, for the purpose of considering what disposition or use should be made of said community house property.

At said meeting said beneficiaries adopted a resolution requesting and authorizing the trustees of said community house to sell said property. Immediately thereafter said trustees held a meeting and appointed a committee from their number to procure bids for said property. The plaintiff offered $3,000.00 for the property, the trustees accepted said offer and executed and delivered to the plaintiff a deed to said property, said deed being dated 23 September, 1926, and duly recorded.

Each of said trustees at said time was *sui juris* and each of the surviving trustees has been *sui juris* at all times since the execution and delivery of said deed. Infants reside in said community and have resided in said community at all times referred to. The consideration of $3,000.00, which the plaintiff paid for said deed, was used, as the record indicates, to pay the indebtedness which was incurred to build said community house. J. K. Wolfe and wife have quitclaimed all of their right, title and interest in said property to the plaintiff.

Plaintiff has held said property by adverse possession at all times since 9 October, 1926. The defendant J. R. Harris and the plaintiff entered into a contract that J. R. Harris should buy said property from plaintiff for a consideration of $3,500.00, and said J. R. Harris has refused to accept the deed tendered by plaintiff upon the alleged ground that said deed does not convey a good title to said property.

Three of the defendants, Harvey Hunter, Sid Washam and A. L. Parker, are citizens and residents of said community, the questions referred to in the complaint are of a common and general interest to all

persons living in said community, and said three named defendants are made parties in order that they may defend for the benefit of all persons living in said community who are interested in the questions referred to.

The defendants demurred to the complaint, setting forth *seriatim* several grounds. We think it necessary to consider only the main ground: "For that the complaint fails to state facts sufficient to constitute a cause of action and to support the judgment prayed for in the complaint for that, upon the facts as alleged in the complaint, it appears as a matter of law that plaintiff never acquired and is not now seized of good fee simple title to the land described in the complaint."

The defendants in their brief say: "The defendant Trustees of the Park Road Community House, having in effect abandoned the property for the purposes for which it was originally conveyed to them and having in good faith conveyed it to the plaintiff, have not made any claim as such Trustees to the land since such conveyance; but have interposed their demurrer in this action for the purpose of performing such duties as they may have to the resident beneficiaries in the community of the trust and for the purpose of preserving such right and title as they as trustees might now have for the benefit of such community residents. The three individual resident beneficiary defendants have not heretofore interposed any claim or interest in the said property since its conveyance to plaintiff by the said trustees; but feel that, inasmuch as they are made parties in a representative capacity, it is their duty, in so far as the other resident beneficiaries are concerned, to protect whatever interest such other beneficiaries may have. Defendant J. R. Harris has entered into a binding contract to purchase the *locus in quo* from the plaintiff and is ready, anxious and willing to perform his said contract, provided plaintiff can convey to him a good fee simple marketable title to the *locus in quo* entirely free from the trust heretofore imposed upon same."

The court below signed an order overruling the demurrer, defendants excepted, assigned error and appealed to the Supreme Court.

O. M. Litaker and Joe W. Ervin for plaintiff.
Taliaferro & Clarkson for defendants.

CLARKSON, J. The only exception and assignment of error made by defendants is to the order of the court below overruling the defendants' demurrer. We think the ruling of the court below correct.

The plaintiff states two main contentions why the demurrer should have been overruled. As one is sufficient to determine this cause, we do not consider the other: The plaintiff contends that he has been in possession and held the property in controversy adversely for thirteen years

next preceding the commencement of this action, under known and visible lines and boundaries and colorable title, by virtue of a valid deed from the trustees to the plaintiff. That he purchased the land in good faith and paid full value. That therefore plaintiff's title has ripened into a fee simple title by adverse possession under color of title for more than seven years. We think plaintiff's contention correct under the facts and circumstances of this case.

N. C. Code, 1935 (Michie), sec. 428, is as follows: "When a person or those under whom he claims is and has been in possession of any real property, under known and visible lines and boundaries and under colorable title, for seven years, no entry shall be made or action sustained against such possessor by a person having any right or title to the same, except during the seven years next after his right or title has descended or accrued, who in default of suing within that time shall be excluded from any claim thereafter made; and such possession, so held, is a perpetual bar against all persons not under disability."

Adverse possession consists of the actual possession of property held to the exclusion of others, including the true owner, and is exercised by making the ordinary use of which the property is susceptible in its present state and taking the usual profits. *Locklear v. Savage,* 159 N. C., 236; *Owens v. Lumber Co.,* 210 N. C., 504 (508).

The record discloses that plaintiff had not only possession for seven years, in conformity to the above statute, but for thirteen years.

The defendants contend: "There is respectable authority to the effect that where lands have been dedicated for use as a public square or common or park or playground title thereto can never be acquired by adverse possession, whether under color of title or not." They cite the case of *Moose v. Carson,* 104 N. C., 431 (434), where it is said: "No one can acquire as a general rule by adverse occupation as against the public the right to a street or square dedicated to the public use. *Hoadley v. San Francisco,* 50 Cal., 265; *People v. Pope,* 53 Cal., 437." 1 Amer. Jurisprudence, p. 850, sec. 106. We do not think the deed creating the trust in this case susceptible of the defendants' construction. See *Sheets v. Walsh, ante,* 32.

We have the following statute—N. C. Code, *supra,* sec. 435: "No person or corporation shall ever acquire any exclusive right to any part of a public road, street, lane, alley, square or public way of any kind by reason of any occupancy thereof or by encroaching upon or obstructing the same in any way, and in all actions, whether civil or criminal, against any person or corporation on account of an encroachment upon or obstruction or occupancy of any public way it shall not be competent for a court to hold that such action is barred by any statute of limitations." This statute is not applicable in this case.

In the case of *Shannonhouse v. Wolfe, supra,* it was held by this Court that the Park Road Community House property was in the nature of a charitable trust, and the decisions are uniform that adverse possession under color of title of property belonging to a charitable trust will ripen into a full title for the person in such adverse possession. The general rule is stated in 2 Corpus Juris, part sec. 476, at p. 225, as follows: "But in the absence of some statutory provision to the contrary, title by adverse possession may be acquired as against a religious or charitable corporation or educational corporation, and that, too, although such corporations are expressly prohibited by statute from conveying their lands."

The same general rule is reaffirmed in 2 Corpus Juris Secundum, sec. 5 in part, at pp. 515-516: "In the absence of some statutory provision to the contrary, title by adverse possession may be acquired against religious, charitable or educational corporations, even though such corporations are expressly prohibited by statute from conveying their lands."

In *Herndon v. Pratt,* 59 N. C., 327 (333-334), *Pearson, C. J.,* speaking to the subject says: "The principle, that when the statute of limitations is a bar to the trustee, it is also a bar to the *cestui que trust* for whom he holds the title, and whose right it is his duty to protect, is settled; *Wellborn v. Finley,* 7 Jones, 228. In delivering the opinion in that case, the principle was considered so plain that it was deemed unnecessary to cite authorities, and the Court was content to leave the question on the manifest *reason of the thing.* For statutes of limitation and statutes giving title by adverse possession, would be of little or no effect, if their operation did not extend to *cestui que trust* as well as trustees who hold the title for them, and whose duty it is to protect their rights. If by reason of neglect on the part of the trustees, *cestui que trust* lost the trust fund, their remedy is against the trustees, and if they are irresponsible, it is the misfortune of the *cestui que trust,* growing out of the want of forethought on the part of the maker of the trust, under whom they claim." 2 A. L. R., at p. 41, *et seq. Wellborn v. Finley,* 52 N. C., 228; *Blake v. Allman,* 58 N. C., 407; *Clayton v. Cagle,* 97 N. C., 300; *King v. Rhew,* 108 N. C., 696; *Kirkman v. Holland,* 139 N. C., 185; *Cameron v. Hicks,* 141 N. C., 21.

In *Orange County v. Wilson,* 202 N. C., 424 (427), is the following: "Besides, the trustees of the petitioners were parties defendant and were served with process." The principle was so well settled that it was recognized without citing authorities, that a trustee could bind the *cestuis que trustent.*

The defendants raise the questions: "Would judgment in this case be binding upon minor residents in the community who are neither parties

to the action nor represented by guardians *ad litem?*" and "Would judgment in this cause be binding upon the other numerous beneficiaries not parties to this action under the doctrine of representation?"

N. C. Code, *supra,* sec. 457, in part, is as follows: "When the question is one of a common or general interest of many persons, or where the parties are so numerous that it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

We think the deed of the trustees bound all who had an interest in the land if not the community meeting, and other matters set forth in the record were in the nature of an estoppel. From the facts and circumstances of this case, we think none of the contentions of defendants can be sustained. We think the deed tendered by plaintiff to defendant J. R. Harris conveyed to him "a good fee simple marketable title to the *locus in quo,* entirely freed from the trust heretofore imposed upon same," and defendant Harris is bound by the contract to take and pay for the land.

The brief of defendants is persuasive, but not convincing.

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

Affirmed.

JAMES W. BROWN v. E. H. CLEMENT COMPANY.

(Filed 2 February, 1940.)

1. Contracts § 21: Master and Servant § 9—Complaint held to allege contract, breach by defendant and damages, and demurrer thereto was properly overruled.

The complaint in this action alleged in effect that defendant employed plaintiff to perform certain of the construction work on buildings let under contract to defendant, plaintiff to be paid upon a salary basis plus a percentage of the net profits earned in the performance of the construction contract, that the contract was verbally extended to other buildings let to defendant by the same corporation, that plaintiff fully performed the services agreed upon, but that defendant had breached the contract by failing to pay plaintiff his percentage of the net profits earned in the construction of the buildings included in the contract by the parol agreement. *Held:* Defendant's demurrer on the ground that the complaint failed to state a cause of action was properly overruled.

2. Contracts § 23—

Evidence *held* sufficient to sustain, *prima facie,* allegations of complaint stating cause of action for breach of contract.

3. Reference § 3—

A plea in bar such as to preclude an order of compulsory reference is one that goes to the entire controversy and which, if found in favor of the pleader, bars the entire cause of action and puts an end to the case.

4. Same—Matter pleaded held not to bar entire cause and therefore not to preclude compulsory reference.

This cause of action was instituted to recover a percentage of the net profits earned in the construction of two certain buildings, plaintiff alleging that he was entitled thereto upon the completion of the buildings under terms of his contract of employment with defendant contractor. Defendant pleaded a receipt signed by plaintiff in full satisfaction of all work and labor done by plaintiff or under his supervision, which receipt was executed after completion of one of the buildings but ten months prior to the completion of the other building. *Held:* No amount could be due plaintiff under the profit sharing contract in the construction of each building until the completion of the building and the ascertainment of the net profit earned in its construction, and therefore the receipt could not bar plaintiff's claim to a percentage of the net profits derived from the construction of the building completed subsequent to the execution of the receipt, and therefore the receipt is not a bar to plaintiff's entire cause of action and does not preclude the court from ordering a compulsory reference.

5. Reference § 13—Procedure necessary to preserve right to trial by jury upon appeal in compulsory reference.

While the parties to a compulsory reference must except to the order of reference, make exceptions to the findings of fact of the referee, and demand a jury trial and tender issues under such exceptions in order to preserve their right to a jury trial, it is not required that the demand and tender of issues be physically made immediately under each exception, it being sufficient if contemporaneously with the filing of exceptions, issues raised by the pleadings are tendered based on the exceptions to the referee's findings and related thereto by the number of the exceptions and the number of the finding to which it was taken, and a jury trial demanded as to each of such issues.

APPEAL by defendant from *Olive, Special Judge,* at April Term, 1939, of DURHAM. Reversed.

Civil action to recover compensation alleged to be due for services rendered under contract.

The defendant corporation is engaged in the building construction business. In contemplation of bidding for the contract for the construction of the buildings to be erected by Duke University in its building program, begun about the year 1927, the defendant approached the plaintiff to procure his services as a foreman to supervise the rubble stone work in connection with the buildings and requested plaintiff not to make any bids for such work but to coöperate with the defendant.

From time to time the defendant submitted bids to the Duke Construction Company and received contracts for the erection of the stone masonry work in the Hospital and Medical School Building, Group C. Dormitory Building, Union Building, School of Religion, Library, Auditorium and Classroom, Group A. Dormitory, Group B. Dormitory, Law

Building, Botany and Zoology Building, A and B Extensions, Physics, Chemistry, Stage Addition, Nurses' Home, Gymnasium and Chapel.

The first contract provided for the stone masonry work on the Hospital and Medical Building, Group C. Dormitory Building and Union Building. On 14 January, 1928, defendant entered into a contract with the plaintiff to pay him $350.00 per month salary and one-sixth of the net profits received by the defendant for the said work, the net profits to be arrived at as stipulated in the contract. On 4 September, 1928, the defendant received a contract for the stone masonry work to be done on the School of Religion, Library, and Auditorium and Class Room. The defendant's contract with the plaintiff was extended to embrace these buildings by letter. The defendant then received contract for the stone masonry work to be done on Group A. Dormitory, Group B. Dormitory and the Law Building. Its contract with the plaintiff was extended by letter to include these buildings. Upon receipt of the last letter extending his contract plaintiff advised an agent of the defendant that his contract with the defendant embraced all buildings which should be let by contract to the defendant by the Duke Construction Company and that it was needless for the defendant to write him a letter upon the execution of each contract it might make with the Duke Construction Company.

Thereafter, the defendant received contract from the Duke Construction Company for the erection of the Botany, Zoology, A and B Extension, Chemistry and Stage Addition Buildings, and still later received a contract for the erection of Duke Chapel and Gymnasium.

The plaintiff alleges that his contract with the defendant was orally extended to embrace the buildings enumerated in the last two contracts between the defendant and the Duke Construction Company and that he did all the rubble stone masonry and limestone setting on each and every building included therein. He further alleges that he has been paid his full compensation including both salary and interest in the net profits in respect to each and every building constructed by the defendant except the Duke Chapel, the Gymnasium Building and the Nurses' Home, but that his work on the Nurses' Home was done under a separate contract for which he is not entitled to compensation under the terms of the original contract as renewed from time to time. Having been paid his salary he instituted this action to recover $16,382.65 as representing one-sixth of the net profit on the Duke Chapel Building and $2,420.84 as representing one-sixth of the net profit on the Gymnasium Building, together with $43.29 error in the settlement for the other buildings.

The defendant denies that the original contract was extended to include Duke Chapel and the Gymnasium and alleges that it has made full settlement with the plaintiff for all amounts due him under his contract

of participation in the net profits derived from the buildings which were embraced in the contract. It further alleges, and pleads in bar, that the plaintiff, on 4 April, 1931, executed and delivered to the defendant a receipt in full settlement of all claims and demands for or on account of his profit-sharing interest in all work and labor done by him or under his supervision upon or in connection with the buildings of Duke University.

It likewise sets up a counterclaim in the amount of $500 represented by note dated 1 March, 1932.

The Gymnasium Building was completed prior to the execution of the release or receipt set up and pleaded in the defendant's further answer and the Chapel Building was completed some ten months thereafter. Under the contract, the one-sixth interest in the net profits payable to the plaintiff was made payable after the completion of the work on such buildings.

At the January Term, 1938, Hamilton, J., found that on the allegations contained in the pleadings it appeared that: "The issues arising upon the pleadings concern the performance of several construction contracts and a division of profits growing out of the performance of such contracts and the examination of a long account between the parties" and entered an order of compulsory reference. The defendant duly excepted thereto.

After hearing the evidence the referee filed his report in which he concluded that plaintiff was not entitled to any compensation on any building which was completed prior to 4 April, 1931, the date of the receipt in full settlement signed by the plaintiff; that the plaintiff was entitled to judgment in the sum of $16,382.65 in final settlement of the amount due him on the Chapel Building and that the defendant is entitled to judgment in the sum of $500 with interest on the note of plaintiff to defendant pleaded in defendant's further answer. The defendant filed exceptions: (1) to specific finding of fact by referee; (2) to failure of the referee to find certain specific facts; (3) to certain specific conclusions of law made by the referee; (4) to the failure of the referee to allow the defendant's motion of judgment as of nonsuit duly renewed at the conclusion of all the evidence.

In the same paper writing immediately following the exceptions entered the defendant tendered issues and demanded trial by jury on each objection and exception covered by the issues submitted. The issues tendered are made to relate to specific findings of fact.

The plaintiff moved the court to deny a trial by jury for the reasons assigned in the motion.

After further hearings and argument the court, "being of the opinion that the defendant had waived its right to a jury trial, for that the

defendant has failed to tender issues upon its exceptions in accordance with the practice and procedure in cases of compulsory reference, and by failing to assert its right to a trial by jury definitely and specifically under each exception to the referee's report" denied plaintiff's demand for a jury trial. The court likewise overruled the defendant's demurrer *ore tenus* to the plaintiff's complaint for that the complaint does not state a cause of action. The court then entered judgment confirming, approving and adopting the findings of fact and conclusions of law made by the referee, affirmed the report and entered judgment accordingly. The defendant excepted and appealed.

J. Elmer Long, S. C. Brawley, and Marshall T. Spears for plaintiff, appellee.

Hedrick & Hall and Fuller, Reade, Umstead & Fuller for defendant, appellant.

BARNHILL, J. The defendant's demurrer *ore tenus* was properly overruled. The plaintiff alleges that the written contract between him and the defendant under which he was to receive one-sixth of the net profits derived by the defendant from the performance of its several contracts with the Duke Construction Company was orally extended to include the Chapel and Gymnasium; that he fully performed his part of the contract; that the defendant has breached the contract by failing to pay him the amount due on the Chapel and Gymnasium Buildings; and that by reason of such breach the defendant is now indebted to him in the amount alleged. This is a sufficient statement of a cause of action to repel a demurrer.

Likewise, the judgment of the court denying the defendant's motion to dismiss as of nonsuit is without error. There is sufficient evidence in the record to sustain *prima facie* the allegations in the complaint.

The defendant insists that the order of reference was improper and that its motion to vacate the same should have been allowed for the reason that its further answer contains a plea in bar. *Jones v. Wooten,* 137 N. C., 421; *Garland v. Arrowood,* 172 N. C., 591, 90 S. E., 766; *Graves v. Pritchett,* 207 N. C., 518, 177 S. E., 641; *Ward v. Sewell,* 214 N. C., 279, 199 S. E., 28.

A plea in bar which extends to the whole cause of action so as to defeat it absolutely and entirely will repel a motion for a compulsory reference and no order of reference should be entered until the issue of fact raised by the plea is first determined. To defeat a reference the plea must be such that if found in favor of the pleader it will operate to bar the entire cause of action and put an end to the case, leaving nothing further to be determined. It must be a plea that denies the plaintiff's right to maintain the action, and which, if established, will

destroy the action. *Oldham v. Rieger,* 145 N. C., 254, and cases there cited; *Alley v. Rogers,* 170 N. C., 538, 87 S. E., 317; *Reynolds v. Morton,* 205 N. C., 491, 171 S. E., 781, and cases there cited; McIntosh, sec. 523.

The defendant expressly asserts that the contract to pay the plaintiff a percentage of the profits on certain of its contracts did not relate to or include the Gymnasium or the Chapel. The receipt in full satisfaction pleaded in bar was signed after the completion of the Gymnasium, but ten months or more before the completion of the Chapel. Under the contract, if it applied to the Chapel, there was nothing due to the plaintiff from net earnings on that building until after the completion of the building and the net profits were ascertained. The receipt is in satisfaction of "all work and labor done by me or under my supervision."

In respect to this receipt the defendant assumes inconsistent positions and the contentions made are at cross purposes. It avers that there was no contract to pay the plaintiff any part of the profits derived from the erection of the Chapel or the Gymnasium. At the same time it insists that it was within the contemplation of the parties, when the receipt was signed, that it bound the plaintiff not to claim any further right to profits derived from the construction of either of these buildings when, at the time, there was nothing due on the Chapel. It can hardly be said that in paying the amount which constituted the consideration for the receipt the defendant was seeking and did procure release from further liability on a contract it insists did not exist or in respect to an amount which was not then due.

It would seem that the referee properly held that this receipt was a bar to any claim of plaintiff to any further interest in the profits derived from the construction of the Gymnasium Building. On the other hand, we are unable to conceive how any reasonable construction of the receipt, under the circumstances, would lead to the conclusion that it bars the plaintiff from any right that he may have to share in the profits earned under the contract to construct the Chapel.

As the defendant's plea in bar does not pertain to plaintiff's entire cause of action, the defendant's exception to the order of reference and its exception to the refusal of the court to vacate the reference were properly overruled.

This leaves but one further question which demands consideration. Has the defendant waived its right to a trial by jury?

Every litigant has the right to have the issues of fact raised by the pleadings and the evidence offered in support thereof determined by a jury. But this right may be waived. *Stacy, C. J.,* speaking for the Court in *Booker v. Highlands,* 198 N. C., 282, 151 S. E., 635, clearly and concisely states the procedure which must be pursued in a compulsory reference in order to preserve the right to a trial by jury as follows:

"It may be adduced from the authorities that a party who would preserve his right to a jury trial in a compulsory reference should observe the following procedure:

"1. Object to the order of reference at the time it is made. *Driller Co. v. Worth, supra* (117 N. C., 515); *Ogden v. Land Co.,* 146 N. C., 443, 59 S. E., 1027.

"2. On the coming in of the report of the reference, if it be adverse, file exceptions in apt time to particular findings of fact made by the referee, tender appropriate issues based on the facts pointed out in the exceptions and raised by the pleadings, and demand a jury trial on each of the issues thus tendered. *Wilson v. Featherstone,* 120 N. C., 446, 27 S. E., 124; *Yelverton v. Coley,* 101 N. C., 248, 7 S. E., 672.

"3. If the report of the referee be favorable and unobjectionable, tender appropriate issues based on the facts pointed out in the exceptions, if any, filed to the report by the adverse party and raised by the pleadings, and demand a jury trial on each of the issues thus tendered. *Jenkins v. Parker, supra* (192 N. C., 188); *Baker v. Edwards,* 176 N. C., 229, 97 S. E., 16; *Robinson v. Johnson,* 174 N. C., 232, 93 S. E., 743.

"4. If the report of the referee be not wholly favorable to either party and both sides file exceptions thereto, tender appropriate issues based on the facts pointed out in the exceptions and raised by the pleadings, and demand a jury trial on each of the issues thus tendered. But if a jury trial be insured on the determinative issues raised by the pleadings, as in the instant case, by tendering appropriate issues based on the facts pointed out in one set of exceptions and by demanding a jury trial thereon, the retender of said issues based on facts pointed out in the other set of exceptions and a jury trial demanded thereon need not be made. *Keerl v. Hayes, supra* (166 N. C., 553.)

"A failure to observe any one of these requirements may constitute a waiver of the party's right to have the controverted matters submitted to a jury and authorize the judge to pass upon the exceptions without the aid of a jury." McIntosh, sec. 525.

The plaintiff contends that the defendant has waived his right to trial by jury by reason of the fact that in each exception filed by it there was no specific and definite demand for a jury trial followed immediately by an issue tendered thereon and that its demand for a jury trial comes too late at the end of its exceptions.

This Court has consistently held that in a reference case a litigant who desires to preserve his right to a trial by jury must tender appropriate issues under the exceptions to the referee's report. Such confusion as exists arises from the interpretation of the word "under" as used in these decisions to mean physically under and immediately below

the exception rather than as meaning "arising upon and relating to" the finding which is the subject of the exceptive assignment of error. Thus the plaintiff interprets the rule. This is a construction which assumes that the language of the opinions relates solely to the mechanics of the procedure.

If the plaintiff's position is to be sustained it will make the practice in reference cases, when a party seeks to preserve his right to a jury trial, extremely technical and burdensome. It would convert the issues into questions of fact raised by the report rather than issues of fact raised by the pleadings or, in many instances, require numerous repetitions of the same issue. This is not the intent or the purpose of the former decisions of this Court.

Notwithstanding an order of reference, a determination of the issues of fact raised by the pleadings and evidence in the cause remains as the primary purpose. A jury trial does not extend to every finding of fact made by the referee and excepted to by the parties, but only to issues of fact raised by the pleadings and passed upon by the referee. McIntosh, sec. 525. Questions of fact may not be substituted for issues merely because there is a controversy, as disclosed by the exceptions, as to what the facts are. McIntosh, sec. 525 (4).

Every fact found by the referee, if pertinent, relevant and material, necessarily relates to one of the controverted issues of fact. Correctly interpreted, the rule simply requires the litigant who seeks to preserve his right to trial by jury to tender issues raised by the pleadings based on the facts pointed out in the exceptions, and, as to each issue, to definitely and specifically demand a jury trial thereon, and further, by specific reference, to relate the issue to his exceptions to the findings of fact which bear upon and relate to that particular issue.

An examination of the record discloses that the defendant sufficiently complied with this rule. Immediately after his exceptions and as a part of the same paper writing the following appears.

"Upon the foregoing objections and exceptions to the referee's report, the defendant tenders the following issues and demands trial by jury on each objection and exception covered by the issues herewith submitted and as to all other objections and exceptions the defendant asks that each and every objection and exception be determined by the court.

"The defendant tenders issues upon the exceptions to the findings of fact by the referee as follows:"

As illustrative of the issues tendered we quote:

"EXCEPTION NO. 7 TO FINDING OF FACT NO. 9.

"Defendant has lodged its motion to strike findings of fact No. 9, but if motion is overruled then the defendant reserves the right to submit and does submit the issue, as follows:

"ISSUE: Did the defendant enter into an agreement by which the defendant would employ the plaintiff as foreman of rubble stone masonry and cut stone work and give him a share in the profits derived from all buildings constructed on Duke University Campus?"

"EXCEPTION NO. 16 TO FINDING OF FACT NO. 20.

"ISSUE: Did the defendant agree that the contract dated January 14, 1928, should apply to the contracts covering the Gymnasium and Chapel?"

Thus, it appears that the defendant has definitely and specifically demanded a jury trial on exceptions to particular findings of fact made by the referee and has tendered appropriate issues thereon raised by the pleadings, contemporaneously with the filing of the exceptions, giving plaintiff full notice of the facts to be submitted to the jury. When this is done it cannot be fairly said that his demand comes too late. To demand more would impose an unnecessary burden and constitute a resort to useless technicalities—to require less might lead to confusion. The whole purpose of the rule is to clarify and make certain that part of the controversy which is to be submitted to the jury—not to prescribe complex technical procedure with which it is difficult to comply.

The position here assumed is not in conflict with *Gurganus v. McLawhorn*, 212 N. C., 397, 193 S. E., 844. There general issues were tendered, some of which did not arise on the pleadings, without any pretense of relating them to the exceptions to the findings of fact.

The judgment below is

Reversed.

ROSA MACK, ADMINISTRATRIX OF THE ESTATE OF JOHN HUNTER, DECEASED, v. MARSHALL FIELD & COMPANY, ROBERT & COMPANY, INC., SOUTHEASTERN CONSTRUCTION COMPANY, AND W. F. HUMBERT.

(Filed 2 February, 1940.)

1. Pleadings § 20—

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

2. Pleadings § 18—

Only defects appearing upon the face of the complaint can be taken advantage of by demurrer.

3. Master and Servant § 44—Administrator of deceased employee may maintain action for wrongful death against third person tort-feasors.

Deceased was an employee of a subcontractor in the construction of a building, and was killed while performing his duties in the structural

steel work when a steel beam came into contact with an uninsulated, highly charged electric wire. This action was instituted by the administrator of the employee against defendants upon allegations that defendants were negligent in permitting the uninsulated, highly charged wire to remain where it would likely cause injury to the structural steel workers and in failing to give proper warning of the danger. The employer of plaintiff's intestate was not a party to the action. Defendants demurred on the ground that upon the face of the complaint it appeared that the Superior Court was without jurisdiction and that the Industrial Commission had exclusive original jurisdiction. *Held:* Under the provision of Michie's Code, 160, only the personal representative may maintain an action for wrongful death, and the complaint alleged a cause of action therefor against defendants, and their demurrer was properly overruled, defendants having no interest in the disposition of any recovery in accordance with the provisions of Michie's Code, 8081 (r).

APPEAL by plaintiff from *Hamilton, Special Judge,* at June Civil Term, 1939, of GUILFORD, sustaining demurrer *ore tenus* and motion for judgment on the pleading made by each of the defendants. Reversed.

This is an action for actionable negligence, alleging damages, for alleged wrongful death. It was originally brought in the municipal court of the city of High Point, but a consent order was entered transferring it to the Superior Court of Guilford County. The defendant, Robert & Company, Inc., entered a special appearance and moved that the action be dismissed as to it for want of proper service of process. This motion was sustained and an order entered to that effect. Service was duly had upon the other defendants, who filed answers. When the case came on for trial before his Honor, Luther Hamilton, judge presiding, each defendant demurred *ore tenus* to the complaint and moved for judgment on the pleadings. The demurrers and motions were sustained, and judgment entered dismissing the action. To the ruling sustaining the demurrers and motions, and to the signing of the judgment dismissing the action, the plaintiff appealed to the Supreme Court.

The complaint alleges, in part: "That the said plans and specifications were approved and accepted by the defendant Marshall Field and Company, which in January, 1937, employed the defendant Southeastern Construction Company to erect and construct said wing or addition; that the latter company employed J. L. Coe to do the structural steel work on said addition, and the plaintiff's intestate at the time of his death was employed by said J. L. Coe and was engaged in putting steel columns in said addition to said mill. That the addition or wing to said mill was to be constructed of brick, supported by considerable structural steel; that on March 11, 1937, said construction had progressed to a point where most of the steel in the floor of the second story had been placed, and the north brick wall was about 8 or 8½ feet high; that in order to place the steel beams or columns in position it was necessary

to use a form of derrick, consisting of a wooden pole about 35 feet long and about 16 inches in diameter, called a gin pole, which was held in position by guy ropes and braces; that near the top of this pole were two pulley blocks and near the bottom of said pole was what is called a winch, on which is wound the steel cable used in hoisting the steel columns; that on March 11, 1937, said gin pole was located just inside the north brick wall of said addition, near the northeast corner of same; that it was located near a window in the north wall, in which window it was necessary to place one of these steel columns; that about 12 or 15 feet from said window in the northwesterly direction from it was located the pole from which the power lines ran to the old transformer; that said power lines ran from said electric light pole to said old transformer diagonally across said brick wall at a point a few feet above said window; that about 9:30 or 10:00 o'clock a.m., on said day plaintiff's intestate and fellow employees were hoisting a steel column into position in the aforesaid window; that said column was picked up from the ground just inside the north wall of said addition; that plaintiff's intestate and two other employees were at said time engaged in turning the handle on said winch, which caused said steel column to be lifted from the ground and into place with the assistance of other employees, who guided it in its movement; that said steel column was about 30 feet long and weighed about 650 pounds; that when it had been partially raised so that it was clear of the ground it came in contact with one of said power lines, which was charged with about 13,200 volts of electricity, causing said electric current to run down the column and the cable supporting said column and into plaintiff's intestate, knocking him a distance of 6 or 7 feet, and instantly killing him. That there was no sign on said power lines of any kind to warn persons on the premises that they were uninsulated, or charged with electricity, or dangerous; that plaintiff's intestate had not been warned of the danger of said wires; that the condition of said wires and the danger inherent therein were well known to all the defendants; that each and every one of said defendants had the right and authority, and was under the duty to warn persons rightfully on said premises of the condition and danger of said power lines, and to use reasonable precautions to protect such persons from harm therefrom; that plaintiff's intestate was a poor, illiterate and ignorant Negro, and was ignorant of the fact that said wires were uninsulated and exposed and charged with a high voltage and very dangerous. That plaintiff's intestate's death was directly and proximately caused by the negligence and carelessness of the defendants, and each of them, in the following particulars:

"(a) In that said power lines were placed upon and allowed to remain upon said premises in an exposed condition and uninsulated and in this

condition were charged with a high voltage of electricity, when the defendants knew, or by the exercise of reasonable diligence should have known, that they were inherently dangerous, and would probably result in serious injury or death to persons working near them, and more particularly plaintiff's intestate. (b) In that said power lines were so located upon said premises as to be exceedingly dangerous, when charged with electricity, to persons working near them, and more particularly the plaintiff's intestate. (c) In that defendants placed no sign of any kind on said power lines or the poles supporting them to warn persons against danger therefrom, and in that defendants failed and neglected to warn in any manner plaintiff's intestate that said power lines were open and exposed and dangerous. (d) In that the current passing through said power lines was not cut off while persons were working so near them, and particularly while plaintiff's intestate and others were hoisting steel columns so near to said wires, and in that no attempt was made by any of the defendants to cut off or have cut off said current. (e) In that said wires or power lines were not constructed at a height and in such a manner as to not interfere with the construction of said addition to said mill and the persons working thereon. (f) In that the said power lines were not covered with nonconductible material. (g) In that the defendants did not complete construction of the new transformer stand and change the wires from the old transformer stand to the new one, where they would be out of danger, prior to the commencement of construction of said addition. All of which acts of negligence on the part of the defendants were the sole, proximate and efficient cause of the death of plaintiff's intestate."

Plaintiff excepted and assigned error: "That his Honor sustained the demurrer *ore tenus* to the complaint and motion for judgment on the pleadings of each defendant," and "That his Honor rendered and signed the judgment set out in the record," and appealed to the Supreme Court.

Lovelace & Kirkman and Frazier & Frazier for plaintiff.

Junius C. Brown and Sapp & Sapp for defendants Marshall Field & Co. and W. F. Humbert.

Carter Dalton and John A. Myers for Southeastern Construction Co.

CLARKSON, J. Did the court below commit error in sustaining the demurrer *ore tenus* to the complaint and motions for judgment on the pleadings made by each of the defendants? We think so under the facts and circumstances of this case.

In *Leonard v. Maxwell*, 216 N. C., 89 (91), citing authorities, it is stated: "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."

It is well settled that only objections apparent on the face of the complaint can be considered on demurrer.

N. C. Code, 1935 (Michie), sec. 160, in part, is as follows: "When the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured party had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their executors, administrators, collectors, or successors, shall be liable to an action for damages, to be brought within one year after such death, by the executor, administrator or collector of the decedent; and this notwithstanding the death, and although the wrongful act, neglect or default, causing the death, amounts in law to a felony. The amount recovered in such action is not liable to be applied as assets, in the payment of debts or legacies, except as to burial expenses of the deceased, but shall be disposed of as provided in this chapter for the distribution of personal property in case of intestacy." *Curlee v. Power Co.,* 205 N. C., 644 (647). Nothing else appearing, there would be no question that the plaintiff stated a good cause of action against all of the defendants served.

N. C. Code, *supra,* sec. 8081 (r), in part, is as follows: "The rights and remedies herein granted to an employee where he and his employer have accepted the provisions of this act, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin, as against his employer at common law, or otherwise, on account of such injury, loss of service, or death: 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 chapter: Provided, further, that after the Industrial Commission shall have issued an award, the employer may commence an action in his own name and/or in the name of the injured employee or his personal representative for damages on account of such injury or death, and any amount recovered by the employer shall be applied as follows: First to the payment of actual court costs, then to the payment of attorneys' fees when approved by the Industrial Commission; the remainder or so much thereof as is necessary shall be paid to the employer to reimburse him for any amount paid and/or to be paid by him under the award of the Industrial Commission; if there then remain any excess, the amount thereof shall be paid to the injured

employee or other person entitled thereto. If, however, the employer does not commence such action within six months from the date of such injury or death, the employee, or his personal representative shall thereafter have the right to bring the action in his own name, and the employer, and any amount recovered shall be paid in the same manner as if the employer had brought the action. The amount of compensation paid by the employer, or the amount of compensation to which the injured employee or his dependents are entitled, shall not be admissible as evidence in any action againt a third party. When any employer is insured against liability for compensation with any insurance carrier, and such insurance carrier shall have paid any compensation for which the employer is liable or shall have assumed the liability of the employer therefor, it shall be subrogated to all rights and duties of the employer, and may enforce any such rights in the name of the injured employee or his personal representative; but nothing herein shall be construed as conferring upon the insurance carrier any other or further rights than those existing in the employer at the time of the injury to or death of the employee, anything in the policy of insurance to the contrary notwithstanding."

Section 8081 (i)—(b) "The term 'employee' means every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written," etc.

In *McCarley v. Council,* 205 N. C., 370 (374), speaking to the subject, it is said: "In *Brown v. R. R.,* 202 N. C., 256, 162 S. E., 613, it was held that the personal representative, in that case the administrator, of a deceased employee, who has accepted from the employer, or from his insurance carrier, compensation for the death of the employee, under the provisions of the North Carolina Workmen's Compensation Act, can maintain in his own name an action to recover of a third person, who by his negligence has caused the death of the employee, damages for such death. For this reason, there was no error in the order of the Superior Court in that case, striking from the answer of the defendant allegations setting up the payment and acceptance of such compensation as a defense or bar to the action. Section 11 of the act expressly provides that in such case, the personal representative of the deceased employee may maintain the action, and that a recovery thereon shall be primarily for the benefit of the employer or of his insurance carrier, who are designated by the statute as the beneficiaries of the action, to the extent of the amount of the compensation paid for the death of the employee. The construction of the statute which supports this holding is not involved in the subsequent appeal in that case. See *Brown v. R. R.,* 204 N. C., 668, 169 S. E., 419. It was approved in *Phifer v. Berry,* 202 N. C., 388, 163 S. E., 119, and may now be regarded as settled," citing

Pridgen and U. S. Fidelity & Guaranty Co. v. A. C. L. R. R. Co., 203 N. C., 62, 164 S. E., 325. (p. 375): "The instant case is distinguishable from both the *Brown case* and the *Pridgen case*. In the former case, the action was to recover damages for the death of the employee. The action was properly begun and prosecuted by his personal representative. In the latter case, the action was to recover damages for injuries suffered by the employee, which did not result in his death. The action was not begun and prosecuted, as in the instant case, by the employee, who had elected to accept compensation for his injury from his employer or from his insurance carrier, and who by such acceptance is expressly barred by the statute, of the right to recover on the cause of action alleged in the complaint. . . . The order is reversed, without prejudice to a motion which may be made by the plaintiff in the Superior Court that the insurance carrier be made a party plaintiff to the action, if he is so advised. *Cunningham v. R. R.*, 139 N. C., 427, 51 S. E., 1029. If such motion is allowed, and the insurance carrier files a complaint and prosecutes the action, the action may be maintained. If the insurance carrier declines to prosecute the action, the plaintiff may not be without a remedy."

In *Thompson v. R. R.*, 216 N. C., 554 (556), it is written: "The N. C. 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."

This is an action against third parties for negligence. Under the N. C. Workmen's Compensation Act, negligence is eliminated and an employee may recover from his employer. N. C. Code, *supra*, sec. 8081 (i), subsec. (f): "'Injury and personal injury' shall mean only injury by accident arising out of and in the course of the employment," etc.

If the insurance carrier of the employer has paid the award to the employee, he is subrogated, as set forth in sec. 8081 (r), *supra*. This action is brought by the administrator of the deceased employee charging negligent killing against the defendants, third parties. The plaintiff charges in his complaint the defendants (one not served) with a violation of duty by third persons in not using due care. The complaint charges

that the power lines were on the premises in an "exposed condition and uninsulated," and in this condition charged with "high voltage of electricity" (13,500 volts). "The said wires or power lines were not constructed at a height and in such manner as not to interfere with the construction of said addition to said mill and persons working thereon."

In *Mitchell v. Electric Co.*, 129 N. C., 166 (170), quoting from Joyce on Electric Laws, sec. 445, we find: "'A company maintaining electric wires over which a high voltage of electricity is conveyed, rendering them highly dangerous to others, is under the duty of using the necessary care and prudence at places where others might have the right to go, either for work, business or pleasure, to prevent injury. It is the duty of the company under such conditions to keep the wires perfectly insulated, and it must exercise the utmost care to maintain them in such condition at such places.'" *Helms v. Power Co.*, 192 N. C., 784; *Calhoun v. Light Co.*, 216 N. C., 256.

In *Kiser v. Power Co.*, 216 N. C., 698 (at page 700), is the following: "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 customers. 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 defendant contends that upon the face of the complaint the Superior Court was without jurisdiction to hear and determine the matter for that, under the law, the N. C. Industrial Commission had the original and exclusive jurisdiction thereof. For the reasons given, we cannot so hold. The complaint sets forth actionable negligence against the defendants, who were third parties. The demurrer *ore tenus* as to each defendant is overruled. The judgment of the court below is

Reversed.

J. M. FREEMAN v. JAMES S. COOK, JR., LAYTON ANTHONY AND W. J. NICKS, CONSTITUTING THE BOARD OF ELECTIONS FOR ALAMANCE COUNTY.

(Filed 2 February, 1940.)

1. **Constitutional Law § 4d: Sheriffs § 1—Terms of office of sheriffs begin on first Monday in December after their election.**

   The General Assembly has power to prescribe the time when sheriffs-elect shall qualify and be inducted into office, and it has provided that the term of office of sheriffs-elect shall begin on the first Monday in December next ensuing the general election in November at which they are elected. Public Laws of 1868, ch. 20, sec. 8 (32), as amended by Public Laws of 1876-77, ch. 275, secs. 1 and 77. C. S., 1297 (12).

2. **Constitutional Law § 2c—**

   The General Assembly, in authorizing the submission of a constitutional amendment to the qualified voters of the State, and the voters, in voting thereon, are presumed to act in the right of existing constitutional and statutory provision.

3. **Constitutional Law § 2b: Sheriffs § 1—The term of office of sheriffs elected in 1938 is four years in conformity with constitutional amendment in effect at the beginning of the term.**

   The term of office of sheriffs-elect begins on the first Monday in December next ensuing their election, and the constitutional amendment changing the term of office of sheriffs from two to four years, approved by the voters in the election of 1938, being in effect on the first Monday in December, the date of the beginning of the term of the sheriffs elected in that election, their term of office is four years in accordance with the amendment then in effect. This being true, whether the amendment became effective on the date of the election or the time of its certification by the Governor, is not necessary to be determined.

4. **Sheriffs § 1—Upon vacancy in office of sheriff, county commissioners have power to make appointment for unexpired term.**

   A person elected sheriff on 8 November, 1938, duly qualified and was inducted into office the first Monday in December next ensuing, and was killed two days thereafter. *Held:* The person appointed by the county commissioners to fill the vacancy took office upon his qualification for the unexpired portion of the four-year term, the county commissioners having power to make the appointment, Constitution of North Carolina, Art. IV, sec. 24, and the term of sheriffs elected in 1938 being four instead of two years in conformity with the constitutional amendment in effect at the beginning of the term.

APPEAL by defendants from *Carr, J.*, at November Civil Term, 1939, of ALAMANCE.

Civil action for *mandamus* to require defendant to accept notice of plaintiff's candidacy for nomination for sheriff of Alamance County in primary election to be held on 25 May, 1940.

Trial by jury having been waived and the case heard by consent of parties, the court finds facts substantially these:

(1) At the general election held on 8 November, 1938, Marcellus Preston Robertson was elected sheriff of Alamance County, as was upon canvass of the election returns duly judicially determined by the board of elections of said county on 10 November, 1938, and proclamation was made as required by law. On the first Monday in December following he qualified and was inducted into office and gave the bonds required of him as sheriff. Two days thereafter, while in the performance of his official duty, he was killed.

(2) On 12 December, 1938, the board of commissioners of Alamance County appointed William V. Copeland to fill the vacancy in the office of sheriff caused by the death of Sheriff Robertson, and said Copeland immediately qualified as such sheriff by giving the bonds required of him and taking the oath of office, and he is now the incumbent.

(3) On 28 October, 1939, plaintiff, a citizen and resident of Alamance County and legally qualified to hold the office of sheriff of said county, tendered to defendants, constituting the board of elections of said county, notice of his candidacy for the nomination as Democratic candidate for sheriff of said county in the primary election to be held on 25 May, 1940, and in all respects complied with statutory requirement in such matters.

(4) Defendants refused to accept notice of plaintiff's candidacy upon the ground that there will be no vacancy in the office of sheriff of said county until the first Monday in December, 1942, for that the term to which Marcellus Preston Robertson was elected and into which he was inducted on the first Monday in December, 1938, was, by virtue of the adoption of an amendment to Article IV, section 24, of the Constitution of North Carolina, a term for four years instead of two, as formerly; and for that upon the death of Sheriff Robertson the board of county commissioners of the county was authorized to fill the vacancy by appointment for the unexpired term.

(5) The legislative authority for submitting the said amendment to popular vote as required by the Constitution, Article XIII, section 2, is an act, Public Laws 1937, chapter 241, which provides:

"Section 1. That section twenty-four of Article Four of the Constitution of North Carolina be and the same is hereby amended to read as follows: 'Sec. 24. Sheriffs and Coroners. In each county a sheriff and a coroner shall be elected by the qualified voters thereof as is prescribed for the members of the General Assembly, and shall hold their offices for a period of four years. In each township there shall be a constable elected in like manner by the voters thereof, who shall hold his office for a period of two years. When there is no coroner in a county the clerk of the Superior Court for the county may appoint one for special cases.

In case of a vacancy existing for any cause in any of the offices created by this section the commissioners of the county may appoint to such office for the unexpired term.' "

Section 2. That this amendment shall be submitted "at the next general election to be held in North Carolina in the year one thousand nine hundred and thirty-eight."

"Section 3. That the electors favoring the adoption of this amendment shall vote a ballot on which shall be written or printed the words 'For Amendment Making Term of Office of Sheriff and Coroner Four Years,' and those opposed shall vote a ballot on which shall be written or printed the word 'Against Amendment Making Term of Office of Sheriff and Coroner Four Years.'

"Section 4. That the election upon this amendment, except as otherwise provided in this act, shall be held and conducted under the same laws, rules and regulations as now prescribed for the holding and conducting of elections for members of the General Assembly, and the returns of said election shall be canvassed and declared as is now prescribed by law for the election of State officers.

"Section 5. That if, upon the canvass of the election upon this amendment, it shall be ascertained that a majority of the votes cast be in favor of this amendment, it shall be the duty of the Governor of the State to certify the amendment under the seal of the State to the Secretary of State, who shall enroll said amendment so certified among the permanent records of his office, and the amendment and every part thereof so certified shall be in force from and after the date of such certification."

(6) Pursuant to said act, Public Laws 1937, chapter 241, the question of the adoption of the amendment was submitted to the qualified voters of the State at the general election on 8 November, 1938, and approved by a majority of the votes cast as was ascertained upon canvass duly made. Thereafter, on 30 November, 1938, the Governor of North Carolina duly certified the amendment, under the seal of State, to the Secretary of State, who enrolled the amendment so certified, among the permanent records of his office.

Upon these findings of fact, the court concluded these as matters of law:

1. That the said amendment to Article IV, section 24, of the Constitution became effective on 30 November, 1938, and does not have the force and effect of increasing from two to four years the term of office of sheriff to which Marcellus Preston Robertson was elected on 8 November, 1938, and into which he was inducted on the first Monday in December, 1938;

2. That in filling the vacancy in the office of sheriff of Alamance County, caused by the death of Sheriff Robertson, the board of commissioners of said county was and is without authority to name William V. Copeland for a term extending beyond the first Monday in December, 1940;

3. That on the first Monday in December, 1940, there will be a vacancy in the office of sheriff for such county and it is to be filled by the person elected in the general election to be held in November, 1940;

4. And that plaintiff, as candidate for nomination for sheriff of Alamance County, is entitled to have his name placed upon the ballot to be voted in the Democratic Party primary election to be held on 25 May, 1940, and to that end is entitled to an order requiring defendants as board of elections of said county to accept his notice with the accompanying fee and pledge.

From judgment in accordance with such findings of fact and conclusions of law defendants appeal to Supreme Court, and assign error.

H. J. Rhodes, Cooper & Sanders and W. Clary Holt for plaintiff, appellee.

Louis C. Allen for defendants, appellants.

John D. Larkins and J. C. B. Ehringhaus amici curiæ.

WINBORNE, J. Two questions are presented as determinative of this appeal: (1) Does the amendment to Article IV, section 24, of the Constitution of North Carolina, fixing the term of sheriff at four years instead of two as formerly, affect the term of office of sheriff of Alamance County to which Marcellus Preston Robertson was elected at the general election in November, 1938, and into which he was inducted on the following first Monday in December?

(2) If so, did the board of commissioners of Alamance County have the power to fill the vacancy caused by the death of Sheriff Robertson by appointment for the unexpired portion of the term of four years?

We hold that both questions are properly answerable in the affirmative.

1. At the outset, it is noted that the wording of the pertinent portion of the section in question as it originally appeared in the Constitution adopted in 1868 is that "In each county a sheriff and coroner shall be elected by the qualified voters thereof as is prescribed for the members of the General Assembly, and shall hold their offices for a period of two years"; and that the only material change effected by the amendment is the substitution of the word "four" for the word "two," as it there appears. It is also noteworthy that the section is silent with respect to the time when the terms of office begin.

That the term of the office of sheriff elected at a general election held in November begins on the first Monday in December next thereafter appears to be settled by judicial interpretation of legislative enactments originating in the period in which the Constitution was adopted. *Worley v. Smith,* 81 N. C., 304, and *Sneed v. Bullock,* 80 N. C., 132, involving title to offices of sheriff. See, also, *Buckman v. Comrs.,* 80 N. C., 121; *Jones v. Jones,* 80 N. C., 127; *Clarke v. Carpenter,* 81 N. C., 309; and *Kilburn v. Latham,* 81 N. C., 312.

Looking to that period for the background upon which these decisions were rendered, we find that the General Assembly, in special session in the city of Raleigh, in July, 1868, recognizing the necessity of machinery to carry into effect the provisions of the Constitution, and after providing for the organization of the board of county commissioners, directed and empowered that board to proceed to qualify all other county officers recently elected or appointed under the provisions of the Constitution and to take bonds required of them—specifying that sheriffs shall execute three several bonds as prescribed in the Revised Code. Public Laws 1868, chapter 1. At the same session by another act concerning the government of counties, the Legislature provided that the board of county commissioners shall have power "to qualify and induct in office at the annual meeting on the first Monday of September after an election, or at any time when a vacancy in any of the county offices shall be filled, the clerk of the Superior Court, the sheriff, the coroner, the county treasurer, register of deeds and county surveyor; and to take and approve the official bonds of the said county officers. . . ." Public Laws 1868, chapter 20, section 8, subsection 32. In later enactments of the Legislature the provision for the meeting at which such qualification and induction into office should take place was changed to "the first Monday in the month next succeeding their election or appointment." Public Laws 1874-75, chapter 237, section 3, ratified 22 March, 1875.

It further appears that prior to 1876 general elections for the election of county officers, including sheriff and coroner, were held on the first Thursday in August. But by the said act of 1874-75 it is provided that the election for such officers in the year 1876 shall be held on Tuesday after the first Monday in November. And further provides: "Sec. 6. That all officers whose terms of office would expire did the election occur on the first Thursday in August, 1876, are hereby authorized and directed to hold over in the same until their successors in office are elected and qualified under this act." However, at the next session, the Legislature fixed the first Thursday in August as the date for the general election of such officers in the year 1878, but provided that in 1880, and every two years thereafter, a general election shall be held on Tuesday

after the first Monday in November. Public Laws 1876-77, chapter 275, sections 1 and 77, ratified 12 March, 1877.

It was in this period that the actions in the cases above referred to arose.

In the case of *Worley v. Smith, supra,* an action to try title to the office of sheriff of Jones County, the facts briefly stated are these: Nathaniel McDaniel was elected sheriff at the election in August, 1878, for the ensuing term. He appeared before the board of county commissioners on the first Monday in September, tendered his bonds, which were accepted, and took the oath of office. He died in that month. On 7 October next the commissioners appointed Worley, the plaintiff, to fill the vacancy and he qualified on 16 October. On the first Monday in December the commissioners elected the defendant, Smith, for the full term of two years. Upon giving the process bond and taking the oath he was inducted into office. Later he executed the other two bonds which were accepted and approved by the commissioners. Worley challenged the last appointment. Speaking through *Smith, C. J.,* the Court said: "By the act of March 22, 1875, the general election which, under the existing law, was required to be held on the first Thursday in August, 1876, was postponed and required to be held on Tuesday after the first Monday of November of that year; and the county officers, then elected, to be qualified and inducted into office on the first Monday in December instead of the first Monday in September, as theretofore. The law in its other provisions was modified and made to conform to this change of time for holding the election, and those county officers whose terms would have expired on the first Monday in August were 'authorized and directed to hold over in the same until their successors in office are elected and qualified under the act.' Laws 1874-75, chapter 237, section 6.

"We have already decided that this section simply extended the expiring term—spanning over the intervening space—until the newly elected officers could be qualified; and that it did not take away the power of the commissioners to fill a vacancy by appointment or election. *Sneed v. Bullock, supra.* The effect of this act is to change the *time of election,* and to make the terms of office begin and end in December, instead of September, as theretofore; and this the General Assembly was competent to do." And in conclusion the Court said: "Though the election is held in August, the terms of the county officers elected commence in December and continue for two years thereafter, as required by the Constitution."

It thus appears that in interpreting legislation enacted early in the period following the adoption of the Constitution, relating to the time when sheriffs-elect shall qualify and be inducted into office, the Court recognizes the power of the General Assembly to legislate with respect

thereto, and that the legislation enacted—properly interpreted—fixes the first Monday in December next ensuing the general election in November as the time for the beginning of the term of office of sheriffs elected at such election. As there written, the law has remained and is unchanged. Likewise, the statute, Public Laws 1868, chapter 20, section 8 (32), amended as above indicated and considered by the Court in *Worley v. Smith, supra,* has been brought forward in substantially the same form in subsequent codifications of statutes (Code of 1883, Vol. 1, chapter 17, section 707 [28]; Revisal of 1905, section 1318 [23]; and the Consolidated Statutes of 1919, section 1297, subsection 12), and is now and was in effect in the years 1937 and 1938. Therefore, when the General Assembly in the 1937 session came to propose and authorize the submission to the qualified voters of the State, and when the voters came to vote on the question of the adoption of the amendment, it is presumed that each acted in the light of the law.

Applying the law as there declared to the present case, it is manifest that though at the general election held on 8 November, 1938, Marcellus Preston Robertson was elected sheriff of Alamance County, the term of office to which he was elected commenced on the first Monday in December and is to continue for the number of years next thereafter as then fixed by the Constitution—four years. It is admitted on all hands that whether the effective date of the amendment be on the day of its approval by a majority of the qualified voters, 8 November, or at the time of the certification by the Governor, 30 November, the amendment was in effect on the first Monday in December. Hence, it is not necessary that we consider here the question of the date on which the amendment became effective. North Carolina Constitution, Article XIII, section 2; *Reade v. Durham,* 173 N. C., 668, 92 S. E., 712.

2. The Constitution, Article IV, section 24, further provides that "In case a vacancy existing for any cause in any of the offices created by this section, the commissioners of the county may appoint to such office for the unexpired term." The language is clear and the meaning manifest. See *Worley v. Smith, supra.* Hence, holding as we do that the term is for four years, the affirmative answer to the second question follows as a matter of course.

In accordance with this opinion, the judgment below is

Reversed.

GLADYS FISHER, MRS. EDNA F. CANNADY, AND MRS. EDNA F. CANNADY, GENERAL GUARDIAN OF ANNA FISHER, A MINOR, AND ELLEN FISHER, A MINOR, *v.* LOIS RUTH FISHER, AND VICTOR STOUT, GUARDIAN AD LITEM FOR WILLIAM H. FISHER, JR., A MINOR, AND LOIS RUTH FISHER, ADMINISTRATRIX OF THE ESTATE OF W. HOMER FISHER, DECEASED, AND SYDNOR DEBUTTS, TRUSTEE.

(Filed 2 February, 1940.)

1. Husband and Wife § 4b—

A conveyance of land by a wife to her husband is void when the acknowledgment fails to comply with C. S., 2515, and the acknowledgment is fatally defective if the probating officer fails to certify that, at the time of its execution and the wife's privy examination, the deed is not unreasonable and injurious to her.

2. Same—

A deed by husband and wife conveying lands held by them by entireties to a trustee for the use and benefit of the husband is a conveyance of land by a wife to her husband within the meaning of C. S., 2515.

3. Same—Defective acknowledgment of deed conveying wife's interest in land to her husband held not cured by prior deed of separation properly executed.

Husband and wife executed deed to land held by them by entireties to a trustee for the use and benefit of the husband, which deed was not acknowledged as required by C. S., 2515. They also executed deed of separation, properly acknowledged in conformity with the statute, which deed of separation bore a date five days prior to that of the deed to the trustee and was acknowledged one day before the deed to the trustee was acknowledged. The deed of separation did not refer to lands held by them by entirety, the only reference to real estate therein being that each should hold the land then owned or thereafter acquired by them, respectively, free from the claims of the other, and the deed of separation contained no *indicia* that the deed to the trustee should be executed as a part of the separation agreement. *Held:* The properly acknowledged deed of separation does not cure the defective acknowledgment of the subsequent deed to the trustee nor render the certificate of acknowledgment of the deed to the trustee unnecessary, and the contention that the clerk must have passed upon the deed to the trustee and included same in his acknowledgment to the deed of separation is untenable.

4. Same: Husband and Wife § 18a—

The right of a wife to convey her real estate as a free trader without consent of her husband attaches upon the registration of the deed of separation, and a deed of separation cannot affect the wife's conveyance of her land prior to the date the deed of separation is filed for registration, C. S., 2529. It would seem that C. S., 2529, applies to conveyances by the wife to third persons and not to conveyances by her to her husband, C. S., 2515.

5. Husband and Wife § 4b—Improper acknowledgment in deed held not cured by wife's subsequent quitclaim deed to trustee or trustee's deed to husband.

Husband and wife executed deed to lands held by them by entireties to a trustee for the benefit of the husband, which deed was not acknowledged as required by C. S., 2515. Thereafter they were divorced *a vinculo* and each married a second time. The wife and her second husband executed a quitclaim deed to the trustee reciting that the parties wished to cure any defect in the acknowledgment in the former deed to the trustee. Thereafter the trustee conveyed the property to the husband and his second wife by deed reciting that the purpose of the said trust could thereby be best effected. *Held:* Neither the recitals in the quitclaim deed nor those in the deed from the trustee to the husband affected the requirements of the statute or supplied the deficiency in the acknowledgment of the original deed to the trustee, and said deed is void, and the grantors therein continue to hold the land by entireties until the granting of the absolute divorce, when they become tenants in common, each owning a one-half undivided interest therein in fee simple.

6. Quieting Title § 2—

Upon demurrer to the complaint in an action to quiet title the court is required to ascertain only if the complaint is sufficient to allege a cause of action under C. S., 1743, and when it appears from the facts alleged that plaintiffs are some of the heirs at law of a person who died intestate seized of a one-half interest in the *locus in quo*, and assert title thereto, the demurrer of the defendants in possession of the land is properly overruled.

APPEAL by the defendant, Lois Ruth Fisher, from *Grady, J.*, at April Term, 1939, of GUILFORD.

Civil action instituted under C. S., 1743, to quiet title and to remove cloud upon title arising from adverse claim of defendant, Lois Ruth Fisher, that she is surviving tenant of an estate by the entirety in lands in controversy, heard upon demurrer to complaint filed by her individually, and as administratrix of W. Homer Fisher, deceased.

Plaintiffs allege substantially these facts:

1. Plaintiffs are all of the children of the marriage of W. Homer Fisher, now deceased, and his first wife, Cleo M. Fisher, who were divorced absolutely on 15 June, 1933.

2. W. Homer Fisher, who on 22 June, 1933, was lawfully married to defendant, Lois Ruth Fisher, to which union the defendant, W. Homer Fisher, Jr., aged five years is the only child, died intestate 14 July, 1938, survived by said child and by his said wife, who is the administratrix of his estate.

3. W. Homer Fisher and Cleo M. Fisher, his wife, were the owners as tenants by the entirety of three tracts of land situate in Guilford County, here in question.

4. On 16 December, 1931, W. Homer Fisher and his wife, Cleo M. Fisher, executed a deed of separation, which was acknowledged 23 December, 1931, before the clerk of the Superior Court in the manner provided by C. S., 2515. It is recited therein that: "Whereas the said parties have agreed among themselves as to the custody of the children and a settlement of all property rights and difference existing between them," but the lands in question are not mentioned specifically or by inference. The only references therein to any land are briefly stated as follows: Said party of the second part (the wife) is to hold all real estate and personal property which she may now own, or hereafter acquire, free from all rights of the husband, from curtesy or any rights arising from the marital relation; and the husband is to have and to hold any real or personal property which he may now own, or hereafter acquire, other than that hereby specifically mentioned, free from any claim on the part of his wife; and each agree that he or she will at all times execute and do all such assurances and things as the other of them, his or her heirs, executors, administrators or assigns, shall reasonably require for the purpose of giving full effect to these presents, and the covenants, claims and provisions herein contained. This agreement was filed for registration on 12 August, 1932, and registered.

5. On 21 December, 1931, W. Homer Fisher and wife, Cleo M. Fisher, executed an instrument purporting to be a deed of trust to Sydnor DeButts, Trustee, in which they undertook to convey to him the lands in question for the sole use and benefit of W. Homer Fisher, his heirs, executors or administrators, granting to the trustee "absolute discretion and power to sell, mortgage, exchange, convey or dispose of the said property, and reinvest the proceeds of the said sale in such other property as the said trustee may deem advisable, and shall pay the income from the said property, or from the property which may be exchanged for the said property, to the said W. Homer Fisher, or to whomsoever he designates." The instrument contained covenants of seizin, right to convey, freedom from encumbrances and general warranty, and was acknowledged before the clerk of Superior Court on 24 December, 1931, but the certificate of the clerk fails to comply with section 2515 of Consolidated Statutes of 1919. It was filed for registration 28 November, 1932, and registered. W. Homer Fisher did not thereafter execute a deed to said trustee conveying any interest in the land in question.

6. Sydnor DeButts, Trustee, has at no time taken possession of said lands, or attempted in any manner to execute the duties imposed upon him under said instrument; but, to the contrary, up to the time of his death, W. Homer Fisher continued to occupy, possess and enjoy the same in the same manner as he had previously done, and as if the said instrument had not been executed.

7. On 19 June, 1933, Cleo M. Fisher was lawfully married to Luther D. Hatchell; and on 30 June, 1936, they, as husband and wife, executed a deed to Sydnor DeButts "as trustee as hereinafter stated," by which they remised, released, and quitclaimed to him, his successors and assigns, all their right, title and interest in and to the lands in question. In this deed, after referring to the said instrument executed by W. Homer Fisher and wife, Cleo M. Fisher, to Sydnor DeButts as trustee, and identifying her as now the wife of Luther D. Hatchell, it is recited that: Whereas, the question has been raised as to the technical form and acknowledgment of said former deed; and whereas, the grantors herein claim no interest in said lands and desire to correct said former mistake, if such there be." The *habendum* clause in this deed is as follows: "To have and to hold, said lands and premises, together with all privileges and appurtenances thereunto belonging to him, the said party of the second part as trustee, upon the trusts and for the uses and purposes set out in said former deed to him, free and discharged from all right, title, claim or interests of the parties of the first part." This deed was properly acknowledged and duly registered 13 August, 1936.

8. On 19 May, 1938, Sydnor DeButts, Trustee, executed a deed to W. Homer Fisher and wife, Lois Ruth Fisher, in which, after referring to the separation agreement, to the deed of trust from W. Homer Fisher and wife, Cleo M. Fisher to Sydnor DeButts, Trustee, to the divorce of W. Homer Fisher and Cleo M. Fisher, and to the deed from Cleo M. Hatchell and husband to Sydnor DeButts, Trustee as hereinabove stated, and after reciting that "Whereas the said W. Homer Fisher has requested that the said trustee convey to said W. Homer Fisher and his wife, Lois Ruth Fisher, the legal title to said lands; and, whereas, the said trustee has removed from the State of North Carolina to the State of Florida; and whereas, in his opinion the purpose of said trust could be best carried out by such conveyance of the legal title to said property," he undertook to convey to them the land in question. This deed, after being duly acknowledged, was filed for registration 1 June, 1938, and registered.

9. Lois Ruth Fisher is now in the possession of said lands, claiming to own same in fee simple, as the surviving wife of W. Homer Fisher under the said deed from Sydnor DeButts, Trustee, to W. Homer Fisher and wife, Lois Ruth Fisher.

10. Plaintiffs, while not in possession of any part of the lands, assert title thereto and claim an interest in the same as heirs at law of W. Homer Fisher, deceased; and if the deed from the trustee to said Fisher and his wife, the defendant, Lois Ruth Fisher, does not convey the title in fee, as an estate by the entirety as claimed by said defendant, it is a cloud upon the title of plaintiffs.

11. It is not necessary that the lands be sold to create assets to pay debts of the estate.

Upon such allegations plaintiffs pray judgment *inter alia:*

(1) Removing the claim of Lois Ruth Fisher as a cloud upon the title of all the heirs of W. Homer Fisher, deceased; and (2) that the deeds from Sydnor DeButts to W. Homer Fisher, and his wife, Lois Ruth Fisher, be declared ineffective to create an estate by the entirety; and (3) for the appointment of a resident trustee in the place of Sydnor DeButts, Trustee, nonresident.

Defendant Lois Ruth Fisher (a) as administratrix demurs to the complaint for that it does not state a cause of action in that it affirmatively appears that it is not necessary to sell the lands to create assets to pay debts of the estate; and (b) individually, for that the complaint does not state any facts tending to show that the plaintiffs have title to, or any interest in the property in question, but that, on the contrary, the facts alleged show affirmatively that title thereto is vested in her.

The court entered judgment sustaining the demurrer filed by Lois Ruth Fisher, administratrix, but overruling that filed by her individually. Lois Ruth Fisher appeals therefrom to the Supreme Court and assigns error.

Harry R. Stanley for plaintiff, appellee.
Moseley & Holt and Hoyle & Hoyle for defendant, appellant.

WINBORNE, J. Section 1743 of the Consolidated Statutes of 1919, under which plaintiffs are proceeding, provides that 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 claim. "The law . . . was designed and intended to afford a remedy wherever one owns or has an estate or interest in real property, whether he is in or out of possession, and another wrongfully sets up a claim to an estate or interest therein which purports to affect adversely the estate or interest of the true owner and which is reasonably calculated to burden and embarrass such owner in the full and proper enjoyment of his proprietary rights, including the right to dispose of the same at its fair market value." *Hoke, J.,* in *Satterwhite v. Gallagher,* 173 N. C., 525, 92 S. E., 369.

Applying this as the test, do the allegations of fact in the complaint, when admitted to be true for the purpose of passing upon the demurrer, state a cause of action in behalf of the plaintiffs and against the defendant, Lois Ruth Fisher? The correctness of the ruling of the court below upon the demurrer of defendant, Lois Ruth Fisher, which challenges the sufficiency of such allegations, is the only question properly determinable

on this appeal. We are of opinion and hold that the demurrer was properly overruled.

As the question now presented only involves a matter of pleading, we will consider only such of the allegations of fact, admitted for the purpose, as will determine the sufficiency of the complaint to state a cause of action.

It is sufficient to consider this question only: Is the deed from W. Homer Fisher and wife, Cleo M. Fisher, to Sydnor DeButts, Trustee, for the use and benefit of W. Homer Fisher, void because the certificate of the clerk before whom the deed was acknowledged fails to comply with the provisions of C. S., 2515?

This Court has uniformly held that the deed of a wife, conveying land to her husband, is void unless the probating officer in his certificate of probate certify that, at the time of its execution and her privy examination, the deed is not "unreasonable or injurious" to her. *Wallin v. Rice,* 170 N. C., 417, 87 S. E., 239; *Foster v. Williams,* 182 N. C., 632, 109 S. E., 834; *Davis v. Bass,* 188 N. C., 200, 124 S. E., 566; *Best v. Utley,* 189 N. C., 356, 127 S. E., 337; *Garner v. Horner,* 191 N. C., 539, 132 S. E., 290; *Caldwell v. Blount,* 193 N. C., 560, 137 S. E., 578; *Capps v. Massey,* 199 N. C., 196, 154 S. E., 52; *Bank v. McCullers,* 201 N. C., 440, 160 S. E., 494, and numerous other cases.

The principle applies to deed by husband and wife to a trustee for the use and benefit of the husband conveying lands held by them as tenants by the entirety. *Davis v. Bass, supra; Best v. Utley, supra; Garner v. Horner, supra.* While these general principles of law are not controverted, the defendant contends that the deed to the trustee is covered by the certificate to the deed of separation, which is in conformity with the statute. It is argued that from an examination of the deed of separation it is manifest that at the time of its execution Fisher and his wife had agreed upon a complete settlement of all their property rights; that the deed to the trustee was an essential part of the property settlement; and that, hence, it must have been passed upon by the clerk and included in his certificate to the deed of separation, thereby making a separate certificate under C. S., 2515, unnecessary for the deed to the trustee. In this connection, it is pertinent to note that the deed of separation appears to bear date five days previous to that of the deed to the trustee, and to have been acknowledged one day before the deed to the trustee was acknowledged. It is further noteworthy and significant that while in the premises in the deed of separation it is recited that "the parties have agreed among themselves as to . . . a settlement of all property rights," the agreement makes no reference to property held by them as tenants by the entirety, and is limited in so far as real estate is concerned, to that "which she may now own or hereafter acquire," and to "that which he may now own or hereafter acquire."

Careful examination fails to reveal any *indicia* in the deed of separation that the deed to the trustee should be executed as a part of the separation agreement, nor is there in the deed to the trustee any reference to the deed of separation. We must consider the instruments as they are written.

Further in this connection defendant inquires whether after the execution and certification of the deed of separation, a certificate under C. S., 2515, is required for a conveyance from the wife to the husband, or to a trustee for his benefit, and refers to C. S., 2529. That statute, if it be conceded that it is otherwise applicable to the instant case, provides, *inter alia,* that the wife, who is living separate from her husband under deed of separation, shall be deemed and held to be a free trader from the registration of such deed, and may convey her real estate without the assent of her husband. But in the case at hand the deed of separation was not filed for registration until 12 August, 1932, many months after the deed to the trustee was executed and acknowledged. Furthermore, while it is not necessary here to so hold, the wording of the statute indicates that it affects and is only intended to affect deeds of married women to third persons, and not those she has attempted to make to her husband. See *Foster v. Williams, supra.*

Nor do the recitals in either the quitclaim deed executed by Mrs. Hatchell and husband to Sydnor DeButts, Trustee, or in the deed from DeButts, Trustee, to W. Homer Fisher and wife, change the statutory requirement, or supply the deficiency.

Hence, we are of opinion and hold that the court below correctly ruled that the deed from Fisher and wife to the trustee is void, and conveyed nothing, that the tenancy by the entirety continued to exist between W. Homer Fisher and his wife, Cleo M. Fisher, and that, upon absolute divorce being granted, they became tenants in common, each owning an undivided one-half interest therein in fee simple. *McKinnon v. Caulk,* 167 N. C., 411, 83 S. E., 559. See, also, *Davis v. Bass, supra.*

The allegations are sufficient to indicate that W. Homer Fisher did not thereafter make any conveyance of this one-half undivided interest, that when he died intestate he was seized of it, and that plaintiffs, being some of his heirs at law, assert title thereto. Also the allegation of cloud upon the title of plaintiffs thereto is sufficient to meet legal requirements. Thus plaintiffs have stated a cause of action. Therefore, it is inopportune to extend the consideration to other points discussed in briefs filed on this appeal, as to which we express no opinion.

For the reasons herein stated, the judgment overruling the demurrer is

Affirmed.

ATLANTIC COAST LINE RAILROAD COMPANY, A CORPORATION, v. H. T. THROWER, TRADING AS THROWER TILE AND MARBLE COMPANY.

(Filed 2 February, 1940.)

1. Carriers § 14—Question of which rate classification goods in question came under held for jury under the evidence.

The parties agreed that the rate schedule in effect at the time of the shipment in question prescribed a rate of 51c per hundredweight for "asphalt paving blocks or tiles" and $1.10 per hundredweight for "asphalt composition facing or flooring tile." Plaintiff carrier contended that the shipment was some kind of asphalt composition and liquid asphalt and offered evidence that the consignee laid same for the floor of a building and cemented same down with the liquid asphalt, that the duplicate bill of lading showed that the shipment was packed in "389 boxes," while asphalt blocks would have been loaded on the car without containers or wrappers of any kind, and that defendant consignee wrote on his check given in payment for the charges the words "asphalt tile," thus indicating that at the time he knew the shipment was asphalt tile, and that the defendant stopped payment on the check at the instance of the consignor. Defendant consignee's evidence and contentions were to the effect that the duplicate bill of lading had been altered and that the classification put on the shipment by the consignor should govern. *Held:* The evidence was properly submitted to the jury upon the question of which classification the goods came under, and the court made no error in denying defendant's requested instruction to the effect that if the jury believed all the evidence to find that the shipment came under the lower classification.

2. Same—

Defendant consignee stopped payment on his check given in payment of freight charges on the shipment in question, contending that the charges were excessive for that they were based upon an inapposite rate classification. *Held:* It was competent for plaintiff carrier to introduce in evidence correspondence between the shipper and defendant tending to show that defendant stopped payment on the check at the instigation of the shipper.

3. Same—

Where a consignee accepts and uses a shipment of goods and gives his check in payment of the freight charges, he may not thereafter repudiate the matter and contend that the charges were excessive in that they were based upon an inapposite rate classification.

4. Same—

Defendant consignee stopped payment on his check given in payment of freight charges, contending that the charges were excessive in that they were based upon an inapposite rate classification. *Held:* In the carrier's action on the check, the burden was properly placed upon defendant consignee to show that the freight charges should have been based upon a lower rate classification as contended by him.

5. Appeal and Error § 39a—

A new trial will not be awarded for mere error alone, but the appellant must show not only that error was committed, but also that the error was material and prejudicial, amounting to a denial of a substantial right.

APPEAL by defendant from *Burney, J.*, at 27 March, 1939, Civil Term, of CUMBERLAND. No error.

The complaint alleges, in part: "On the 9th day of August, 1937, the defendant H. T. Thrower, in the due course of business, signed and delivered to the plaintiff at its office in Fayetteville, North Carolina, his check in the sum of $568.60 ($563.49—5.11) drawn by him on the Commercial National Bank of Charlotte, North Carolina, and payable to the order of the plaintiff. . . . On the 13th day of August, 1937, the said check was duly presented to the drawee bank, to wit, Commercial National Bank of Charlotte, for payment in due course; and, on said date, the payment of the same was refused, and the said check was duly protested for nonpayment. . . . That the protest fees amounting to $1.50 were charged to and paid by plaintiff, making a total amount due on the check of $570.10. That on or about the 15th day of August, 1937, the defendant H. T. Thrower paid to the plaintiff, on account of said check, the sum of $5.11." There is now due and owing $564.99 and interest from 15 August, 1937, and demand for payment.

In answer to the complaint, the defendant admitted that the check was duly protested for nonpayment, but denies liability and for a further answer and defense says: "That on or about July 27, 1937, the defendant entered into a contract for the performance of certain work incident to the construction of a school building in the city of Fayetteville, North Carolina; that on or about the same date the defendant ordered and purchased from a manufacturer in San Antonio, Texas, certain materials necessary to the performance of the contract which the defendant had entered into. That the materials so ordered and purchased by the defendant consisted of 49,161 pounds of asphalt paving blocks or tiles, and 2,065 pounds of liquid asphalt. That the said materials were shipped to the defendant from Houston, Texas, the freight charges on such shipment to be paid by and collected from the defendant upon the delivery of said materials by the plaintiff in Fayetteville, North Carolina. That upon the arrival of the said shipment in Fayetteville, North Carolina, the plaintiff demanded of the defendant that he pay the sum of $563.49 as freight charges on the said shipment and refused to deliver the said materials except upon the payment of that sum and required and compelled the defendant to pay the said sum of $563.49 before obtaining and in order to obtain possession of the said materials. That the defendant did thereupon, on or about August 9, 1937, through his

agents and representatives, make, issue and deliver to the plaintiff his check drawn on the Commercial National Bank of Charlotte, North Carolina, payable to the order of the plaintiff, for the aforesaid sum of $563.49, plus the sum of $5.11 due by the defendant to the plaintiff, as freight charges on another shipment from a manufacturer in New Jersey, which other shipment had been received by the defendant from the plaintiff on or about the same date—the total amount of said check thus being $568.60. That after the making, issuing and delivering of the aforesaid check, the defendant being informed and believing that the plaintiff had charged an excessive and unlawful amount as and for the freight bill on the aforesaid shipment from Houston, Texas, ordered the bank on which the aforesaid check was drawn not to pay the same upon presentation; and that the said check was not paid upon presentation and has not been paid. That the defendant has since, however, paid to the plaintiff the sum of $5.11, the same being the correct amount of the freight charges on the shipment referred to above received by the defendant from New Jersey, as to which shipment and the freight charges therefor there is here no controversy. That as the defendant is informed and believes, the correct, lawful and proper charge on the aforesaid shipment of freight from Houston, Texas, to Fayetteville, North Carolina, is $261.25, that is, 51c per hundredweight (the total weight of said shipment being 51,226 pounds) and not $563.49, or $1.10 per hundredweight, as charged by the plaintiff." That the plaintiff's charge for what was shipped is contrary to that allowed on shipments from Houston, Texas, to Fayetteville, North Carolina, as fixed by the Interstate Commerce Commission of the United States. That the correct charge was $261.25 and all over that amount was illegal. The defendant tenders judgment for that amount. That the plaintiff recover nothing and "go without day."

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

"1. Were the commodities involved in the shipment for which the check in question was given asphalt paving blocks or tiles, as alleged in the answer? Ans.: 'No.'

"2. Is the defendant indebted to the plaintiff, and if so, in what amount? Ans.: 'Yes, $564.99, with interest from August 15, 1937."

The judgment of the court below was as follows: "This cause coming on to be heard at this term of court, before the undersigned judge, and a jury; and the jury having answered the issues as above. It is therefore, on motion of Rose & Lyon, attorneys for the plaintiff, considered, ordered and adjudged that the plaintiff, Atlantic Coast Line Railroad Company, do have and recover of the defendant, H. T. Thrower, trading as Thrower Tile & Marble Company, the sum of $564.99, with interest

thereon from and after August 15, 1937, together with the costs of this action, to be taxed by the clerk. John J. Burney, 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.

W. A. Townes and Rose & Lyon for plaintiff.
Guthrie, Pierce & Blakeney for defendant.

CLARKSON, J. The defendant requested the court below to instruct the jury that if they believe the evidence, they should answer the first issue "Yes." The court below refused to give this instruction, and in this we can see no error on the facts and circumstances of this case. The issues submitted to the jury were correct, in fact, defendant made no objection, nor did he submit other issues. The controversy, in the final analysis, was one of fact, viz.: What was the actual commodity contained in a carload shipment, which moved from the Uvalde Rock Asphalt Company, at Houston, Texas, to the defendant, H. T. Thrower, at Fayetteville, North Carolina, in August, 1937? If the commodity was "Asphalt Composition Facing or Flooring Tile," it carried a freight rate of one dollar and ten cents ($1.10) per hundred pounds. If the commodity was "Asphalt Paving Blocks or Tiles," it carried a freight rate of fifty-one cents (51c) per hundred pounds.

In the stipulation agreed upon by the parties, was the following: "That during the month of August, 1937, the freight tariffs and schedules of rates made, promulgated and filed with the Interstate Commerce Commission, and published, and applicable to shipments of freight from Houston, Texas, to Fayetteville, North Carolina, over the routes referred to above, fixed the freight charge upon shipments of 'asphalt composition facing or flooring tile' from Houston, Texas, to Fayetteville, North Carolina, over the routes referred to above at $1.10 per hundredweight and the freight charges upon shipments of 'asphalt paving blocks or tiles' from Houston, Texas, to Fayetteville, North Carolina, over the routes referred to above, at 51c per hundredweight."

The plaintiff's evidence was to the effect that the defendant knew at the time that it was tile, because he wrote upon the face of his check that the check was covering the freight charges on a shipment of "asphalt tile," and he knew at that time, and his agent and servants knew, that was tile and not paving blocks. The defendant received the commodities and used them in paving the second and third floors of the high school building located in Fayetteville, in August, 1937. The liquid asphalt that was shipped along with it was used to cement and place the tile in firm condition upon the floors of the school building and to cement

and hold it together, and that is what the liquid in the barrels that were shipped along with it was for. The bill of lading shows that it was packed in "389 boxes" and that tile is shipped in packs or bundles and that if it was asphalt blocks as used for paving that it would be just loaded in a car as blocks and not shipped in boxes, as was done in this case. That the exhibit offered in this case from one's own knowledge that it is tile, that it is not a block and that it is not asphalt, but it is a composition of some kind, made especially for the purpose of laying a floor in office buildings, and school buildings, such as it was used for in this case. That in truth and in fact this particular shipment was not asphalt paving blocks and that it was in truth asphalt composition facing or flooring tile.

The defendant denied that the evidence and contentions of plaintiff were correct. His evidence and contentions were that someone interested in getting a large amount of freight on this shipment got hold of the duplicate copy and he erased "asphalt paving blocks or tile" and inserted "389 boxes" to the first article in the bill of lading as "asphalt composition facing or flooring tile" and set up the rate from 51c to $1.10 per hundredweight; and he contends that was wrong, that the classification as originally billed out by the people who manufactured, that their classification should govern and that you should answer the first issue "No."

The court charged the jury, among other things: "Now, gentlemen of the jury, if the defendant, H. T. Thrower, trading as Thrower Tile & Marble Company, has satisfied you from the evidence and by its greater weight, the burden being upon him to so satisfy you, that the commodities involved in the shipment for which the check in question was given was asphalt paving blocks or tile, as alleged in the answer, then it would be your duty to answer that first issue 'Yes'; if he has failed to so satisfy you, it will be your duty to answer it 'No.'" The defendant excepted and assigned error as to certain correspondence introduced in evidence from the shipper to him, indicating that the payment of defendant's check was stopped at the shipper's instance. We think this some probative evidence to indicate defendant was not the real party who stopped the payment of the check. It was, at least, some evidence of the defendant why he stopped payment of the check. Plaintiff offered in evidence, over the defendant's objection, the carrier's way-bill or copy of the bill of lading, in which the commodities here in question were described and classified as commodities other than "asphalt paving blocks or tiles." Defendant contended that this paper was incompetent for the reason that the original bill of lading was the best evidence of the matters set forth therein and had already been introduced in evidence.

The defendant further contended that the copy on its face had been altered, and this was contrary to what was set forth in the original bill of lading. Be that as it may, the defendant accepted the commodities as plaintiff contends, used them and gave a check for them, and is not now permitted, at the instance of the shipper or defendant, to repudiate the matter. All of the evidence above set forth and the contentions were competent, and the fact was for the jury to determine. From the pleadings we think the burden of proof, a substantial right, was properly placed on defendant.

We think that none of the exceptions and assignments of error to the charge or evidence on the trial can be sustained. We think the charge of the court set forth the law applicable to the facts and was fair to both sides. The contentions were accurately and carefully given.

Devin, J., in *Collins v. Lamb,* 215 N. C., 719 (720), for the Court says: "'Verdicts and judgments are not to be set aside for harmless error for mere error and no more. To accomplish this result, it must be made to appear not only that the ruling complained of is erroneous, but also that it is material and prejudicial, amounting to a denial of some substantial right.' *Wilson v. Lumber Co.,* 186 N. C., 56 (citing many authorities) . . . (p. 721) The record reveals the diligence of appellant's able counsel. Nothing has been overlooked that might help his cause. But the jury has accepted the view presented by the evidence of the plaintiffs, and rendered a verdict in accord with their contentions. Upon consideration of the entire record we reach the conclusion that the judgment below should be affirmed."

We have examined the record and able briefs of the litigants. The question is one mainly of fact. We can see no prejudicial or reversible error on the record.

No error.

BERTHA BUTNER v. E. A. SPEASE AND L. T. BUTNER,
and
MYRTIE SPEASE v. L. T. BUTNER.

(Filed 2 February, 1940.)

1. Negligence § 19d—

Whether the intervening active negligence of a person is such as to insulate, as a matter of law, the primary negligence of another is a difficult question, but the principal of insulating negligence is a wholesome one and must be applied in proper instances.

2. Negligence § 7—Whether intervening negligence insulates primary negligence is basically a question of proximate cause.

Whether intervening active negligence on the part of another or others is such as to insulate the primary negligence is basically a question of proximate cause, and the primary negligence is not actionable if it would have produced no injury except for such intervening negligence and if the intervening negligence is not reasonably foreseeable, but if the intervening acts or omissions are reasonably foreseeable, the primary negligence will be held to act through such intervening causes and to be the proximate, or one of the proximate causes of the injury.

3. Negligence § 19d: Automobiles §§ 18d, 21—Negligence of driver of one vehicle held to insulate that of driver of other vehicle and to preclude recovery by guest in first vehicle against driver of the second.

A car and a truck collided. The guest in the car sued the driver of the truck, in which action the driver of the car was joined as a defendant upon motion of the original defendant. The guest in the truck sued the driver of the car, and the actions were consolidated for trial. The evidence tended to show that the automobile, driven in a southerly direction, and the truck, driven in a northerly direction, approached each other at night on a straight, level highway free of other traffic, that the headlights of both vehicles were visible for three-quarters of a mile, that when the vehicles were within forty feet of each other, at the entrance of a dirt side road forty feet wide, the truck suddenly turned to the left across the highway and undertook to enter the side road at its southern edge, and was struck about the middle of its right side by the automobile. The driver of the truck testified that he put out his hand and made the signal for a left turn, and that the automobile was being driven at an excessive speed. *Held:* The signal for the left turn could not have been seen by the driver of the car because made in the shadow of the truck's headlights, and even if it could have been seen, would not indicate that the driver of the truck would turn immediately in front of the path of the car when it was then about the northern edge of the entrance of the side road, and even conceding that the driver of the car was guilty of *prima facie* negligence in traveling at an excessive speed, he could not have reasonably foreseen the intervening negligence of the driver of the truck, nor would his excessive speed have resulted in any injury except for such intervening negligence, and therefore his negligence was insulated by the intervening negligence, and his demurrers to the evidence in the action by the guest in his car against both drivers, and in the action against him by the guest in the truck should have been sustained, and the judgment against the driver of the truck in favor of the guest in the car is upheld.

APPEALS by defendants from *Johnston, Special Judge,* at May Term, 1939, of FORSYTH.

Civil actions by guests to recover damages for personal injuries resulting from collision between an automobile and a truck alleged to have been caused by the negligence of the drivers of both vehicles, and as the two causes of action arise out of the same state of facts, for convenience, they were consolidated and tried together. *Fleming v. Holleman,* 190 N. C., 449, 130 S. E., 171.

On the evening of 7 February, 1939, soon after dark, Mrs. Bertha Butner was riding with her husband, L. T. Butner, in his Studebaker automobile on the Bethania-Rural Hall Highway and was injured when her husband's car collided with a Ford truck driven by E. A. Spease and in which his mother, Mrs. Myrtie Spease, was riding at the time. Mrs. Myrtie Spease was also injured in the collision. The drivers of the two motor vehicles escaped with only slight injuries. Mrs. Bertha Butner brought suit against E. A. Spease, alleging negligence. L. T. Butner was made a party defendant in this action on motion of the original defendant. Thereafter, Mrs. Myrtie Spease instituted suit against L. T. Butner, alleging negligence. By consent, the two causes were consolidated for trial.

The Bethania-Rural Hall Highway is a bitulithic, black-top road, 15 feet wide, with dirt shoulders 2½ feet in width on either side. It is level and straight where the injury occurred, and the headlights of both vehicles could be seen for a distance of three-quarters of a mile. The direction of the Butner car was southward; that of the Spease truck northward. They collided at the entrance of a side road leading westward to Tobaccoville.

As the Butner car approached the "mouth" of this side road, which was approximately 45 to 50 feet wide, and when the two vehicles were about 40 feet apart, the Spease truck suddenly turned to its left, across the path of the oncoming Butner car, and undertook to enter the side road at its southern edge. The front of the Butner car struck the right side of the truck "just in front of the rear fender," knocked it over a fill and caused it to turn over several times.

L. T. Butner testified: "As we drew closer together, I pulled off my side of the road 12 or 18 inches in order to give the approaching car plenty of room to pass. When I was within approximately 40 feet of the approaching car, without any warning, without any signal, without any sounding of the horn, the driver made a quick left-hand turn, cutting directly in front of my path. I immediately applied my brakes and the next thing I knew we had collided. . . . My car stopped approximately 15 feet south of the center of the intersection. . . . I can't look at a car approaching me at night and tell what speed it is going. . . . There were some marks there for about 26 feet from where I skidded, where I put on my brakes, to the impact. . . . I had no time to direct the direction of my car other than to make a slight turn. It happened about as far from me to where you are right there. . . . I had no idea he was going to make a left turn. . . . The side road is a dirt road. . . . There was no light coming up the side road showing anybody was approaching. . . . I made the statement I was going 45 or 50."

E. A. Spease testified: "I saw the Butner car just before I started to make my turn. I was practically in the act of making the turn when I first saw his car. I had not seen it prior to that time. . . . After I had turned, it seemed as though the car had shot out of the bushes or somewhere right on me. I would say Mr. Butner was going at least 70 to 75 miles an hour. . . . I held my hand out as a signal 10 or 15 feet before I made a turn. . . . I don't think I blew my horn. . . . I couldn't say how far away he was. . . . I misjudged his speed. . . . I guess I would not have turned in front of him if I had not misjudged his speed. . . . It is hard to judge speed at night when a car is coming towards you. . . . The accident occurred on my left-hand side as I was going in the side road. . . . Mr. Butner was right where I thought he was, but I misjudged his speed. . . . I thought I could get across."

The record contains much evidence pertaining to the extent of plaintiffs' injuries.

Upon submission to the jury under separate issues, there was a verdict for the plaintiff in each case. From judgments thereon, the defendants appeal, assigning errors, the defendant Butner relying principally upon his motions for judgments of nonsuit.

P. V. Critcher and Fred M. Parrish for plaintiff Butner, appellee.

John C. Wallace and Peyton B. Abbott for plaintiff Spease, appellee.

John C. Wallace and Peyton B. Abbott for defendant Spease, appellant.

Fred S. Hutchins and H. Bryce Parker for defendant Butner, appellant.

STACY, C. J., after stating the facts as above: The case calls for the application of old and familiar principles to new facts. It is conceded that in one respect the record presents a difficult problem. See *Powers v. Sternberg,* 213 N. C., 41, 195 S. E., 88, and *Quinn v. R. R., ibid.,* 48, 195 S. E., 85. Indeed, the application of the doctrine of insulating the negligence of one by the subsequent intervention of the active negligence of another, as a matter of law, is usually fraught with some knottiness. *Smith v. Sink,* 211 N. C., 725, 192 S. E., 108. However, the principle is a wholesome one, and must be applied in proper instances. *Hinnant v. R. R.,* 202 N. C., 489, 163 S. E., 555; *Herman v. R. R.,* 197 N. C., 718, 150 S. E., 361.

Here, the essential facts are not in dispute. The liability of E. A. Spease, the driver of the truck, is established beyond all peradventure. Was his negligence the sole proximate cause of the collision? This is the real question posed by the record.

It must be steadily borne in mind that we are dealing with a fact situation not heretofore presented in any case. *Cf. Cunningham v. Haynes,* 214 N. C., 456, 199 S. E., 627. Two motor vehicles are approaching each other at night on a straight, level stretch of road with the headlights of both visible for a distance of three-quarters of a mile. No other traffic is in sight. When they are within 40 feet of each other at the entrance of a side road, the northbound truck makes a quick left turn, without notice or warning so far as the other can see or hear, and is struck by the southbound car. This turn was made, not at the center, but at the southern edge of the side road, and at a time when the other car had about reached or perhaps passed its northern edge. The driver of the southbound car had no reason to believe that the other would turn into this side road. *Guthrie v. Gocking,* 214 N. C., 513, 199 S. E., 707. The indications were all to the contrary. True, the northbound driver says he gave a hand signal just before making the turn, but it is a matter of common knowledge that a hand signal can seldom be seen by the driver of an approaching car under the circumstances here disclosed, because to him the other driver's hand would be in the shadow of his own lights. Nor would such a signal necessarily indicate to the approaching driver that a perilous left turn across his path was intended. Moreover, both drivers testify to the immediacy of the emergency occasioned by the sudden turn. *Ingle v. Cassady,* 208 N. C., 497, 181 S. E., 562; *Poplin v. Adickes,* 203 N. C., 726, 166 S. E., 908. Such a situation was not reasonably foreseeable by the driver of the southbound car. *Guthrie v. Gocking, supra.* He instantly applied his brakes, as the skid marks show, and stopped immediately following the impact. Indeed, the only suggestion of negligence on the part of the driver of the southbound car is the speed at which he was going. The evidence of the defendant Spease in regard to this may be taken with some allowance, because he frankly says that he misjudged the speed of the Butner car; that it is hard to estimate the speed of a car at night when it is coming towards you, and that he was practically in the act of turning when he first saw the car. Nevertheless, conceding the speed of the Butner car to be in excess of 45 miles an hour, and therefore *prima facie* unlawful, it is manifest that its speed would have resulted in no injury but for the "extraordinarily negligent" act of the defendant Spease—in the language of the Restatement of Torts, sec. 447. *Powers v. Sternberg, supra.* Hence, the proximate cause of the collision must be attributed to the gross and palpable negligence of the driver of the northbound vehicle. *Smith v. Sink,* 211 N. C., 725, 192 S. E., 108; *Beach v. Patton,* 208 N. C., 134, 179 S. E., 446; *Hinnant v. R. R., supra; Herman v. R. R., supra; Burke v. Coach Co.,* 198 N. C., 8, 150 S. E., 636; *Lavergne v. Pedarre* (La. App.), 165 So., 17.

This doctrine of insulating the negligence of one by the subsequent intervention of the active negligence of another really belongs to the definition of proximate cause. *Boyd v. R. R.*, 200 N. C., 324, 156 S. E., 507; *R. R. v. Kellogg*, 94 U. S., 469. The principle is stated in *Craver v. Cotton Mills*, 196 N. C., 330, 145 S. E., 570, as follows: "While there may be more than one proximate cause, that which is new and entirely independent breaks the sequence of events and insulates the original or primary negligence." *Lineberry v. R. R.*, 187 N. C., 786, 123 S. E., 1; *Thompson v. R. R.*, 195 N. C., 663, 143 S. E., 186.

The pertinent decisions here and elsewhere are in full support of Mr. Wharton's statement in his valuable work on Negligence (sec. 134): "Supposing that if it had not been for the intervention of a responsible third party the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? This question must be answered in the negative, for the general reason that causal connection between negligence and damage is broken by the interposition of independent responsible human action. I am negligent on a particular subject matter. Another person, moving independently, comes in, and either negligently or maliciously so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a nonconductor, and insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces. He is the one who is liable to the person injured."

The same rule announced by *Mr. Justice Strong* in *R. R. v. Kellogg, supra*, regarded as sound in principle and workable in practice, has been quoted with approval in a number of our decisions. He says: "The question always is, Was there an unbroken connection between the wrongful act and the injury—a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act amounting to a wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence, or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

Speaking to the application of the doctrine in *Balcum v. Johnson*, 177 N. C., 213, 98 S. E., 532, *Hoke, J.*, dealt with the matter as follows: "The proximate cause of the event must be understood to be that which in natural and continuous sequence, unbroken by any new and independ-

ent cause, produces that event, and without which such event would not have occurred. . . . The test by which to determine whether the intervening act of an intelligent agent which has become the efficient cause of an injury shall be considered a new and independent cause, breaking the sequence of events put in motion by the original negligence of the defendant, is whether the intervening act and the resultant injury is one that the author of the primary negligence could have reasonably foreseen and expected."

Again, in *Hardy v. Lumber Co.*, 160 N. C., 113, 75 S. E., 855, *Walker, J.*, quotes from *R. R. v. Kellogg, supra,* with approval, as follows: "We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the immediate cause. But when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury."

The decisions are all to the effect that liability exists for the natural and probable consequences of negligent acts or omissions, proximately flowing therefrom. The intervening negligence of a third person will not excuse the first wrongdoer, if such intervention ought to have been foreseen. In such case, the original negligence still remains active and a contributing cause of the injury. The test is to be found in the probable consequences reasonably to be anticipated, and not in the number or exact character of events subsequently arising. *Lane v. Atlantic Works,* 111 Mass., 136.

The rule is, that if the original act be wrongful, and would naturally prove injurious to some other person or persons, and does actually result in injury through the intervention of other causes which are not in themselves wrongful, the injury is to be referred to the wrongful cause, passing by those which are innocent. *Scott v. Shepherd,* 2 Bl., 892 (*Squib case*). But if the original wrong only becomes injurious in consequence of the intervention of some distinct wrongful act or omission on the part of another or others, the injury is to be imputed to the last wrong as the proximate cause, and not to the first or more remote cause. Cooley on Torts, sec. 50. *"In jure non remota causa sed proxima spectatur.* It were infinite for the law to judge the causes of causes, and their impulsions one of another; therefore it contenteth it selfe with the immediate

cause, and judgeth of acts by that, without looking to any further degree." Bacon's Maxims, I; *Newell v. Darnell,* 209 N. C., 254, 183 S. E., 374; *Burke v. Coach Co., supra; Ballinger v. Thomas,* 195 N. C., 517, 142 S. E., 761.

The test by which the negligent conduct of one is to be insulated as a matter of law by the independent negligent act of another, is reasonable unforeseeability on the part of the original actor of the subsequent intervening act and resultant injury. *Newell v. Darnell, supra; Beach v. Patton, supra; Hinnant v. R. R., supra; Balcum v. Johnson,* 177 N. C., 213, 98 S. E., 532. "The test . . . is whether the intervening act and the resultant injury is one that the author of the primary negligence could have reasonably foreseen and expected." *Harton v. Tel. Co.,* 141 N. C., 455, 54 S. E., 299. "The law only requires reasonable foresight, and when the injury complained of is not reasonably foreseeable, in the exercise of due care, the party whose conduct is under investigation is not answerable therefor. Foreseeable injury is a requisite of proximate cause, and proximate cause is a requisite for actionable negligence, and actionable negligence is a requisite for recovery in an action for personal injury negligently inflicted." *Osborne v. Coal Co.,* 207 N. C., 545, 177 S. E., 796; *Beach v. Patton, supra.*

Measured by this standard, it would seem that the negligence of the defendant Spease was the sole proximate cause of the collision. But for his intervention, the speed of the Butner car would have resulted in no injury to the plaintiffs. The causal connection between this original negligence and the ultimate damage was broken. It does not appear that the collision, with its attendant suffering and damage, was the natural and probable consequence of Butner's negligence, or wrongful act, and that it ought to have been foreseen in the exercise of reasonable prevision or in the light of the attending circumstances.

It results, therefore, that in each case the demurrer to the evidence by the defendant Butner should have been sustained; and the judgment in the first case against the defendant Spease will be upheld.

On defendant Butner's appeals, Reversed.

On defendant Spease's appeal, No error.

BOARD OF EDUCATION OF WATAUGA COUNTY; J. B. HORTON, WILL C. WALKER, CHAPEL WILSON, CLYDE PERRY AND CHARLIE TRIPLETT, BEING AND CONSTITUTING THE BOARD OF EDUCATION OF WATAUGA COUNTY; WATAUGA COUNTY; ELLER McNEILL, CHAIRMAN; COY BILLINGS AND IRA EDMISTEN, BEING AND CONSTITUTING THE BOARD OF COUNTY COMMISSIONERS OF WATAUGA COUNTY, v. THE STATE BOARD OF EDUCATION.

(Filed 2 February, 1940.)

1. Taxation § 3b—Held: Debt was contracted during fiscal year following that in which debt was reduced, even though certificate of Secretary of Local Government Commission was not executed therein.

A county board of education made an application for a loan from the State Literary Fund, which application was approved by the State Board of Education, the Attorney-General, and the Local Government Commission, the county having reduced its debt during the prior fiscal year in an amount sufficient to justify the proposed loan under the provision of Article V, section 4, of the Constitution of North Carolina as amended. The State Board mailed notes for the proposed loan to the county board of education which executed same and mailed them back to the State Board of Education, and the State Board received same on the last day of the fiscal year. The Local Government Commission refused approval of the loan because the notes were not submitted to it for the certificate of its Secretary until after the expiration of the fiscal year, the reduction in indebtedness of the county being sufficient to justify the loan only during the fiscal year in which the application was made. *Held:* Although the certificate of the Secretary of the Local Government Commission is necessary to the validity of the notes, it is a detail which is not required by the statute to be performed within any time limit, and the county having accepted the offer to lend prior to the expiration of the fiscal year during which the increase in indebtedness was permissible under Article V, section 4, of the Constitution of North Carolina as amended, the debt is valid and constitutional.

2. Contracts § 4—

Ordinarily, the offeree may accept or reject an offer by mail when the offer is transmitted by mail, and upon valid acceptance the contract is mutually binding.

APPEAL by defendant from *Frizzelle, J.*, at September Term, 1939, of WAKE. Affirmed.

Submission of controversy without action. N. C. Code, 1935 (Michie), sec. 626. Statement of facts:

The Board of Education and Board of County Commissioners of Watauga County, on 5 June, 1939, by appropriate resolution, authorized an application to be made to the State Board of Education for a loan of $25,000 from the State Literary Fund, to be used for the construction of a new school building in Watauga County. On 12 June,

1939, the application for the loan was filed with the State Board of Education; was approved by the Local Government Commission on 20 June, 1939, and by the Attorney-General of North Carolina and the State Board of Education on 21 June, 1939.

On 22 June, 1939, the notes covering the proposed amount of the loan, in the principal amount of $25,000, were sent by the State Board of Education to the Board of Education of Watauga County and were duly executed by the chairman and secretary of said Board of Education of Watauga County on 27 June, 1939. The notes were thereafter dispatched by U. S. Mail to the office of the State Board of Education, in Raleigh, where they were received on 30 June, 1939, at 10:30 p.m.

On 1 July, 1939, these notes were transmitted to the Local Government Commission for approval and deposit with the State Treasurer, and on 24 August, 1939, Mr. W. E. Easterling, secretary of the Local Government Commission, advised the State Board of Education that the approval of the notes was being denied, for the following reason: "Our construction of Article V, section 4, of the Constitution, as amended, is that the debt evidenced by these notes is not contracted until they are actually executed in full and turned over to the State Treasurer, and the proceeds remitted to the county, or at least set aside to the credit of the county."

On the basis of the advice from the secretary of the Local Government Commission, the State Board of Education refused to complete the loan.

The county of Watauga reduced its debt during the fiscal year beginning 1 July, 1937, and ending 30 June, 1938, in the amount of $38,266.75, which amount of reduction would be sufficient to warrant the creation of a new debt of Watauga County in the amount of $25,000. Watauga County did not reduce its debt during the fiscal year ending 30 June, 1939, sufficiently to warrant the creation of a new debt of $25,000.

The judgment of the court below is as follows: "This cause coming on to be heard before his Honor, J. Paul Frizzelle, judge presiding, at the September Civil Term, 1939, of Wake County Superior Court, upon the controversy without action heretofore filed in the Superior Court of Wake County in the above entitled cause, and it appearing to the court from the case agreed upon, filed in this cause, that the Board of Education of Watauga County and Watauga County contracted the $25,000 debt in controversy during the fiscal year ending June 30, 1939, and that said indebtedness of $25,000 is within the limitation prescribed by Article V, section 4, of the Constitution of the State of North Carolina: It is, therefore, ordered and adjudged by the court that the $25,000 debt in controversy is a valid and existing debt of the Board of Education of

Watauga County and Watauga County, and that said debt was contracted and created during the fiscal year ending June 30, 1939, and that said debt is within the limitation prescribed by Article V, section 4, of the Constitution of the State of North Carolina; it is further ordered and adjudged by the court that the State Board of Education is authorized, directed and empowered to make available to the Board of Education of Watauga County from the State Literary Fund the amount of the loan in accordance with the approval of the creation of said indebtedness heretofore given by the said State Board of Education. J. Paul Frizzelle, Judge Presiding."

To the signing of the foregoing judgment, the State Board of Education, defendant, excepted, assigned error and appealed to the Supreme Court.

Wade E. Brown for Board of Education of Watauga County, plaintiff.
Attorney-General McMullan and Assistant Attorney-General Patton for the State.

CLARKSON, J. The question involved: Did Watauga County contract a debt of $25,000 within the meaning of Article V, section 4, of the Constitution of the State of North Carolina during the fiscal year ending 30 June, 1939? We think so, under the facts and circumstances of this case.

An interpretation of certain sections of law will decide the issue involved. One question is from the N. C. Constitution, Art. V, sec. 4, as amended. This section, in part, is as follows: "And counties and municipalities shall not contract debts during any fiscal year, to an amount exceeding two-thirds of the amount by which the outstanding indebtedness of the particular county or municipality shall have been reduced during the next preceding fiscal year, unless the subject be submitted to a vote of the people of the particular county or municipality."

N. C. Code, 1935 (Michie), sec. 5683, provides: "Loans by State Board from State Literary Fund. The State Board of Education under such rules and regulations as it may deem advisable, not inconsistent with the provisions of this article, may make loans from the State Literary Fund to the county board of education of any county for the building and improving of public schoolhouses or dormitories for rural high schools and teacherages and buildings for county farm-life schools in such county; but no warrant for the expenditure of money for such purposes shall be issued by the auditor except upon the order of the State Superintendent of Public Instruction, with the approval of the State Board of Education."

Section 5684 provides: "Terms of Loans. Loans made under the provisions of this article shall be payable in ten installments, shall bear interest at four per centum, payable annually, and shall be evidenced by the note of the county board of education, executed by the chairman and secretary thereof, and deposited with the State Treasurer. The first installment of such loan, together with the interest on the whole amount then due, shall be paid by the county board of education on the 10th day of February, after the 10th day of August subsequent to the making of such loan and the remaining installments, together with the interest, shall be paid, one each year, on the 10th day of February of each subsequent year till all shall have been paid."

Section 2492 (20) provides: "Obligations of units must be certified by Commission. No bonds or notes or other obligations of any unit hereafter issued shall be valid unless on the face or reverse thereof there be a certificate signed by the secretary of the Commission or an assistant designated by him either (a) that the issuance of the same has been approved, under the provisions of the Local Government Act, or (b) that the bond or note is not required by law to be approved by the Commission. Such certificate shall be conclusive evidence that the requirements of this act as to approval by the Commission, advertisement and sale have been observed, and shall also be conclusive evidence that the requirements of sections 2492 (21) and 2492 (22) have been complied with."

If the debt was contracted during the fiscal year ending 30 June, 1939, the loan would come under Art. V, sec. 4, of the N. C. Constitution, *supra*, and would be a valid contract. The contention of defendant relates to detail which was not a condition precedent to be effective during the fiscal year.

In *Belk's Department Store v. Ins. Co.*, 208 N. C., 267 (270), speaking to the subject as to what constitutes a contract, it is said: "In *Overall Co. v. Holmes*, 186 N. C., 428 (431-2), a contract, citing numerous authorities, is defined as follows: 'A contract is "an agreement, upon sufficient consideration, to do or not to do a particular thing." 2 Blackstone Com., p. 442. There is no contract unless the parties assent to the same thing in the same sense. A contract is the agreement of two minds —the coming together of two minds on a thing done or to be done. "A contract, express or implied, executed or executory, results from the concurrence of minds of two or more persons, and its legal consequences are not dependent upon the impressions or understandings of one alone of the parties to it. It is not what either thinks, but what both agree."' *Jernigan v. Ins. Co.*, 202 N. C., 677 (679)."

In *Shubert Theatrical Co. v. Rath*, 271 Fed., 827 (834), we find: "Authorization to communicate acceptance by mail is implied . . .

where the post is used to make the offer and says nothing as to how the answer is to be sent."

In *Rucker v. Sanders,* 182 N. C., 607 (608), we find: "The offer to sell . . . was made by mail, which carried with it an implied invitation, nothing else appearing, to accept or reject the offer in like manner, that is by mail." *Patrick v. Bowman,* 149 U. S., 411; 6 R. C. L., 611; *Farmers' Produce Co. v. McAlester Storage Co.,* 48 Okl., 488; *Shaw v. Ingram-Day Lumber Co.,* 152 Ky., 329.

In *Durant v. Powell,* 215 N. C., 628 (633), it is said: " 'An offer may invite an acceptance to be made by merely an affirmative answer, or by performing or refraining from performing a specified act, or may contain a choice of terms from which the offeree is given the power to make a selection in his acceptance.' Restatement of Law-Contracts, Amer. Law Inst., Vol. 1, sec. 29."

In *Rucker v. Sanders, supra,* at p. 609, it is said: "And if the contract be binding as to one of the parties, it is binding as to both. The defendant's offer was accepted absolutely, without condition, and this resulted in an executory contract, with mutuality of obligation and remedy. *Howell v. Pate,* 181 N. C., 117, and cases there cited."

In *Sides v. Tidwell,* 216 N. C., 480 (483), is the following: "In the making of a contract it is essential that the parties assent to the same thing in the same sense, and their minds must meet as to all the terms," citing many authorities.

In N. C. Code, sec. 2492 (20), *supra,* it will be noted that this section makes no mention of the time element such as is contemplated by Article V, section 4, as amended, of the Constitution. The intention of the Legislature seems to be clearly set out in the last sentence of said section, in that the secretary of the Local Government Commission certify by signature, to the effect that such bonds or notes were in proper order. His approval of the bond issue was made before the bonds were ever executed. This certificate by signature was clearly not meant to be a part of the contract itself, and therefore would not be required to be signed during the fiscal year as set out by the Constitution. It is not denied that approval of the secretary of Local Government Commission is made a necessity, but the statute does not say this approval is to be made within the fiscal year as required by the Constitution, Art. V, sec. 4. That statute law requiring certain things to be done is made a part of the contract is true, but in some cases we still find that the above section does not set down the requirement that the approval of the secretary of the Local Government Commission is a condition precedent to the contracting of the debt as set out in the Constitution. We think the contract was made during the fiscal year beginning 1 July, 1938, and ending 30 June, 1939. There was no condition precedent that the

approval of the secretary of the Local Government [Commission] should be made during the fiscal year above set forth. The loan was approved by the defendant, State Board of Education, on 21 June, 1939, during the fiscal year in which the money could be borrowed under the Constitution, Art. V, sec. 4. The detail complained of could be completed after 30 June, 1939, but the contract was executed, and a binding one, when received by defendant on 30 June, 1939.

The department of the Attorney-General is watchful and efficient and was correct in seeing that the State loaned no money on an invalid obligation.

We think the judgment of the court below should be

Affirmed.

GEORGE ROEDIGER v. GUS SAPOS.

(Filed 2 February, 1940.)

1. Trial § 2—

An appeal from the judgment of a justice of the peace in a summary ejectment has precedence over all other cases except those involving exceptions to homesteads, C. S., 2373, and is properly called upon demand at the beginning of the term of the Superior Court commencing next after the docketing of the appeal.

2. Ejectment § 5—

The affidavit of plaintiff made in support of the summons in this proceeding in summary ejectment *is held* sufficient to state a cause of action, and defendant's motion to set aside the verdict rendered in the Superior Court upon appeal, on the ground that plaintiff failed to state a cause of action, was properly denied.

3. Justices of the Peace § 4—

Pleadings in a magistrate's court are oral and will not be held insufficient for mere informality.

4. Attorney and Client § 7—

When an attorney is retained generally to conduct a legal proceeding he enters into an entire contract to follow the proceeding to its termination, and he may withdraw from the case for good cause only by permission of the court after notice to the client, and the court should not permit him to withdraw in the absence of the client without showing that his client had been notified.

5. Judgments § 22e—

The court's permitting counsel for defendant to withdraw from the case, upon the calling of the case for trial, in the absence of notice to defendant constitutes "surprise" under C. S., 600, but does not entitle defendant to have the judgment set aside in the absence of a showing of a meritorious defense.

6. Attorney and Client § 4—

A litigant has the right, as a matter of law, to be represented by counsel, who must, within reasonable bounds, be permitted to cross-examine the witnesses of his adversary.

7. Judgments § 22e—Record held not to show that client was without notice that attorney would withdraw from case, and therefore motion to set aside verdict for surprise was properly denied.

Defendant's case was called for trial at the beginning of the term, and counsel for defendant moved for a continuance, which motion was denied, and the case was set for trial during the afternoon. Upon the call of the case at that time defendant's counsel again moved for a continuance and upon denial of the motion stated that he would withdraw from the case and the court permitted him to withdraw therefrom in the absence of defendant. The case was tried and verdict rendered in plaintiff's favor, and defendant through new counsel moved that the verdict be set aside, as a matter of law, for surprise. The court found that the conduct of defendant and his counsel was for the purpose of forcing the continuance of the case. *Held:* The evidence supports the finding that defendant and his counsel were thus attempting to trifle with the court, and the Supreme Court will not assume that the withdrawal of counsel was other than with the knowledge and approval of defendant, and the denial of the motion to set aside is affirmed.

APPEAL by defendant from *Pless, J.*, at September Term, 1939, of FORSYTH. Affirmed.

This is a summary proceeding in ejectment instituted by plaintiff, landlord, against defendant, tenant, who holds over after the expiration of his lease, to obtain possession of a commercial building located on West 4th Street, in Winston-Salem, N. C.

The defendant was a tenant from month to month. He having failed to vacate on due notice at the end of his term, this action was instituted before a magistrate to eject the defendant from said premises. From a judgment in favor of the plaintiff the defendant appealed to the Superior Court.

When the cause came on for hearing in the Superior Court, the defendant being absent, his counsel moved for a continuance and offered in support thereof a doctor's certificate in which it was stated, "His (defendant's) health at this time does not permit him to be subjected to a trial." The court, being of the opinion that the certificate was not sufficient to justify a continuance, declined to continue the cause for the term but did continue it until the afternoon session for further investigation.

During the interim the court consulted the physician who signed the certificate and was told by the doctor that, "The condition of the defendant was that the defendant has a heart ailment and that his health is about the same condition now as it has been for several months, including the time at which this case was tried before the justice of the peace,

and that there is no likelihood that there will be any noticeable change in his condition for several months or that the defendant will be more likely to be able to attend trial at any time during the fall than he is at this time; that the defendant could attend trial without probable injury to himself but due to the nature of his ailment there is a remote possibility that the excitement of the trial might cause him to have an attack of serious consequence; that his condition was not such as would have prevented the taking a deposition at any time since the case was tried before the justice of the peace."

At the morning session, in answer to the motion to continue, counsel for plaintiff offered to waive notice of the taking of the defendant's deposition and to take it so that it could be used in the trial when the cause was called on Monday afternoon, which suggestion or offer was declined by the attorney for the defendant. Being then informed that the court did not feel justified in continuing the case, counsel for defendant stated that he thought he would withdraw as counsel.

When the case was again called for trial at the afternoon session (on Monday, the first day of the term), the defendant still being absent, counsel for defendant renewed his motion for a continuance. Being informed by the court that no sufficient cause for continuance had been presented, defendant's counsel stated that he wished to withdraw as counsel and the court permitted him to do so. The case was then called for trial and the court examined the jurors to determine that they were fair and impartial in respect to the defendant. After the conclusion of the plaintiff's testimony the court publicly asked if anyone wished to be heard in behalf of the defendant. In response the daughter of the defendant tendered herself as a witness and testified in behalf of the defendant. At the conclusion of the evidence appropriate issues were submitted to and answered by the jury in favor of the plaintiff.

The court further found:

"This cause involves the possession of certain business property in Winston-Salem, the defendant having known since April, 1939, that the premises had been or would be leased to another tenant for occupancy on August 1, 1939. The proposed new tenant has given up his former location and it has been rented to another merchant. Because of the failure of the defendant to move from the premises, three businesses are seriously affected. The court was of the opinion that the rights of the parties required that the case be speedily disposed of and in the exercise of its sound discretion, required the trial at this time, having first been informed of the position of the defendant at the trial of the justice's court, and being of the opinion that the defendant had no reasonable hope of succeeding in this litigation had he been present and represented by such attorney as he might have employed.

"The attorney for the defendant announced his withdrawal from the case upon the convening of court on Monday afternoon, the court being of the opinion that he sought by this means to obtain a continuance which had theretofore been denied, and the court being of the opinion that the case should be tried, required the same."

At the afternoon session both the defendant's bondsman upon his stay bond and the defendant's daughter expressed the desire that the defendant be given time to get new counsel and prepare for trial.

On Friday, 22 September, 1937, it being the Friday of the same week, the cause was tried, present counsel appeared and requested the court to find the facts upon the motion for continuance. The court found the facts herein summarized and the defendant excepted. Counsel then moved the court to set aside the verdict on the following grounds:

"(1) That the verdict should be set aside as a matter of law; and

"(2) That the plaintiff failed to state a cause of action."

The court overruled the motion on each cause assigned and the defendant then moved the court to set aside the verdict on the grounds of surprise and excusable negligence on the part of the defendant.

The defendant offered no evidence in support of either motion but the plaintiff, on the latter motion, offered evidence tending to show, and the court found, that the defendant had no meritorious defense to plaintiff's cause of action.

The court further found that "the defendant has not used diligence or any diligence towards preparing for this trial"; denied the defendant's motion to set aside the verdict and signed judgment upon the verdict rendered. The defendant excepted and appealed.

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

Joe W. Johnson for defendant, appellant.

BARNHILL, J. The trial before the magistrate was had approximately six weeks prior to the convening of the term of the Superior Court at which the cause was heard. On demand of counsel for the plaintiff the case in the Superior Court had precedence on the calendar over all other cases, except cases involving exceptions to homesteads. C. S., 2373. It was properly called for trial at the beginning of the term.

The defendant's motion to set aside the verdict for that the plaintiff failed to state a cause of action, even if deemed to have been in apt time, cannot be sustained. The affidavit of plaintiff made in support of the summons issued by the magistrate sufficiently states a cause of action in summary ejectment. Furthermore, pleadings in a magistrate's court are oral and will not be held insufficient for mere informality.

The defendant did not request the court to set aside the verdict in the exercise of its sound discretion, which discretion rested in the judge during the continuance of the term at which the case was tried. Therefore, no question of abuse of discretion is presented or supported by the record.

The defendant, in his brief, states the question presented for decision to be, "Is the defendant, Gus Sapos, entitled to a new trial on account of surprise and excusable neglect in this cause?" It is upon this one of the several motions made that the defendant now seems to rely.

It is now an accepted principle of law that when an attorney is retained generally to conduct a legal proceeding, he enters into an entire contract to follow the proceeding to its termination and hence cannot abandon the services of his client without sufficient cause and without giving proper notice of his purpose. *Branch v. Walker,* 92 N. C., 87; *Gooch v. Peebles,* 105 N. C., 411; *Gosnell v. Hilliard,* 205 N. C., 297, 171 S. E., 52; *Ladd v. Teague,* 126 N. C., 544; *Newkirk v. Stevens,* 152 N. C., 498, 67 S. E., 1013; *U. S. v. Currie,* 6 How., 106, 12 L. Ed., 363; *Tenny v. Berger,* 93 N. Y., 524, 45 A. L. R., 263. "An attorney who undertakes the conduct of an action impliedly stipulates to carry it to its termination and is not at liberty to abandon it without reasonable cause and reasonable notice." Weeks on Attorneys at Law, sec. 265.

The dual relation sustained by an attorney imposes upon him a dual obligation—the one to his client, the other to the court, *Waddell v. Aycock,* 195 N. C., 268, 142 S. E., 10; *Gosnell v. Hilliard, supra,* and he can withdraw from a pending action in which he is retained only by leave of the court, *Branch v. Walker, supra; Ladd v. Teague, supra; Gosnell v. Hilliard, supra,* and only after having given reasonable notice to the client. While an attorney may sever his relation with a client for good cause, his withdrawal should not be allowed by the court in the absence of the client without a showing that he has notified his client or without giving the client ample opportunity to be heard. *Spector v. Greenstein,* 85 Pa., sup., R., 177; *Gosnell v. Hilliard, supra.*

When defendant's counsel undertook to withdraw from the case at the moment the cause was ordered to trial the court below should have denied him the right to do so. If counsel insisted upon withdrawing or declined to participate in the trial in defense of his client's rights, he being an officer of the court, the judge had ample authority to require him to proceed in good faith. The conduct of the attorney in withdrawing from the case under the circumstances disclosed by this record, inadvertently participated in by the judge in allowing such conduct, if the defendant had no notice of such purpose, constitutes "surprise" under C. S., 600. *Manning v. R. R.,* 122 N. C., 824, 28 S. E., 963; *Gosnell v. Hilliard, supra.*

But the existence of surprise or excusable negligence standing alone is not sufficient under the terms of C. S., 600, to justify or require the vacation of a verdict or judgment by the court. It must further appear that the defendant has a meritorious cause of action or defense. *Gosnell v. Hilliard, supra; Sutherland v. McLean,* 199 N. C., 345, 154 S. E., 662; *Parham v. Hinnant,* 206 N. C., 200, 173 S. E., 26; *Parham v. Morgan,* 206 N. C., 201, 173 S. E., 27; *Gooch v. Peebles, supra; Hooks v. Neighbors,* 211 N. C., 382, 190 S. E., 236. In the *Parham cases* both the plaintiff and counsel were excusably delayed in arriving in court. When they appeared the case had already been called for trial and dismissed as of nonsuit for failure of the plaintiff to appear and prosecute his action. Upon a motion to reinstate the court heard the evidence from which it found that plaintiff's cause of action was without merit and declined to reinstate. These judgments were affirmed on appeal.

The defendant moved to set aside the verdict as a matter of law. He failed to point out in the motion wherein the verdict was deficient. Neither does he direct our attention to any legal defect in the verdict in his brief. If we assume that the defendant intended thereby to attack the validity of the verdict for the reason that it was rendered at a time when he had been deprived by the court of the right to have counsel present at the trial, and such contention was supported by the record, then a most serious question would be presented. Whether the litigant is present in court or not when a case is tried he has the right, as a matter of law, to be represented by counsel who must, within reasonable bounds, be permitted to cross-examine the witnesses of his adversary. *S. v. Roberson,* 215 N. C., 784, 3 S. E. (2d), 277, and to argue the cause before a jury. *Howard v. Telegraph Co.,* 170 N. C., 495, 87 S. E., 313; *Puett v. R. R.,* 141 N. C., 332; *Irvin v. R. R.,* 164 N. C., 6. However, to so assume requires us to venture outside the record. Furthermore, the defendant not only failed to offer evidence of meritorious defense but he likewise failed to offer any proof that he was unaware that his counsel would retire in the event the court declined to continue the cause, or that he was without notice thereof.

The court has found that the conduct of the defendant and of counsel was for the purpose of forcing the continuance of the case. The finding that they were thus attempting to trifle with the court is supported by the evidence in the record. Under these circumstances it is just as reasonable to conclude that the withdrawal of counsel was with the full knowledge and approval of the defendant as it is to presume that he had no knowledge thereof. Thus, on this record, it appears that there is no sound reason for disturbing the verdict or the judgment rendered thereon

by the court below. The court will not do a vain thing, and it is unwilling to put itself in the position of assuming a condition which does not appear from the evidence in order to help a litigant who has been so lacking in diligence in prosecuting a defense which is apparently without merit.

The judgment below is

Affirmed.

M. L. MINTZ v. SAM JOE FRINK.

(Filed 2 February, 1940.)

1. Process § 2—

Summons in a civil action served on Sunday is invalid and does not bind defendant, C. S., 3958, and the status of the process is the same as if service had not been made.

2. Process § 12—

When the original summons is invalid, plaintiff is entitled to have *alias* summons issued within 90 days next after the date of original summons, C. S., 480, but in order to prevent a discontinuance *alias* and *pluries* summons must be successively and properly issued.

3. Same—Summons original in form is not constituted an alias summons by endorsement of word "alias" at its top.

The court adjudged the original process invalid because served on Sunday and ordered *alias* summons to be issued. Thereafter summons in the form of an original summons but marked at the top "*alias* summons" was issued and served. *Held:* The second summons having the form and tenor of original process without anything in the body of the summons to show its relation to the original summons is not changed from an original to an *alias* summons by the endorsement, and the order for the issuance of an *alias* summons, being merely directory, does not constitute the second summons an *alias*.

4. Same—

Service of the original summons in this action was void because made on a Sunday and an "*alias*" summons thereafter issued was ineffective because not in the form prescribed by statute. *Held:* Upon the expiration of 90 days from the date of the original summons there was a discontinuance, and the court was without authority thereafter to order the issuance of an *alias* summons.

5. Appearance § 1—

A motion to dismiss for failure of plaintiff to file security for costs as required by C. S., 493, pertains to a procedural question apart from the merits of the action, and an appearance for the purpose of making this motion, and a motion to dismiss for want of jurisdiction, does not constitute a general appearance, C. S., 490.

MINTZ *v.* FRINK.

APPEAL by defendant from *Stevens, J.*, at September Civil Term, 1939, of BRUNSWICK.

Civil action to recover damages for alleged slander.

Summons in this action, issued 26 November, 1938, was returned with endorsement showing service was made upon defendant on the same date.

On 12 December, 1938, defendant, after notice to attorneys for plaintiff, entered special appearance and moved to dismiss the action for that the summons was served on Sunday, 27 November, 1938, contrary to law, and for that cost bond is not justified by the surety as required by the statute, and there is no order authorizing the plaintiff to sue without giving bond.

Upon the hearing of the motion at January Term, 1939, Harris, J., finding as a fact from the affidavits filed that the summons was served on Sunday, 27 November, 1938, held that such service is a nullity, and ordered the return to be stricken out; and, upon plaintiff's motion for an *alias* summons, the court then ordered that the case be remanded to the clerk of Superior Court, and that he be, and is authorized to serve immediately an *alias* summons with an attached copy of the complaint; and further ordered that plaintiff give a justified cost bond within ten days or the action is dismissed. Defendant excepted to the order for *alias* summons and to the refusal to dismiss the action.

Thereafter, on 12 January, 1939, "in compliance with" the said order, the assistant clerk of Superior Court issued a summons in form of an original summons, but marked at the top: "Alias Summons," which was returned by the sheriff endorsed "Served January 13, 1939, by delivering a copy of the within summons and a copy of the complaint" to defendant.

Subsequently, on 7 February, 1939, defendant, again after notice to attorneys for plaintiff, entered special appearance and moved to dismiss the action and to strike out the officer's return on the summons marked "Alias Summons" and dated 12 January, 1939, for that there was no complaint filed for that suit, and there was no order extending the time for filing the complaint, and there was no cost bond filed, and for that the same is not an *alias* summons. Upon hearing of the motion on 4 March, 1939, the clerk, upon finding that the summons issued on 12 January, 1939, was in compliance with the order of Harris, J., and being of opinion that same is a valid *alias* summons, denied the motion to dismiss. Plaintiff excepted and appealed to Superior Court.

Upon such appeal, heard at September Civil Term, 1939, and upon finding as fact that the summons marked "Alias Summons" issued by the clerk on 12 January, 1939, was not in fact an *alias* summons, and that same was actually served upon the defendant without a copy of the complaint, the court, being of opinion that such summons so marked and served is inoperative, but being further of opinion that the court has

"inherent right to correct its mistakes and errors," denied motion of defendant to dismiss the action, and ordered that the cause be remanded to the clerk of Superior Court with direction to him to issue at once an *alias* summons and attach thereto copy of complaint for service on defendant.

Defendant appeals therefrom to the Supreme Court, and assigns error.

E. K. Bryan for plaintiff, appellee.
S. B. Frink and I. C. Wright for defendant, appellant.

WINBORNE, J. The questions involved on this appeal are these:

(1) Is service of summons on Sunday valid? (2) Does marking an original summons "alias" constitute it an *alias summons?* (3) When summons has been served on defendant on Sunday and when *alias* summons has not been issued within the time limited by statute, is defendant, by motion made on special appearance, entitled to have the action dismissed for want of jurisdiction of person? (4) When defendant enters an appearance, designated special, and moves to dismiss the action not only for invalid service of summons, that is, want of jurisdiction of person, but also for lack of justification of plaintiff's bond as security for costs, is the appearance general or special?

The law as established in this State answers the first and second questions in the negative, and the third in the affirmative. While as to the fourth the exact question has not been considered heretofore in this State, the rule of reason prompts us to hold the appearance is not general.

(1) The statute, C. S., 3958, provides that "it shall not be lawful for any sheriff, constable or other officer to execute any summons, capias or other process on Sunday, unless the same be issued for treason, felony or misdemeanor." See *Bland v. Whitfield,* 46 N. C., 122; *Devries v. Summitt,* 86 N. C., 126. Hence, in the present action service of original summons on Sunday is invalid and not binding on defendant. Having been so adjudged and the return having been stricken out at January Term, 1939, the status of the process was the same as if service had not been made. *Hatch v. R. R.,* 183 N. C., 617, 112 S. E., 529. The plaintiff then had the right, given by statute, C. S., 480, to "sue out an *alias* . . . summons, returnable in the same manner as original process"—a right which could and must have been exercised at any time within ninety days next after the date of the original summons, 26 November, 1938. *McGuire v. Lumber Co.,* 190 N. C., 806, 131 S. E., 274.

(2) In order to preserve a continuous single action referable to the date of its institution the original ineffective summons must be followed by process successively and properly issued. *Hatch v. R. R., supra,* and *McGuire v. Lumber Co., supra,* and cases cited. An *alias* follows next

after the original. There should be something in the body of the second summons to indicate its alleged relation to the original. *Hatch v. R. R., supra.* The character of process purporting to be original is not changed by an endorsement of the word "alias." Such endorsement forms no part of the record, and could not have the effect of changing the tenor from an original to an *alias summons.* See *Simpson v. Simpson,* 64 N. C., 427, as applied to executions. The issuance of a second summons in the form of an original, without something in the body of it to indicate its relation to the original, has the force and effect of initiating an independent action.

(3) Section 481 of Consolidated Statutes of 1919 provides that "a failure to keep up the chain of summonses issued against a party, not served, by means of an *alias* or *pluries* summons, is a discontinuance as to such party; and if a summons is served after a break in the chain it is a new action as to such party, begun when the summons was issued." See *Hatch v. R. R., supra; Neely v. Minus,* 196 N. C., 345, 145 S. E., 771.

In the case in hand the service of summons being invalid and an *alias* as required by statute not having been issued, nothing else appearing, the action was discontinued at the expiration of ninety days next after the issuance of the original summons. The order of Harris, J., that the clerk issue an *alias* summons is merely directory, and does not and cannot have the effect of suspending the provisions of the statute. Likewise, after the expiration of period provided in the statute within which an *alias* summons can and must be issued, Stevens, J., was without authority to order an *alias* summons issued. Therefore, at September Term, 1939, upon the finding that the summons issued 12 January, 1939, was not in fact an *alias* summons, nothing else appearing, a discontinuance of the action as originally instituted should have been decreed.

(4) However, plaintiff contends that, notwithstanding the right of defendant to appear specially to make the motion upon which the court struck out the erroneous return on the original summons and declared to be invalid the service as made, or to move to dismiss for lack of jurisdiction of his person, the defendant, by coupling in the motion the further purpose to dismiss the action for failure to justify plaintiff's bond as security for costs, appeared generally. With respect thereto it is our view, and we hold, that the matter of moving to dismiss the action for failure to comply with statutory requirement, C. S., 493, relating to security for costs pertains to a procedural question, apart from the merits of the action, and such motion may be invoked as incidental to jurisdiction.

The statute, C. S., 493, in effect provides that, unless plaintiff makes a deposit of cash therefor or obtain permission to sue *in forma pauperis,*

the clerk, before issuing summons, should require the plaintiff to give as security for costs "an undertaking with sufficient surety in the sum of two hundred dollars, with the condition that it will be void if the plaintiff pays all the costs which the latter recovers of him in the action." The sole object of the bond is to secure the defendant. *Brittain v. Howell,* 19 N. C., 107; *Waldo v. Wilson,* 177 N. C., 461, 100 S. E., 182. Failure of the clerk to require this may subject him to penalty. *Dale v. Presnell,* 119 N. C., 489, 26 S. E., 27. But this Court has uniformly held that the undertaking is not a condition precedent so as to make a summons void if it is not given. McIntosh P. & P., 331; *Russell v. Saunders,* 48 N. C., 432. The decisions are likewise uniform in holding that if the summons be issued without the undertaking the defendant may make a motion to dismiss the action for such defect, but this motion must be made promptly. McIntosh P. & P., 331; *Cooper v. Warlick* 109 N. C., 672, 14 S. E., 106.

Courts in only a few other jurisdictions have considered the identical question. In New York (*Wendel v. Connor,* 220 App. Div., 211, 221 N. Y. S., 10) and in Louisiana (*Collier v. Morgan's L. & T. R. and S. S. Co.,* 41 La. Ann., 37, 5 So., 37) the courts hold the appearance to be special, while in Nebraska (*Healy v. Aultman,* 6 Neb., 349, and *Raymond Bros. v. Strine,* 14 Neb., 236, 15 N. W., 350) and in Wisconsin (*Stonach v. Glessner,* 4 Wis., 288) the courts hold the appearance to be general. But see *Kingsley v. Great Northern Ry. Co.* (Wis.), 64 N. W., 1036, in which the Wisconsin Court holds that where defendant asks that service of summons be set aside and that "the action be dismissed, with costs," and again, "with costs of motion," it must be construed as claim for only such costs as the court might properly grant on setting aside the service of the summons, and, therefore, was not a waiver of the objection, or a general appearance. The New York decision is more convincing in that it is predicated upon a statute, sec. 237 of the Civil Practice Act of New York, which, in part, is identical with our statute, C. S., 490, which provides that a "voluntary appearance of a defendant is equivalent to personal service of summons upon him." Also in connection with the New York decision it is significant to note that pertinent sections of the Civil Practice Act of New York provides that "the defendant . . . may require security for costs to be given, . . ." sec. 1522, and when this is done "the court . . . or a judge thereof . . . must make an order requiring the plaintiff . . ." to make deposit or to file bond; "and staying all other proceedings on the part of the plaintiff, except to review or vacate the order, until the payment or filing, and notice thereof," sec. 1524.

The judgment entered at September Term, 1939, is

Reversed.

J. W. McCLAMROCH, EXECUTOR OF ESTATE OF J. R. McCLAMROCH, DECEASED, v. COLONIAL ICE COMPANY AND JOHN BIDDING.

(Filed 2 February, 1940.)

1. Evidence § 34—

The contents of a public record may be proven in any court by the original record itself.

2. Appeal and Error § 39b—Error, if any, in admission of evidence held cured by verdict.

In this action for wrongful death plaintiff objected to the admission in evidence of his testator's death certificate, which had not been certified in accordance with C. S., 7111, plaintiff contending that the admission of the certificate was prejudicial for that the contents supported an inference that testator's death did not result from the accident in suit. *Held:* The verdict of the jury in plaintiff's favor on the issue of negligence rendered the error, if any, in the admission of the certificate harmless.

3. Appeal and Error § 39d—

Ordinarily, an exception to the admission of evidence cannot be sustained when similar evidence is admitted without objection.

4. Trial § 31—

The remarks of the trial court upon being interrupted during his charge to the jury by a witness interested in the event, who sought to correct an inadvertence in a statement by the court, C. S., 401, *held* not to disparage or discredit the witness so as to constitute prejudicial error.

5. Evidence § 16—

The charge of the court upon the credibility to be given testimony of interested witnesses *held* without error.

6. Death § 8—

Charge of the court on the issue of damages in this action for wrongful death *held* without error, C. S., 1790, 161.

7. Appeal and Error § 37b—

The plaintiff excepted to the refusal of the court to set aside the verdict upon his contention that it reflected a compromise in that immediately after requesting and receiving additional instructions, the jury returned a verdict awarding inadequate damages. *Held:* In the absence of error of law or legal inference, the direct supervision of verdicts is a matter resting in the sound discretion of the trial court and is not reviewable.

APPEAL by plaintiff from *Sink, J.*, at 17 April, 1939, Civil Term, of GUILFORD.

Civil action for recovery of damages for alleged wrongful death. C. S., 160.

Plaintiff alleges and offers evidence tending to show that the testator, J. R. McClamroch, died 16 December, 1935, as result of injuries re-

ceived on 20 February, 1934, and proximately caused by the negligent operation of truck of defendant Colonial Ice Company while being driven by its servant, Roscoe Garner, along Elm Street in the city of Greensboro, North Carolina, by reason of which the plaintiff has been greatly damaged.

Defendant denies the material allegations of plaintiff and pleads the contributory negligence of the testator, J. R. McClamroch, in bar of recovery and offers evidence upon issues joined.

When the case was called for trial plaintiff submitted to judgment as of nonsuit as to defendant John Bidding, for that he was an improper party.

Upon the issues submitted the jury returned the following verdict:

"1. Was plaintiff's testator injured and killed by carelessness and negligence of the defendant, Colonial Ice Company, as alleged in the complaint? Answer: 'Yes.'

"2. Did plaintiff's testator, by his own carelessness and negligence, contribute to his injury, as alleged in the answer? Answer: 'No.'

"3. What damage, if any, is plaintiff entitled to recover of the defendant, Colonial Ice Company? Answer: '$1,000.00.' "

The court entered judgment thereon for the plaintiff, from which plaintiff appeals and assigns error.

Frazier & Frazier for plaintiff, appellant.
Sapp & Sapp for defendant, appellee.

Winborne, J. A careful consideration of plaintiff's exceptive assignments fails to reveal reversible error. They are presented in four groups, and will be so considered in this opinion.

I. The court permitted defendant, over objection by plaintiff, to introduce in evidence: (a) Death certificate showing death of plaintiff's testator, J. R. McClamroch. Plaintiff contends that, upon two grounds, the admission of this certificate is prejudicial error: (1) Lack of proof of its authenticity for that same is not certified in accordance with the method prescribed in C. S., 7111. As to this, the record discloses that after objection upon the ground that the certificate is not authenticated and that it is "incompetent, irrelevant and immaterial," counsel for plaintiff qualified the objection by saying: "We don't deny that it is a record in the clerk's office, but we deny its materiality and the competency." Whereupon, "with the qualification stated by plaintiff's counsel" the objection is overruled. Therefore, it appears that the objection is limited to materiality and competency, and not to the method of proof of the instrument itself. However, the contents of a public record may be proven in any court by the original record itself. *Blalock v. Whis-*

nant, 216 N. C., 417, 5 S. E. (2d), 130, citing cases. (2) That the admission of the certificate is prejudicial for that there being no answer to the question: "If death was due to external causes (violence), fill in also the following," defendant could argue, and argued, that if the death of testator had been caused by accident the doctor would have said so. The verdict of the jury, however, negatives any prejudicial effect of the lack of answer to the question. Hence, if there were error in admitting the certificate in evidence, no harm has resulted to plaintiff. *Cochran v. Mills,* 169 N. C., 57, 85 S. W., 149. (b) Letter from Jas. McClamroch, who is a lawyer, and son of the testator and brother of the plaintiff executor, to the clerk of Superior Court of Guilford County, conveying information that: "There are no assets in the estate and that the sole purpose in instituting the administration was to bring suit for wrongful death," and that, hence, "there are no inventories, accounts, or other reports to be filed." Plaintiff contends that thus letter, not having been written by the plaintiff, is incompetent. He relies upon the decision in *Carpenter v. Power Co.,* 191 N. C., 130, 131 S. E., 400. The factual situation there, however, is distinguishable from that here. It is noted that here the letter purports to have been written in response to a card from the clerk to the plaintiff, J. W. McClamroch, calling for annual report on this estate. Further examination of the record discloses that the writer of this letter, as a witness for plaintiff, testified, that from his knowledge and familiarity with the business and the records of the business of his father, of which the father was sole proprietor, he knew of the large earnings of his father over a long period of years. Then, in the course of cross-examination with respect thereto, the witness identified the letter in question, and, without objection by plaintiff, the same was read into the record as a part of the testimony of the witness.

Later, when defendant came to offer evidence, plaintiff then objected to the admission of the letter in evidence. The record also discloses that later in the trial and without objection a report of the plaintiff as executor of the estate of the testator, giving similar information to that contained in the letter, was introduced in evidence at the instance of defendant.

In the light of the record, the admission of the letter is harmless. The general rule, as established in long line of decisions in this jurisdiction, is that evidence is harmless when similar evidence is admitted without objection. *Smith v. R. R.,* 163 N. C., 143, 79 S. E., 433; *Shelton v. R. R.,* 193 N. C., 670, 139 S. E., 232; *Colvard v. Power Co.,* 204 N. C., 97, 167 S. E., 472; *Owens v. Lumber Co.,* 212 N. C., 133, 193 S. E., 219; *S. v. Bright,* 215 N. C., 537, 2 S. E. (2d), 541, and numerous other cases.

Hence, we deem it unnecessary to debate the question of competency and relevancy of the letter.

II. The next assignment relates to an exception taken after trial with respect to an incident occurring during the charge, and to a portion of the charge immediately following.

It appears from the record that the court referred to the executor J. W. McClamroch as a witness, when in fact it was Jas. G. W. McClamroch who had testified. Then the incident occurred in detail as follows: "Mr. McClamroch: May I interrupt, your Honor? The Court: I will hear from your counsel but not from a litigant. Mr. Frazier: What he wanted to say to your Honor was—— The Court: He is a lawyer and he knows better than that. Mr. McClamroch: I beg your pardon. The Court: I will be glad for you to interrupt me, Mr. Frazier. Mr. Frazier: What Mr. McClamroch had called my attention to and I did not catch it was that Mr. McClamroch is not the executor. That is his brother. The Court: I see. I had it in mind that this was Mr. J. W. McClamroch. Mr. Frazier: No, sir. The Court: In any event, gentlemen, Mr. McClamroch—what are the initials of the witness? Mr. Frazier: Mr. J. G. W. McClamroch. The Court: Mr. J. G. W. McClamroch, according to the testimony, is the son of the testator. I just got the initials wrong. I was under the impression that this Mr. McClamroch was the executor."

Thereupon, the court proceeded with the charge as follows: "The court charges you that he is an interested witness, and that you will scrutinize his testimony because of his interest in the case. The law does not stop here, however. It says that the court must charge you to do exactly that, but it goes further than that and says that after you have scrutinized his testimony—and, gentlemen, that same rule would apply to Mrs. McClamroch, the wife of the deceased—but it says that after you have scrutinized the testimony of these interested witnesses, if you shall find that they, or either of them, have or has testified to the truth, then it is your duty to give to the testimony that you shall find to be the truth, if any, even though it may have come from interested witnesses, the same weight and consideration you would had it fallen from the mouth of a disinterested witness."

Do the remarks of the court tend to disparage or to discredit the witness' testimony? The Court has declared upon the subject in numerous cases, notably these: *S. v. Rogers,* 173 N. C., 755, 91 S. E., 854; *S. v. Bryant,* 189 N. C., 112, 126 S. E., 107; *S. v. Buchanan,* 216 N. C., 34, and cases cited.

Tested by these decisions, a reading of the report of the instant incident fails to convey the impression that it comes under the prohibition of the legal ban.

Also, it is provided by statute, C. S., 401, that a party may appear "either in person or by attorney in actions or proceedings in which he is

interested." Speaking to the effect of this statute in the case of *Abernethy v. Burns,* 206 N. C., 370, 173 S. E., 899, *Stacy, C. J.,* said: "It is the general holding that a party has the right to appear *in propria persona* or by counsel. This right is alternative. A party has no right to appear both by himself and by counsel. Nor should he be permitted *ex gratia* to do so."

The further charge with respect to testimony of interested witnesses is in harmony with recognized rule.

III. Plaintiff next assigns in group as error various portions of the charge bearing upon the issue of damages and with respect to the probative value of the mortuary tables. C. S., 1790. The exceptions are not well taken. From examination of the portions to which the exceptions relate it appears that in stating the rule for the admeasurement of damages, the court has followed in the main the exact language of the statute, C. S., 161, as applied in decisions of this Court in such cases. *Purnell v. R. R.,* 190 N. C., 573, 130 S. E., 313; *Carpenter v. Power Co., supra.*

Then as to the mortuary table, the charge taken as a whole in effect declares that the table is not conclusive, but only evidentiary. *Odom v. Lumber Co.,* 173 N. C., 134, 91 S. E., 716; *Young v. Wood,* 196 N. C., 435, 146 S. E., 70; *Trust Co. v. Greyhound Lines,* 210 N. C., 293, 186 S. E., 320; *Hancock v. Wilson,* 211 N. C., 129, 189 S. E., 631.

We think the charge as given substantially complies with the statutory requirements of C. S., 564.

IV. Lastly, plaintiff contends that the court erred in refusing to set aside the verdict, and in the judgment.

It is contended that the verdict reflects a compromise; that the jury was confused with reference to the issues; that "they came in for further instructions"; and after being further instructed retired and soon returned with a verdict of $1,000, which plaintiff contends is inadequate.

As stated in *Johnston v. Johnston,* 213 N. C., 255, 195 S. E., 807, "It is the rule in this jurisdiction that in the absence of some imputed error of law or legal inference arising in connection therewith, the direct supervision of verdicts is a matter resting in the sound discretion of the trial court, and is not reviewable on appeal." Here nothing appears which would warrant a departure from this rule.

No error.

STATE v. BEN ELDER.

(Filed 2 February, 1940.)

1. Criminal Laws § 43: Constitutional Law § 14a—

The search warrant in question was issued upon the sworn affidavit of a police officer which stated that the basis of the oath was "information." *Held:* The affidavit does not negative the assumption that the police officer was examined as to the particulars of his information and it is not required that the affidavit give in detail the source and extent of the information, and evidence procured in a search under the warrant is competent, ch. 339, sec. 1½, Public Laws of 1937.

2. Intoxicating Liquor § 9d—Evidence held sufficient for jury on question of defendant's possession of liquor in violation of Turlington Act.

Evidence tending to show that defendant rented an apartment which had been formerly occupied by a convicted bootlegger, which apartment was located in the business section of a city readily accessible from the street and had numerous peep-holes in the doors, that defendant purchased once or twice each week a gallon of tax-paid liquor, and that when the premises were searched the officers found a gallon of liquor and drinking glasses in the apartment and numerous empty whiskey bottles, a large number of which were dated during the period defendant had occupied the apartment, on the roof, *is held* sufficient to be submitted to the jury on the question of defendant's guilt of possession of intoxicating liquor in violation of the Turlington Act. Whether the A. B. C. Act permits a person to possess one gallon of tax-paid liquor in his residence in a dry county *held* not necessary to be determined.

3. Criminal Law § 81c—

The exclusion of testimony cannot be held for prejudicial error when testimony of the same import is thereafter admitted.

4. Same—

The exclusion of evidence cannot be held prejudicial when the record fails to show the purpose for which the testimony was offered or what the witness' answer would have been.

5. Intoxicating Liquor § 9c—

In this prosecution for the illegal possession of intoxicating liquor evidence that defendant had theretofore been stopped on the highway with a gallon of tax-paid liquor *is held* a competent circumstance to be considered by the jury with the other facts and circumstantial evidence in the case.

6. Criminal Law § 77c—

Where the charge is not in the record it will be presumed without error.

APPEAL by defendant from *Burgwyn, Special Judge,* at June Criminal Term, 1939, of MECKLENBURG. No error.

This is a criminal action in which it was charged that defendant did "buy, possess, possess for the purpose of sale, retail and transport intoxicating liquors in violation of the Turlington Act." Upon a written and

sworn affidavit of an officer, who stated therein that he acted upon "information," a warrant authorizing the search of defendant's premises for liquor was issued. Acting under the search warrant officers searched defendant's apartment, where he and friends were having a frog-leg supper. The officers found one gallon of tax-paid liquor. Drinking glasses were found in defendant's kitchen. On a roof, outside a window in a hallway leading to defendant's apartment, the officers found 102 empty bottles, most of them in a sack but from six to ten lying on the roof. Defendant's witnesses indicated that the bottles were on the roof when he moved to the apartment, but on cross-examination it appeared that the prior occupant left the apartment near the first of the year and that fifteen of the empty bottles taken from the roof bore dates ranging from February through April of that year. The State's evidence also indicated that one of the doors of defendant's apartment, as well as one of the bedroom walls, contained peep-holes covered on the inside with pieces of cardboard which could be moved back and forth, and that these peep-holes (and two others) were in the apartment during the tenancy of the prior occupant, who was convicted of selling liquor while there.

From a verdict of "guilty," and sentence pronounced thereupon, the defendant made numerous exceptions and assignments of error and appealed to the Supreme Court.

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

A. A. Tarlton for defendant.

CLARKSON, J. The defendant, at the close of the State's evidence and at the conclusion of all the evidence, made motions in the court below for judgment of nonsuit. N. C. Code, 1935 (Michie), sec. 4643. The court below overruled these motions, and in this we can see no error.

Aside from the assignments of errors as to the refusal to grant the motions for judgment of nonsuit, the principal assignment of error deals with the admission of evidence procured under an allegedly invalid search warrant. Chapter 339, sec. 1½, Public Laws of 1937, provides that no facts discovered by virtue of a search warrant issued "without first requiring the complainant or other person to sign an affidavit under oath and examining said person or complainant in regard thereto," shall be "competent as evidence in the trial of any action." The affidavit for the warrant of search and seizure, and the warrant itself, appear in the record. It is apparent that the affidavit was sworn to by a rural policeman of Mecklenburg County before a justice of the peace. To this extent the instant affidavit is in strict compliance with the requirement

of the statute. However, the body of the affidavit reveals that the officer gave therein as the basis for his oath merely the one word, "information." It would seem that the defendant takes the position that the failure of the officer, in his affidavit, to give in detail the source and extent of the information upon which he seeks the warrant, is in itself sufficient to render incompetent evidence secured by virtue of the warrant issued upon such affidavit. We cannot so hold.

In so far as the record speaks, the complaining officer made the required affidavit under oath; nor does it negative the presumption that the officer was further examined thereto. *S. v. Shermer,* 216 N. C., 719. The writing of the single word "information" may have been but a short-hand statement by the justice of the peace tending to indicate generally the type of evidence given to him by the officer. If defendant wished to examine into the character of the examination made by the justice of the peace and the extent of the information upon which the officer acted, he made no effort to do so, but elected to challenge the warrant upon the basis of the affidavit and warrant themselves. Looking to the legislative intent of chapter 339, sec. 1½, Public Laws of 1937, it evinces the intention to prohibit the use of "pocket" search warrants, executed in blank and left with officers to be filled in and used as their wishes, whims, or caprices might dictate; we do not find in the statute any necessary implication that, in addition to the necessary examination of the officer, the affidavit itself shall contain in detail the information and the sources of the information upon which the officer is acting. *S. v. Cradle,* 213 N. C., 217; *S. v. McGee,* 214 N. C., 184 (185). Accordingly, we hold that the evidence secured by virtue of the search warrant was competent.

Was this evidence, *in quantum,* sufficient to justify its submission to the jury? We think so. It revealed a defendant—a "big, strong and husky" man—whom two witnesses testified was never known to work. Occupying an upstairs apartment in the business section, easily accessible from the street. He went into the "lair" formerly occupied by a bootlegger who had been convicted of selling liquor in the place. The apartment was conveniently equipped with "peep-holes" to serve the purposes of illicit liquor trade. He went forth once or twice a week, over a period of months, to purchase a gallon of liquor from South Carolina liquor stores. When raided, he was found with the usual stock of liquor drinking glasses, so familiar to the bedroom-and-kitchen vendors of the prohibited fluid. With him also was a gallon of tax-paid liquor, four pints and two quarts, and conveniently near his abode, on a roof outside his hallway window, were a centurion's force of "dead soldiers"—102 empty liquor bottles. Well aware, as we are, of the evasive character of a "scintilla of evidence," we think there was more

than a scintilla of evidence here that defendant was engaged in activities prohibited by the law of this State. We think there was evidence from which the jury might find—as it did—that the comfortable lair so recently occupied by one "blind tiger" furnished an equally pleasant base for operations of another.

The other assignments of error need not be dealt with at length. Although the trial judge refused to permit an officer to be questioned as to his knowledge of the prior occupant of the apartment and his trade in liquor, defendant was not prejudiced thereby, since he was later permitted to elicit the same information from the prior occupant himself. Further, the record does not show the purpose for which this was offered nor what the witness' answer would have been. *S. v. Leak,* 156 N. C., 643 (647); *S. v. McKenzie,* 166 N. C., 290 (294). Nor do we think there was prejudicial error in permitting the State to show that defendant has been stopped on the highway with a gallon of tax-paid liquor. This was one of those "pregnant circumstances" which, while standing alone would not warrant a conviction, taken with the other facts of the case give a decided character to the cumulative effect of the circumstantial evidence. *S. v. Turner,* 171 N. C., 803; *S. v. Hege,* 194 N. C., 526. Whether the A. B. C. Act has, by necessary implication, so modified the Turlington Act as to permit residents of "dry" counties to possess in their homes not exceeding one gallon of liquor, was argued in the briefs, but the determination of this question is not necessary for the disposition of the instant case.

The facts and circumstances of the instant case were sufficient to justify the inference by the jury that defendant had such liquor in his possession in violation of the Turlington Act. *S. v. Langley,* 209 N. C., 178; *S. v. Rhodes,* 210 N. C., 473.

The charge of the court below is not in the record and the presumption is that the court below charged the law applicable to the facts.

For the reasons given, in the judgment of the court below we find

No error.

LANIE B. HILL AND HUSBAND, H. O. HILL, MAGGIE YOUNG AND HUSBAND, A. P. YOUNG, NORA LAYTON AND HUSBAND, N. B. LAYTON, ELVE RANSDELL AND HUSBAND, W. G. RANSDELL, P. T. CLIFTON AND J. R. CLIFTON v. THOMAS T. YOUNG.

(Filed 2 February, 1940.)

1. Boundaries § 7—

Ordinarily, in a processioning proceeding title is not in dispute, and if defendant's answer raises the issue of title the cause should be transferred to the civil issue docket for trial in the Superior Court.

2. Same—

In a processioning proceeding, defendant's claim that he has acquired title to the land in dispute by adverse possession, even conceding that the line as contended for by plaintiff is correct, is a denial of title *pro tanto*, and the cause should be transferred to the civil issue docket.

3. Same: Courts § 2c—

Where issue of title is raised in a processioning proceeding, and the clerk, instead of transferring the cause to the civil issue docket, determines the issue, the Superior Court nevertheless acquires full jurisdiction by appeal and has the power to dispose of the cause.

4. Boundaries § 10—

Where, in a processioning proceeding, defendant claims that he had acquired title to the land in dispute by adverse possession, the burden of proving title by adverse possession is properly placed upon defendant regardless of the form of the issue relating to such claim, although the burden is upon plaintiffs to prove the location of the boundary as contended for by them.

5. Trial § 40—

A party tendering an issue which is submitted cannot thereafter complain of the form of the issue.

6. Boundaries § 10: Trial § 39—Where issues submitted present to the jury all determinative facts presented by evidence and pleadings, refusal to submit another issue tendered is not error.

In this processioning proceeding defendant contended, and offered evidence in support thereof, that the acts of plaintiffs and their predecessor in title in cultivating and using the land only up to the boundary as contended for by defendant, and in pointing out that boundary when they obtained a loan upon the land, estopped plaintiffs to deny that the boundary was other than as contended for by the defendant. *Held:* The evidence and contentions were properly submitted to the jury under the issue relating to the location of the true dividing line between the respective lands of the parties, and refusal to submit an issue tendered by defendant upon the question of estoppel was not error.

APPEAL by defendant from *Sinclair, J.*, at March Term, 1939, of FRANKLIN.

Processioning proceeding to establish boundary between adjacent lands of plaintiffs and of defendant.

Plaintiffs allege in petition filed that they are the owners of a certain tract of land adjoining the lands of defendant and others; that the location of the line between said land and the lands owned by defendant is in dispute; and that the true and correct location of the dividing line is as therein specifically described.

Defendant admits that plaintiffs own the tract of land adjoining that owned by him, but denies the remaining allegations in the petition. For their further answer and defense defendant avers that he is the owner of a tract of land adjoining plaintiffs' land; that the true location

of the dividing line is different from that described by petitioners and is as he, the defendant, therein specifically describes; that he and those under whom he claims have had adverse possession of the tract of land owned by him up to the line located as contended for by him more than twenty years "under known metes and bounds"; that any right, title or interest . . . of the petitioners to any portion of said land now owned by said defendant . . . or any part thereof is barred by the twenty-year statute of limitations, which is expressly pleaded . . . in bar of the right of action of said petitioners as set forth in the petition filed herein"; that the plaintiffs and their predecessors in title have by their cultivation of the land and sale of timber, recognized the location of said line as described by defendant to be the true dividing line; that the defendant and his predecessors have so recognized said line by cultivating and using the land up to the said line; that in 1931 when defendant was having survey of his land made for the purpose of obtaining a description to be used in procuring a loan, P. T. Clifton, one of the petitioners, who at the time was in the occupation and possession of the entire tract owned by plaintiffs, pointed out and agreed that said line is the true and correct dividing line; and that plaintiffs are estopped to deny same.

The cause was not transferred to the civil issue docket, but was heard before the clerk of Superior Court, who found and adjudged the true location of the dividing line to be as contended by plaintiffs.

Defendant appealed to the Superior Court. On the trial there all the evidence tends to show that the lands in question are parts of a larger boundary formerly owned by a common ancestor, the grandmother of plaintiffs and defendant; that in 1882 she divided same among her children, retaining for herself the tract known as the dower tract; that she conveyed to the mother of defendant a boundary of which the land owned by defendant is a part; that she conveyed to the father of plaintiffs another boundary which, with the dower tract, is now owned by the plaintiffs; that the east line of the tract conveyed to the mother of defendant, and the west line of the tract conveyed to the father of petitioners, and that retained as dower tract are in common; that the parties are in dispute with respect to the true location of this dividing line as indicated by the deeds from the common ancestor; and that the location of the line as contended for by plaintiffs is farther west than the place contended for by defendant.

The case was tried and submitted to the jury upon these issues:

"1. What is the true location of the dividing line between lands of the plaintiffs and of the defendant?

"2. Is the plaintiffs' cause of action barred by the statute of limitations, as alleged by the defendant?"

Both of these issues, with a third which reads: "Are the plaintiffs estopped by their acts and conduct and the acts and conduct of their predecessors in title to deny that the true dividing line is as alleged by the defendant?" were tendered by defendant. The court declined to submit the third issue. Defendant excepts. The jury, in answering the first issue, finds the true location of the dividing line in accordance with plaintiffs' contention, and answered the second issue "No."

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

E. F. Griffin and Yarborough & Yarborough for plaintiffs, appellees.
G. M. Beam and White & Malone for defendant, appellant.

WINBORNE, J. While defendant presents numerous exceptive assignments, only a few require consideration, and none shows prejudicial error.

In brief filed defendant states that "This is a processioning proceeding, with title drawn in issue, wherein defendant denies correctness of location of the dividing line, and pleads estoppel and statute of limitations in bar of plaintiffs' claim." A perusal of the record discloses that in the Superior Court this is the theory upon which the case was tried.

The defendant pleads and contended upon the trial below that even though the jury should find the true location of the dividing line to be as contended for by plaintiffs, still plaintiffs are restricted to the location of the line as contended for by defendant for that he and those under whom he claims title have for more than twenty years had adverse possession of the land lying between those two locations. This is tantamount to a denial of plaintiffs' title *pro tanto.*

The court charged the jury that the burden of proof as to the true location of the dividing line is upon the plaintiffs. This is in accordance with well settled rule enunciated in decisions of this Court. *Hill v. Dalton,* 140 N. C., 9, 52 S. E., 273; *Woody v. Fountain,* 143 N. C., 66, 55 S. E., 425; *Garris v. Harrington,* 167 N. C., 86, 83 S. E., 253; *Carr v. Bizzell,* 192 N. C., 212, 134 S. E., 462.

With respect to the second issue the court charged: "Now, gentlemen of the jury, the burden is always upon the plaintiffs where the statute of limitations is pleaded (but in this case whether that is true will depend entirely upon whether or not you find from the evidence, and under the law, that the defendant has acquired rights to this land by reason of adverse possession. He having pleaded adverse possession, the law puts the burden upon him to satisfy you by the greater weight of the evidence that he has acquired rights through adverse possession

against the true owners)." Defendant excepts to that portion in parentheses. There are other exceptions to similar portions of the charge. In the light of the facts on this record, the exception is not sustained.

Ordinarily, in processioning proceedings title to the land is not in issue, *Cole v. Seawell,* 152 N. C., 349, 67 S. E., 753, but if defendant by answer should put the title in issue the proceeding is converted into a civil action to quiet title and is transferred to the civil issue docket of the Superior Court for trial in accordance with rules of practice applicable to such actions originally instituted in that court. *Woody v. Fountain, supra.*

Even though the proceeding be not transferred to the civil issue docket and the Superior Court acquires possession thereof on appeal, that court has full power to dispose of it. *Little v. Duncan,* 149 N. C., 84, 62 S. E., 770; *Ryder v. Oates,* 173 N. C., 569, 92 S. E., 508; *Bradshaw v. Warren,* 216 N. C., 354. Upon trial in Superior Court, it devolves upon plaintiffs to make out their title, and the burden is still upon them to establish the line as contended for by them. *Hill v. Dalton, supra; Woody v. Fountain, supra.* When the plaintiffs have established a legal title to the land, and the defendant undertakes to defeat a recovery by showing adverse possession for the required period of time, either with or without color of title, the defense is an affirmative one, and thereunto the defendant becomes the actor and has the burden of establishing it by the greater weight of the evidence. *Bryan v. Spivey,* 109 N. C., 57, 13 S. E., 766; *Ruffin v. Overby,* 105 N. C., 78, 11 S. E., 251; *Power Co. v. Taylor,* 194 N. C., 231, 139 S. E., 381.

As was said in *Power Co. v. Taylor, supra,* "This is not placing the burden of proof upon both parties at the same time, but is simply requiring the actor in each instance, while occupying that position, to carry the laboring oar."

In the case at bar the second issue does not relate to the ordinary plea of the statute of limitations, where the rule requires the plaintiffs to show that the action is not barred by the statute. Here the defendant invokes the statute in aid of his affirmative plea on which he had the burden of proof. Having tendered the issue, defendant cannot now complain as to its form. McIntosh, North Carolina P. & P., 545. *Phifer v. Alexander,* 97 N. C., 335; *Greene v. Bechtel,* 193 N. C., 94, 136 S. E., 294. The burden of proving the underlying fact of adverse possession remains the same.

Defendant excepts to the refusal of the court to submit the third issue tendered by him. The issues submitted are sufficient to present to the jury proper inquiries as to all the determinative facts in dispute, as well as to afford the parties opportunity to introduce all pertinent evidence and to apply it fairly. When thus tested, the issues submitted meet all

requirements. McIntosh, North Carolina P. & P., 545; *Gross v. McBrayer,* 159 N. C., 372, 74 S. E., 915; *Mann v. Archbell,* 186 N. C., 72, 118 S. E., 911; *Erskine v. Motor Co.,* 187 N. C., 826, 123 S. E., 193; *Hooper v. Trust Co.,* 190 N. C., 423, 130 S. E., 49.

In the case in hand the proposed issue bears upon evidentiary matter pertinent to the first issue. The evidence was received and so presented to the jury. There is no error in refusing to submit the issue.

Careful consideration of all other exceptions presented on this appeal convinces us that the case has been fairly tried and without prejudicial error. The verdict is supported by the evidence. The judgment is affirmed.

No error.

D. ELWOOD CLINARD ET AL. V. CITY OF WINSTON-SALEM ET AL.

(Filed 2 February, 1940.)

1. Courts § 10—

The validity of a municipal ordinance imposing restrictions upon the occupancy of property solely upon the basis of racial status involves a Federal constitutional question, and in the absence of a direct holding on the subject by the Supreme Court of the United States, the question must be determined by the implications of its decisions.

2. Municipal Corporations § 37: Constitutional Law § 11—Municipality may not provide exclusive residential districts respectively for white and Negro races.

The municipal ordinance in question provided reciprocal inhibitions of occupancy of residential districts by members of the white and Negro races, fairly apportioned, the provision being inserted in a general zoning ordinance adopted under authority of chapter 250, Public Laws of 1923. *Held:* Restrictions upon occupancy necessarily involved restrictions upon the purchase and sale of property, or the *jus disponendi,* which is an inherent right in property, and the denial of such right solely upon the basis of race is unconstitutional. *Buchanan v. Warley,* 245 U. S., 60, cited as controlling.

3. Constitutional Law § 7—

A zoning ordinance limiting the uses of property solely on the basis of race is beyond the scope of police power, since the reserved police power of a state must stop when it encroaches on the protection afforded the citizen by the Federal Constitution.

4. Municipal Corporations § 40—

Injunction will lie to restrain the enforcement of a municipal ordinance at the instance of a citizen who is thereby deprived of a constitutional right.

APPEAL by plaintiffs from *Alley, J.,* at September Term, 1939, of FORSYTH.

Civil action to restrain enforcement of zoning ordinance in so far as it inhibits use or occupancy of plaintiffs' property by members of the Negro race.

The facts are not in dispute:

1. On 12 December, 1930, the board of aldermen of the city of Winston-Salem adopted a comprehensive zoning ordinance, under authority of ch. 250, Public Laws of 1923, and provided therein that the city should be divided into a number of zones or districts, with certain regulations and restrictions applicable to the use and occupancy of the property situate in each zone or district.

2. None of these restrictions is questioned in the present action, save and except the following provision in section 10 of the ordinance: "In 'A-1,' 'B-1' and 'C-1' residence districts, no building or part thereof shall be occupied or used by a person or persons of the Negro race," with certain exceptions not presently pertinent.

3. Section 11 of the ordinance provides: "In 'A-2,' 'B-2' and 'C-2' residence districts, no building or part thereof shall be occupied or used by a person or persons of the white race," with certain exceptions similar to those contained in the preceding section.

4. It is found as a fact, and not here challenged, that the areas or districts assigned to the different races, for their exclusive use and occupancy, with the designated exceptions, are fairly located and equitably apportioned according to the respective percentage of each race as compared with the total population of the city.

5. By amendment to the zoning ordinance adopted 10 March, 1939, changing the boundaries of some of the districts, several houses owned by the plaintiffs on Greenwood Avenue were transferred from one area to another and are now situated in a residential district designated for occupancy or use only by a person or persons of the white race.

6. The plaintiffs are members of the white race, except W. A. Kelly, Jr., who is a member of the Negro race. The plaintiffs of the white race have leased their houses on Greenwood Avenue to persons of the Negro race, and W. A. Kelly, Jr., occupies his house as a residence and desires to continue so to use it.

7. Notices to quit, or to vacate, have been issued and served upon the occupants of the premises by the municipal authorities, defendants herein.

This action was instituted 14 June, 1939, to restrain the defendants from enforcing the provisions of the zoning ordinance in the particulars above set out. A temporary restraining order was issued, but upon the return hearing the judge refused to make it permanent. However, upon notice of appeal being given, by consent the original restraining order

was continued in force until the matter could be disposed of on the appeal under authority of the Varser Act, ch. 58, Public Laws 1921.

Elledge & Wells for plaintiffs, appellants.
Manly, Hendren & Womble and I. E. Carlyle for defendants, appellees.

STACY, C. J. The question for decision is whether reciprocal inhibitions of occupancy of residential districts by members of the white and Negro races, fairly apportioned, but admittedly invalid if they stood alone, may be inserted in a general zoning ordinance adopted under authority of ch. 250, Public Laws of 1923. We think not. The law will not permit the indirect accomplishment of that which it directly forbids. *Glenn v. Comrs. of Durham,* 201 N. C., 233, 159 S. E., 439.

The precise question seems to be one of first impression, certainly in this jurisdiction, albeit some of the cases speak of "segregation ordinances" as zoning ordinances, notably *City of Richmond v. Deans,* 37 Fed. (2d), 712, and *Allen v. Oklahoma City,* 52 Pac. (2d), 1054. The case of *Bowen v. City of Atlanta,* 125 S. E., 199, dealt with a zoning ordinance, but the decision there was rested on authority of a segregation case.

This Court held in 1914 that an ordinance providing for the segregation of the white and Negro races in the city of Winston-Salem was void for want of legislative sanction. *S. v. Darnell,* 166 N. C., 300, 81 S. E., 338. The reasoning of the case, like that in some of the others hereafter noticed, went farther than the narrow ground upon which it was decided, and would seem to be helpful here. There, it was said: "Besides, an ordinance of this kind forbids the owner of property to sell or to lease it to whomsoever he sees fit, as well as forbids those who may be desirous of buying or renting property from doing so where they can make the best bargains. Yet this right of disposing of property, the *jus disponendi,* has always been held one of the inalienable rights incident to the ownership of property, which no statute will be construed as having power to take away. In *Bruce v. Strickland,* 81 N. C., 267, it is said: 'The *jus disponendi* is an important element of property and a vested right protected by the clause in the Federal Constitution which declares the obligation of contracts inviolable.' . . . This ordinance forbids a white man or a colored man to live in his own house if it should descend to him by inheritance and should happen to be located on a street where the majority of the residents happen to be of such different race. . . . We therefore hold that the ordinance was adopted without authority of law." Nothing was said in *Berry v. Durham,* 186 N. C., 421, 119 S. E., 748, which was intended to delimit the adumbrations of the *Darnell case, supra.*

It is conceded that the question posed by the record is one arising under the Federal Constitution and is to be determined by the implications of the decisions of the Court of last resort in the absence of a direct holding on the subject.

In 1917 the Supreme Court of the United States had before it an ordinance of the city of Louisville, Ky., which forbade persons of one color "to move into and occupy as a residence" a house in any block in which a majority of houses were already occupied by persons of the other color. This ordinance was held to be void in an action brought by a white man against a colored man for specific performance of contract to purchase a lot in a block where a majority of the residences were then occupied by white persons. The contract of purchase relieved the defendant from obligation to perform if he were not permitted under the law "to occupy said property as a residence."

The Court in deciding the case stated the broad question presented for determination to be: "May the occupancy, and, necessarily, the purchase and sale of property of which occupancy is an incident, be inhibited by the States, or by one of its municipalities, solely because of the color of the proposed occupant of the premises?" The question was answered in the negative. *Buchanan v. Warley,* 245 U. S., 60.

In arriving at this conclusion the Court adverted to the cases of *Pressy v. Ferguson,* 163 U. S., 256 (where it was held that a statute of Louisiana requiring railway companies carrying passengers to provide in their coaches equal but separate accommodations for the white and colored races, did not run counter to the Fourteenth Amendment), and the *Berea College case,* 211 U. S., 45 (where it was held that a statute of Kentucky, while permitting the education of white persons and Negroes in different localities by the same incorporated institution, prohibited their attendance at the same place, was within the reserved power of the Legislature to deal with the charters of its own corporations), and distinguished the principle upon which these cases were decided by quoting with approval from the opinion in *Carey v. Atlanta,* 143 Ga., 192, 84 S. E., 456: "In each instance the complaining person was afforded the opportunity to ride, or to attend institutions of learning, or afforded the thing of whatever nature to which in the particular case he was entitled. The most that was done was to require him as a member of a class to conform with reasonable rules in regard to the separation of the races. In none of them was he denied the right to use, control, or dispose of his property, as in this case. Property of a person, whether as a member of a class or as an individual, cannot be taken without due process of law." This same distinction finds full support in our own decisions as pointed out by *Hoke, J.,* in *Berry v. Durham, supra.* See *Missouri ex rel. Gaines v. Canada,* 305 U. S., 337; Annotation, 103 A. L. R., 713.

In *Harman v. Tyler,* 273 U. S., 668, decided in 1927, and *City of Richmond v. Deans,* 281 U. S., 704, decided in 1930, the former was reversed and the latter affirmed, without written opinion or further elaboration, on authority of the *Buchanan case, supra,* and this after the decision in *Euclid v. Ambler Realty Co.* (1926), 272 U. S., 365, where a general zoning ordinance was upheld which contained no provision for segregation of the races such as the one here challenged. *In re Appeal of Parker,* 214 N. C., 51, 197 S. E., 706. Thus, it appears that the Court has purposely refrained from modifying or delimiting its decision in the *Buchanan case, supra,* and has elected to regard it as the final pronouncement on the subject. It is broad enough to cover the instant case and is therefore controlling.

We are presently concerned, as was the Court in the *Buchanan case, supra,* with municipal restrictions upon the use and occupancy of property as affected solely by the racial status of the proposed occupant. The matter is regarded as beyond the reach of the police power. *Booth v. Illinois,* 184 U. S., 425; *Otis v. Parker,* 187 U. S., 606. "The reserved police power of the State must stop when it encroaches on the protection accorded the citizen by the Federal Constitution." *Women's Kansas City St. Andrew Society v. Kansas City, Mo.,* 58 F. (2d), 593.

The right of the plaintiffs to test the disputed provision by injunction is not controverted. Indeed, there is ample precedent for the action. *Loose-Wiles Co. v. Sanford,* 200 N. C., 467, 157 S. E., 432; *Advertising Co. v. Asheville,* 189 N. C., 737, 128 S. E., 149. See, also, concurring opinions in *Turner v. New Bern,* 187 N. C., 541, 122 S. E., 469, and *R. R. v. Goldsboro,* 155 N. C., 356, 71 S. E., 514.

We conclude that on the record as presented the plaintiffs are entitled to their prayer.

Error.

STATE v. W. T. WILSON.

(Filed 2 February, 1940.)

1. Embezzlement § 6—Admission of minutes and orders of court at previous term, raising inference that defendant had mismanaged funds held error.

This was a prosecution of a public guardian for embezzlement of certain funds of one of his wards. The court permitted to be read to the jury and admitted in evidence minutes of a previous term of court containing statements of a Superior Court judge and a former foreman of the grand jury suggestive of their opinion that the irregularities in the guardianship accounts of defendant were so grave as to require the appointment of a receiver and an order restraining defendant from disposing of any property, and permitted to be read to the jury and admitted

in evidence a prior order of the Superior Court judge presiding at the trial removing defendant as public guardian on the ground that he had mismanaged funds belonging to the estates of his wards. *Held:* The only question at issue was whether defendant, while acting as guardian of the estate of the named ward, had converted to his own use the sum of money belonging to this ward's estate with fraudulent intent, and the admission of the minutes and orders of previous terms of court in evidence was prejudicial error.

2. Criminal Law §§ 30, 41b—

It is error to permit the solicitor, while cross-examining defendant in a criminal prosecution, to read certain allegations of fact in a complaint in a civil action relating to the same subject matter and to ask defendant if he had not failed to deny them by answer. C. S., 533.

3. Criminal Law § 41b: Embezzlement § 6—Ordinarily, State may not offer affirmative evidence relating to collateral matters adduced on cross-examination.

While in a prosecution for embezzlement the solicitor may cross-examine defendant about the administration of other estates of which defendant was guardian and question him in regard to independent indictments then pending against him in connection therewith, for the purpose of impeaching defendant, the State may not introduce affirmative evidence of such collateral matters without showing that they were so connected with the offense charged as to be competent for the purpose of showing intent.

4. Criminal Law § 81d—

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

APPEAL by defendant from *Clement, J.*, at May Term, 1939, of FORSYTH. New trial.

The defendant was charged in the bill of indictment with embezzlement, in that while acting as guardian of the estate of John P. Charles, incompetent, he fraudulently and feloniously converted to his own use the sum of $700 belonging to said estate.

The State's evidence tended to show that upon the defendant's qualification as guardian of the estate of this ward on 7 June, 1938, there were turned over to him by the former guardian United States Treasury notes of the par value of $700; that $600 par value of these notes were sold by the defendant 14 June, 1938, for the sum of $611.52, and the proceeds converted to his own use. It was also in evidence that the defendant had been appointed public guardian in Forsyth County and as such had qualified as guardian of numerous other estates. The defendant testified in his own behalf and offered evidence tending to explain the transactions shown by the State's evidence and to negative the existence of fraudulent intent.

There was verdict of guilty, and from judgment imposing prison sentence, defendant appealed.

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

W. P. Sandridge for defendant.

DEVIN, J. The defendant noted numerous exceptions during the trial, and the case on appeal is quite voluminous. However, in the view we take of the case, it will not be necessary to discuss all the exceptions noted and brought forward in the assignments of error, or to recite the evidence in detail, as we decide there must be a new trial for errors in the admission of certain testimony prejudicial to the defendant.

The defendant's motion to quash and his plea in abatement were properly overruled. The facts found by the trial judge sustain his ruling in this respect. Nor was there error in the denial of defendant's motion for judgment as of nonsuit under the statute, as the evidence was sufficient to be submitted to the jury as to all the elements of the criminal offense charged in the bill of indictment.

During the course of the trial the court permitted the solicitor, over defendant's objection, to offer in evidence and read to the jury the minutes of a previous term of the court, December Term, 1938, containing report of statements made by the then presiding judge, Judge Sink, to the grand jury, including remarks by the solicitor and the foreman of the grand jury, relative to the necessity and importance of an audit of guardianship accounts in the county, reference being made to those of the public guardian. The State also offered other portions of the minutes of the December Term, including report by the foreman of the grand jury and the remarks of the presiding judge thereon, as follows: "The grand jury, upon investigation of the administration of the public guardian, Mr. W. T. Wilson, as fully as it has been able to do from the partial report of the auditors under the court's order, and other available data, is of the opinion and finds as a fact that conditions are so chaotic and the records so poorly kept that the public interest absolutely demands that a receiver be appointed for the assets of Mr. Wilson and his wife individually, until such time as a proper accounting may be had, we, therefore, respectfully recommend such action at this time."

"Mr. Foreman and Gentlemen of the Grand Jury:

"The report the court has just read is one involving subject matter of great and vital interest to the people of Forsyth County and the State of North Carolina. It evidences a degree of resourcefulness that bespeaks its usefulness for the future. . . . You have suggested the

appointment of a receiver, an unusual and so far as this court knows a course without precedent in North Carolina. The court is of the opinion, however, in the light of your findings of fact, that there is no alternative to appointing a temporary receiver and in the light of this recommendation, the solicitor of the Eleventh Judicial District, Honorable J. Erle McMichael, is herewith ordered and directed by the court to prepare the formal order providing for the appointment of Honorable Dallace McLennan as receiver for all assets, documents, records and papers pertaining to or relating to the public guardianship. The said order will contain an order of restraint against W. T. Wilson as public guardian, W. T. Wilson, individually, and Mrs. W. T. Wilson from divesting, encumbering or otherwise transferring any money, property or other thing of value pending the hearing of the cause upon instruction of the court."

The vice of this evidence lay in the fact that it presented to the trial jury statements of a Superior Court judge and a former foreman of the grand jury suggestive of their opinion that the irregularities in the guardianship accounts of the defendant were so grave as to require the unusual procedure of the appointment of a receiver and a restraining order against the defendant's disposition of any of his property.

The propriety of the action of Judge Sink in making the orders referred to, at December Term, 1938, is not here questioned, but it was prejudicial to the defendant on this trial, charged with a felony, to have the weighty effect of those statements, opinions and court orders, relative to the matter then being inquired into, laid before the impaneled jury. The only question at issue in the trial was whether the defendant while acting as guardian of the estate of John P. Charles had converted to his own use the sum of $700, or any part thereof, belonging to his ward's estate, and whether this was done with fraudulent purpose and intent. *S. v. McDonald,* 133 N. C., 680, 45 S. E., 582.

The State was also permitted to offer in evidence and read to the jury, over objection, an order made by Judge Clement 20 February, 1939, removing the defendant as public guardian, on the recited ground "that the said W. T. Wilson, guardian, has made loans to himself (of) his wards' funds; that W. T. Wilson, guardian, has mismanaged the funds belonging to the estates of his wards." This statement, coming from the judge then presiding over the trial, that the defendant had "mismanaged" the funds of his wards, was improperly permitted to go to the jury and was prejudicial.

The solicitor while cross-examining the defendant was permitted to read to him certain allegations of fact contained in the complaint in a civil action against him and to ask him if he had not failed to deny them by any answer. This would seem to infringe upon the prohibition

contained in C. S., 533, that "No pleading can be used in a criminal prosecution against the party as proof of a fact admitted or alleged." *S. v. Ray,* 206 N. C., 736, 175 S. E., 109.

Over objection, the court permitted the solicitor to cross-examine the defendant at length about his transactions as administrator of an estate, as guardian of other estates, and as to improper use of his former office as mayor of the city. This examination was in accord with the rule permitting questions as to collateral matters for the purpose of impeachment, but it would not have been competent for the State to offer affirmative evidence of these collateral matters, to contradict the witness and in proof of such facts, unless they were so connected with the charge in the bill of indictment as to throw light on the question of fraudulent intent or to rebut special defenses. *S. v. Spaulding,* 216 N. C., 538; *S. v. Carden,* 209 N. C., 404, 183 S. E., 898; *S. v. Jordan,* 207 N. C., 460, 177 S. E., 333; *Gray v. Cartwright,* 174 N. C., 49, 93 S. E., 432; *S. v. Patterson,* 24 N. C., 346.

This rule would also exclude testimony offered by the State relating to other matters than those charged in the bill, and about which separate indictments against the defendant were pending, transactions which occurred prior to the defendant's qualification as guardian of the John P. Charles Estate, unless it be shown that they were connected with the particular offense under investigation or rendered competent under the established rule for the purpose of showing intent. *S. v. Stancill,* 178 N. C., 683, 100 S. E., 241; *S. v. Simons,* 178 N. C., 679, 100 S. E., 239; *S. v. Beam,* 184 N. C., 730, 115 S. E., 176; *S. v. Flowers,* 211 N. C., 721, 192 S. E., 110; *S. v. Smoak,* 213 N. C., 79, 195 S. E., 72; *S. v. Godwin,* 216 N. C., 49.

We deem it unnecessary to discuss *seriatim* the many other exceptions noted by defendant to the rulings of the court below on the admission and exclusion of testimony, as they may not arise upon another trial.

We conclude that for the errors herein pointed out there must be a New trial.

BERTIE CUMMINGS, ADMINISTRATRIX OF HOWARD CUMMINGS, DECEASED, v. ATLANTIC COAST LINE RAILROAD COMPANY, INC.

(Filed 2 February, 1940.)

1. Railroads § 10—

No presumption of negligence on the part of a railroad arises from the mere fact that a mangled body of a human being is found on or near the track.

2. Same—Facts necessary to be shown in order to invoke doctrine of last clear chance.

When, in an action for wrongful death of a person struck by a train, plaintiff relies upon the doctrine of last clear chance, the burden is on him to show that at the time intestate was struck he was down or in an apparently helpless condition on the track, that the engineer saw, or by the exercise of ordinary care in keeping a proper lookout, could have seen intestate in time to have avoided the accident, and that the engineer failed to exercise such care, which failure proximately resulted in the accident, and each of these essential elements must be shown by legal evidence which raises more than a mere speculation or conjecture in order for plaintiff to be entitled to the submission of the issue.

3. Same—

The doctrine of last clear chance does not apply in cases where the trespasser or licensee upon the track of a railroad company is, at the time, in apparent possession of his strength and his faculties, since under such circumstances the engineer is justified in assuming, up to the very moment of impact, that such person will get off the track in time to avoid injury, and therefore the engineer need not stop the train or even slacken its speed.

4. Same—Evidence held insufficient to support issue of last clear chance.

Evidence tending to show that defendant was struck and killed by a train on a straight and comparatively unobstructed track without evidence as to intestate's position at the time of impact is insufficient to justify the submission of an issue of last clear chance, since the essential fact of whether intestate was down on the track in an apparently helpless condition is left in speculation and conjecture.

5. Same: Evidence § 42f—In order for a paragraph in a pleading to contain an admission it must make an admission by an independent statement of fact.

The evidence tended to show that intestate, while on or near the track, was struck and killed by a train. In its answer the defendant railroad company alleged that if plaintiff was struck or injured by its train, which it denied, that intestate carelessly and negligently lay down or placed himself on the tracks. *Held:* The statement is in the alternative, and further the words "placed himself upon the tracks" do not necessarily infer that he was lying upon the tracks, and therefore the allegation is not an admission that at the time intestate was struck he was lying on the track in a helpless or apparently helpless condition.

6. Evidence § 42f—

Whether an allegation in a pleading constitutes an admission is a question of law for the court.

APPEAL by plaintiff from *Burney, J.*, at February Term, 1939, of ROBESON.

Civil action for recovery of damages for alleged wrongful death. C. S., 160.

Plaintiff alleges that the intestate Howard Cummings was killed on the night of 17 August, 1938, when one of the trains of defendant ran

over him and that his death "was caused by the negligence of the defendant in that it operated its train at a terrific and unlawful and negligent rate of speed, in that it did not equip its train with proper lights and proper brakes so that it could stop the train after seeing or having an opportunity to see plaintiff's intestate, in that the agents of the defendant did not keep an active and proper lookout, and did not cause the train to be stopped after seeing or having an opportunity to see plaintiff's intestate on the track, in that defendant did not blow its whistle or horn or give any warning that it was approaching and in that defendant was negligent of its duty in keeping a proper lookout or in its duties toward mankind that it did not stop after running over and killing plaintiff's intestate."

Defendant denies the material allegations of the complaint, and pleads the contributory negligence of intestate in bar of any right to recover herein.

On the trial below plaintiff offered evidence tending to show that her intestate, Howard Cummings, twenty-seven years old and an able-bodied farmer, lived with his family in a house on the farm of Russell Livermore, situated on the west side of and about forty-five yards from the double railroad track of defendant, and about two and a half miles north of Pembroke in Robeson County, North Carolina; that from said house the track is straight for three miles to the south and for a mile and a half to the north; that for a distance of five hundred yards south, and a mile north the track is level; that trains running north travel on the east track, and those running south on the west track; that the highway from Pembroke to Red Springs runs parallel to and between three hundred and five hundred yards east of the railroad; that a farm road about eight feet wide extends from this highway to and across the railroad at a point near the house in which plaintiff's intestate resided; that in getting from the highway to said house one "would use the plantation road"; that neither the road nor the crossing is public nor "kept up by the county"; and that while there were cotton and corn fields on each side of the track, the right of way was clear for twenty feet on each side thereof.

Evidence for plaintiff further tended to show that: About noon on 17 August, 1938, her intestate left his home walking to the highway to meet a man and to go to Lumberton "to see his tobacco sold"; that he rode to Lumberton on a truck operated by one Brock Jacobs, who drove for Mr. Livermore; that about five o'clock in the afternoon he was seen riding in the truck with Jacobs about three miles from and in the direction of Pembroke, and was later seen in Pembroke; that he did not return to his home, but he was seen that night in Lumberton drinking beer; that about 10:30 o'clock that night when last seen alive, in so far

as the evidence reveals, he was standing with Brock Jacobs outside of Sally Jane's Cafe in Lumberton "in a drunken, staggering condition"; that between six and seven o'clock the next morning his wife discovered his mangled remains on the east side of the northbound track, a few yards north of the farm road crossing over the railroad near his home, and that since then but before the trial below Brock Jacobs was killed.

Plaintiff's evidence further tends to show that the left hand was entirely cut off; that both legs were almost severed at the ankle; that there was a hole in the back of the head and another in the back; that the body was otherwise bruised; that his hat and the severed hand were found on the crossing, the hand resting, as testified by the wife, between the two tracks and by others between the rails of the east or northbound track; that blood, brains and hair were seen on the crossing on the outside rail of east track; that the body lay a few feet from the track, with feet nearer to track than the head; that the hat and the hand were between the blood and the body; that right off the track north of the crossing and of the body there were some tobacco sheets, that is, sheets intestate used to cover tobacco as it was carried to market; that the sheets were "torn all to pieces" and ground up; that "there was sign of it at the crossing."

Plaintiff further offered in evidence that portion of defendant's answer which read: "that if plaintiff's intestate was struck or injured by a train of this defendant (which is expressly denied), then, at the time plaintiff's intestate was struck he was a trespasser upon the right of way and tracks of defendant; that he carelessly and negligently lay down or placed himself upon the tracks of the defendant with full knowledge of the extreme peril of his position."

There is evidence for plaintiff tending to show that the wife of intestate, who admittedly slept a part of the night, and of others residing along the railroad in the vicinity of the scene of the accident did not hear any whistle blowing or bells ringing during the night.

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

McKinnon, Nance & Seawell for plaintiff, appellant.
Thomas W. Davis and McLean & Stacy for defendant, appellee.

WINBORNE, J. Appellant in challenging judgment below contends that the court erred for that the evidence when taken in the light most favorable to plaintiff is sufficient to justify and to require the submission of the case to the jury under the doctrine of last clear chance. We are unable to agree that the challenge is well taken.

No presumption of negligence on the part of the railroad arises from the mere fact that the mangled body of plaintiff's intestate was found on or near the track. *Upton v. R. R.*, 128 N. C., 173, 38 S. E., 736; *Clegg v. R. R.*, 132 N. C., 292, 43 S. E., 836; *Harrison v. R. R.*, 204 N. C., 718, 169 S. E., 637.

The doctrine of last clear chance does not arise until it appears that the injured party has been guilty of contributory negligence. *Redmon v. R. R.*, 195 N. C., 764, 143 S. E., 829. When the doctrine is relied upon the burden is on the plaintiff to show by proper evidence:

(1) That at the time the injured party was struck by a train of defendant he was down, or in an apparently helpless condition on the track; (2) that the engineer saw, or, by the exercise of ordinary care in keeping a proper lookout could have seen the injured party in such condition in time to have stopped the train before striking him; and (3) that the engineer failed to exercise such care, as the proximate result of which the injury occurred. *Upton v. R. R., supra; Clegg v. R. R., supra; Henderson v. R. R.*, 159 N. C., 581, 75 S. E., 1092; *Smith v. R. R.*, 162 N. C., 29, 77 S. E., 966; *Davis v. R. R.*, 187 N. C., 147, 120 S. E., 827; *George v. R. R.*, 215 N. C., 773, 3 S. E. (2d), 286.

The doctrine of last clear chance does not apply in cases where the trespasser or licensee upon the track of a railroad, at the time, is in apparent possession of his strength and faculties, the engineer of the train which produces the injury having no information to the contrary. Under such circumstances the engineer is not required to stop the train or to even slacken its speed, for the reason he may assume until the very moment of impact that such person will use his faculties for his own protection and leave the track in time to avoid injury. *Redmon v. R. R., supra; Rimmer v. R. R.*, 208 N. C., 198, 179 S. E., 753; *Pharr v. R. R.*, 133 N. C., 610, 45 S. E., 1021; *Reep v. R. R.*, 210 N. C., 285, 186 S. E., 318; *Lemings v. R. R.*, 211 N. C., 499, 191 S. E., 39; *Sherlin v. R. R.*, 214 N. C., 222, 198 S. E., 640.

There must be legal evidence of every material fact necessary to support the verdict, and such verdict "must be grounded on a reasonable certainty as to probabilities arising from a fair consideration of the evidence, and not a mere guess, or on possibilities." 23 C. J., 51; *S. v. Johnson*, 199 N. C., 429, 154 S. E., 730; *Denny v. Snow*, 199 N. C., 773, 155 S. E., 874; *Shuford v. Scruggs*, 201 N. C., 685, 161 S. E., 315; *Allman v. R. R.*, 203 N. C., 660, 166 S. E., 891.

Tested by these principles the evidence offered leaves the instant case in the realm of speculation. While there is no evidence that a train passed the scene of the accident during the night in question, it may be inferred from the evidence as to the physical condition of the body and accompanying signs at the scene that the intestate was struck and killed

by a train. Yet these physical facts present no reasonable theory to the exclusion of many others as to the circumstances under which the accident occurred. In what position was intestate when struck? The evidence is consonant with any of many theories which may be advanced with equal force, but all of which are speculative and rest in mere conjecture. The probabilities arising from a fair consideration of such evidence afford no reasonable certainty on which to ground a verdict upon an issue of last clear chance.

This case is distinguishable from the case of *George v. R. R., supra,* and is not controlled by the decision therein.

It is contended by appellant that, if the evidence otherwise offered by plaintiff be insufficient to take the case to the jury on the question as to whether the intestate was lying on the track in a helpless or apparently helpless condition at the time he was struck, the extract from the answer of defendant, introduced in evidence by her, certainly places intestate on the track in such condition. However, reference thereto reveals words which may not be fairly and properly interpreted as an admission of a fact. Rather the words that he "lay down or placed himself upon the tracks" constitute an alternative expression. The clause, "placed himself upon the tracks," may appropriately apply to any position, lying, sitting or standing upon the tracks. To become an admission the words used in the pleading must form an independent statement of fact. Whether they constitute such statement is a question of law for the court.

The judgment below is

Affirmed.

DR. R. G. ROSSER, J. M. TYSON, W. D. McGRANEY AND A. K. THOMPSON v. W. D. MATTHEWS, COMMISSIONER.

(Filed 2 February, 1940.)

1. Appeal and Error § 40a—

In injunction proceedings where there is no request that the court find the facts, it will be presumed on appeal that the court found facts sufficient to support its judgment.

2. Appeal and Error § 37c—

On appeal in injunction proceedings the Supreme Court has the power to find and review the findings of fact.

3. Taxation § 40c—Taxpayer may not enjoin foreclosure of lands for taxes on ground of mismanagement of its fiscal affairs by the taxing unit.

Where judgments of foreclosure of lands for nonpayment of taxes are regularly entered according to the usual course and practice of the court, after personal service on the landowners, who file answer, their attempt to restrain sale by the commissioner on the ground of insufficient notice

of the judgments is not supported by the record, nor may they restrain the sale on the ground of mismanagement and negligence on the part of the taxing unit in handling its fiscal affairs.

4. Same: Judgments § 22b—

The procedure to attack judgments of foreclosure of lands for nonpayment of taxes on the ground of want of sufficient notice of such judgments is by motion in the cause and not by independent action against the commissioner to restrain him from selling the lands as directed by the judgment.

APPEAL by plaintiffs from *Phillips, J.*, at April Term, 1939, of MOORE. Affirmed.

Action to restrain sale of land under judgment of foreclosure. From an order dissolving the temporary restraining order, plaintiffs appealed.

H. F. Seawell, Jr., and S. R. Hoyle for plaintiffs.
U. L. Spence and W. Duncan Matthews for defendant.

DEVIN, J. The town of Vass instituted tax foreclosure suits against the several plaintiffs to sell lands for the nonpayment of taxes. The summonses, together with copies of complaints, were duly served, and the plaintiffs, defendants in those actions, filed answers. Judgments in those suits were rendered in favor of the town 1 April, 1937, and the defendant Matthews was appointed commissioner of the court to make the sales after due advertisement. The defendant commissioner, pursuant to the judgments, advertised the sales for 6 February, 1939, and on that date these plaintiffs instituted independent action against the commissioner and obtained a temporary restraining order restraining the sales. Thereafter, upon due notice and hearing upon the pleadings, the restraining order was dissolved.

The plaintiffs set up as grounds for this action and for restraining the commissioner's sale that the judgments taken against them were without notice to them, and that the judgments were contrary to law for the alleged reason that they as individuals received no benefits from the town; that tax money had not been properly applied, and some was negligently lost in a bank failure, and that a bonded indebtedness had been wrongfully placed upon the town.

The facts set up in the answer tended to show proper service and notice to the plaintiffs of the foreclosure suits; that these suits were regularly calendared for trial at a regular term of the Superior Court of the county; that they were duly reached for trial, and the defendants consented to waive jury trial and that the court should find the facts; that the presiding judge, Frank S. Hill, entered the judgments of foreclosure according to the usual course and practice of the courts, and

appointed the defendant commissioner to sell; that several of the plaintiffs have at times been officers of the town, and that they receive the same benefits as others in same situation; that some of these same plaintiffs instituted suit relative to the issuance of the bonds of the town in 1929, and the action was decided in favor of the town; that if any money was lost by reason of failure of the bank it was not the fault of the town, and this could not be interposed now as a defense to an action for nonpayment of taxes.

The facts set up in the answer are sufficient to sustain the action of the court below in dissolving the restraining order. While the court made no findings of fact, there was no request that he do so. In the absence of such request it will be presumed that sufficient facts were found to support the judgment. *Dunn v. Wilson,* 210 N. C., 493, 187 S. E., 802; *Hinkle v. Scott,* 211 N. C., 680, 191 S. E., 512. Furthermore, this Court has power to find and review the findings of fact on appeal in injunction proceedings. *Angelo v. Winston-Salem,* 193 N. C., 207, 136 S. E., 489; *Dennis v. Redmond,* 210 N. C., 780, 188 S. E., 807.

It may also be said that there are no facts set up in the complaint that would justify the court in restraining the commissioner who had been duly appointed under judgments of foreclosure in actions based upon the nonpayment of taxes. The plaintiffs allege in their complaint that they filed answers to the tax suits, but complain that they had no opportunity to present their defenses to the court. The facts appear to the contrary. But if there had been insufficient notice of the judgments, application for relief should have been by motions in the cause and not by independent action against the commissioner appointed by the court. C. S., 600; *Fowler v. Fowler,* 190 N. C., 536, 130 S. E., 315; *Buncombe County v. Penland,* 206 N. C., 299, 173 S. E., 609.

The judgment dissolving the restraining order is

Affirmed.

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

(Filed 2 February, 1940.)

1. Appeal and Error § 43—

The petition to rehear on the ground that the Court was inadvertent to one of the grounds upon which plaintiff attacked the constitutionality of the statute involved in the case is allowed.

2. Same—

Where the Supreme Court is evenly divided in opinion, one Justice not sitting, as to whether there was error in the opinion of the Court in the

construction of the statute attacked by plaintiff in the action, plaintiff's petition to rehear on this ground will be denied.

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

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

PETITION to rehear this case, reported in 216 N. C., 114.

Straus, Reich & Boyer, M. James Spitzer, Manly, Hendren & Womble, and W. P. Sandridge for plaintiff, petitioner.

Attorney-General McMullan and Assistant Attorneys-General Bruton and Gregory for defendant, respondent.

Bailey & Lassiter, amicus curiæ.

CLARKSON, J. The petition deals with a matter of form and also with one of substance.

The petition alleges an inadvertence in the interpretation of petitioner's position in that it was stated that petitioner challenged the act only upon the ground that it violates the Commerce Clause of the Constitution of the United States, whereas petitioner likewise challenged the enactment as "Offending against the privileges and immunities and the equal protection of the law clauses of the Constitution of the United States." It is contended by respondents that those matters were dealt with in substance, though without specific mention, in the body of the former opinion. However, to this extent the petition is allowed.

The petition further alleges error in the construction of the statute. "The court being evenly divided on this phase of the petition, *Seawell, J.*, not sitting, the petition is sustained only to the extent above indicated.

Petition dismissed in part and sustained in part.

WINBORNE, J., concurring in the partial allowance of the petition and dissenting from its dismissal in part:

The opinion heretofore filed in this case imputes to the statute a meaning not warranted by its terms. The construction is a forced one. It is conceded on all hands that if the tax is laid on the privilege of taking orders for goods to be shipped in interstate commerce, the act offends against the Constitution of the United States.

The provision of the act is that: "Every person, firm, or corporation, not being a regular retail merchant in the State of North Carolina, who shall display samples, goods, wares, or merchandise in any hotel room, or in any house rented or occupied temporarily for the purpose of securing orders for the retail sale of such goods, wares, or merchandise so displayed, shall apply for in advance and procure a State license from the Commissioner of Revenue for the privilege of displaying such samples, goods, wares, or merchandise, and shall pay an annual privilege tax

of two hundred fifty dollars ($250.00), which license shall entitle such person, firm, or corporation to display such samples, goods, wares, or merchandise in any county in this State." Public Laws 1937, ch. 127, sec. 121, subsec. (e).

This is the exact language of the statute. It admits only of the interpretation that it is a tax on the privilege of taking orders for goods to be shipped in interstate commerce. The authorities are one in holding that such legislation is unconstitutional.

Nor can the construction heretofore given to the statute save it from constitutional offense. If the tax imposed be a "use tax," it is discriminatory. *Leonard v. Maxwell,* 216 N. C., 89.

STACY, C. J., and BARNHILL, J., join in this opinion.

IN THE MATTER OF J. L. MILLER, ADMINISTRATOR OF M. H. STANSBERRY. DECEASED.

(Filed 2 February, 1940.)

Executors and Administrators § 15j—Petitioners held precluded from asserting claim of right to offset debt due estate by failure to assert such claim in apt time.

When judgment upon a money demand is rendered in favor of the administrator of an estate against the parents of decedent, and at the same term of court judgment is rendered against the administrator upon obligations of decedent which were outstanding at the date of his death in favor of his parents, the failure of the parents to demand at that time the right of offset precludes them from thereafter asserting the right to offset as against the general creditors of the estate, the assets of the estate being insufficient to pay general creditors in full. Whether a person is entitled to offset a debt due by him to an insolvent estate by his claim against the estate, *quære.*

APPEAL by administrator from *Alley, J.,* at July Term, 1939, of ASHE. Reversed.

Ira T. Johnston and Grant Bauguess for appellant.
Bowie & Bowie for appellees.

SEAWELL, J. This proceeding involves the propriety and validity of set-off between the administrator and a debtor-creditor of the estate upon matters of debt between appellees and the intestate Stansberry prior to

the death of the latter, as a procedural matter in the settlement and distribution of the estate.

During the lifetime of M. H. Stansberry, William H. Stansberry and Julia Stansberry, father and mother, executed to him a deed for land, in consideration of the payment on the part of the son of $600.00, and his further undertaking to support and maintain them for the term of their natural lives. After the death of the son, William H. Stansberry and Julia Stansberry brought a suit to set aside the deed, on the ground that it was made upon condition precedent, which was impossible of performance, because of the death of M. H. Stansberry. The deed was set aside and the administrator recovered against W. H. Stansberry and Julia Stansberry a judgment in the sum of $600.00 which had been paid as part consideration for the execution of the deed.

At the death of M. H. Stansberry there were outstanding obligations of his to William H. Stansberry and Julia Stansberry in the total sum of $836.82, which were reduced to judgment at the same term of the Superior Court at which the judgment in favor of the administrator and against the Stansberrys was obtained.

The administrator filed his account with the clerk of the court, declining to permit the judgment obtained by him to be offset by the judgments obtained against him by the Stansberrys, recognizing only the *pro rata* part of the latter judgments as proper allowances in the final account and in distribution of the assets among the general creditors, as the assets of the estate were insufficient to pay all the general creditors the full sums due them after distribution on preferred claims in accordance with C. S., 93.

Julia Stansberry and W. H. Stansberry appealed from the order of the clerk of the court approving the account of the administrator disposing of these items, and at July Term, 1939, of Ashe Superior Court, a judgment was rendered by Judge Alley reversing the order of the clerk of the Superior Court referred to upon exceptions thereto and requiring offset to be had between the judgments of Julia Stansberry and W. H. Stansberry and the judgment obtained against them by the administrator. From this the administrator appealed.

The decisions of this Court cannot be regarded as entirely consistent with respect to the right of the debtor-creditor of an insolvent estate to have his claim offset that of the administrator, (*Ransom v. McClees,* 64 N. C., 17, 22; *Rountree v. Britt,* 94 N. C., 104; *Pate v. Oliver,* 104 N. C., 458, 10 S. E., 709; *Whitlock v. Alexander,* 160 N. C., 465, 76 S. E., 538; but we do not feel that it is necessary to pass upon the question as developed in these decisions. It seems clear to us that the petitioners in this case had full opportunity to assert their claim against

the estate in the litigation pending between them and the administrator at the same term of the Superior Court, when independent judgments were obtained and cannot now be allowed to do so even if that procedure should be held permissible upon objections to a final account.

Upon the facts of this case, the judgment is

Reversed.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1940

R. L. JOHNSON v. PILOT LIFE INSURANCE COMPANY.

(Filed 28 February, 1940.)

1. Limitation of Actions § 16—

While the burden is on plaintiff to show that his cause of action is not barred by the statute of limitations, and in an action for fraud must show that the cause was instituted within three years from the discovery of the fraud or the time it should have been discovered in the exercise of due diligence, proof of mental incapacity until within the statutory period is sufficient.

2. Limitation of Actions § 7: Insane Persons § 19—Adjudication of sanity is evidence of sanity but is rebuttable in independent action.

Plaintiff instituted this action to recover disability benefits alleged to be due him under the terms of a life insurance policy and to rescind on the ground of fraud a release of liability signed by him. Defendant introduced in evidence an adjudication of the sanity of plaintiff entered in a lunacy proceeding more than three years prior to the institution of the action, and moved to dismiss as of nonsuit on the ground that the action was barred by the three-year statute of limitation. *Held:* The adjudication of sanity is not binding on those who were not parties or privies to the proceeding, and while it is evidence of sanity, it is rebuttable, and this evidence, together with defendant's other evidence tending to show the sanity of plaintiff, does not entitle defendant to judgment as of nonsuit when plaintiff offers evidence in rebuttal tending to show mental incapacity from the time of the occurrence of the accident causing disability up to the time of the institution of the action.

3. Limitation of Actions § 7—

The failure of the guardian to institute actions which he has the authority and duty to bring on behalf of his ward is the failure of the ward, entailing the same legal consequences with respect to the bar of the statutes of limitation.

4. Same—Evidence held not to show that guardian knew or should have known of fraud and his failure to institute suit does not bar ward.

Plaintiff instituted this action to recover disability benefits alleged to be due him under the terms of a life insurance policy and to rescind on the ground of fraud a release of liability signed by him. Defendant introduced evidence that plaintiff had been adjudged insane and a guardian appointed for him more than three years before the institution of the action, and contended that the mental incapacity asserted by plaintiff as a disability preventing the running of the statute was terminated by the appointment of the guardian, and that the statute having begun to run upon the appointment of the guardian more than three years prior to the institution of the action, the cause was barred unaffected by a later adjudication of plaintiff's sanity and the termination of the guardianship. *Held:* Whether the guardian knew, or was put upon inquiry which would have discovered the alleged fraud, is determinative of whether the guardian should have instituted action, and the evidence is insufficient to support a holding, as a matter of law, that the cause of action was barred.

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

APPEAL by plaintiff from *Cowper, Special Judge,* at September Term, 1939, of NASH. Reversed.

Dan B. Bryan, Harold D. Cooley, and I. T. Valentine for plaintiff, appellant.

Smith, Wharton & Hudgins, Battle & Winslow, and O. B. Moss for defendant, appellee.

SEAWELL, J. The appeal of the plaintiff is from a judgment as of nonsuit made at the conclusion of plaintiff's evidence and at the conclusion of all the evidence.

Plaintiff sued on an insurance contract containing provisions for the payment of fixed installments to the insured on proof of total and permanent disability, as defined in the contract and, upon the conditions named, waiving further payment of premiums.

Plaintiff claims that by reason of an accident, presently described, he was disabled within the meaning of the insurance policy and liability thereon had accrued. He further complains that while he was physically weak and without mental capacity to make a contract, the defendant, through its representatives and agents, came to see him and fraudulently procured from him a release from liability on the payment to him of the sum of $5,000.00, which he alleges is an unfair and inadequate consideration. He seeks to have this settlement rescinded and to recover the amount alleged to be due on his insurance down to the institution of this action—$13,500.00, subject to the credit of $5,000.00 received in the challenged settlement.

The defendant admits the contract, denies liability upon it, pleads the release, and claims that the settlement was fair and unaccompanied by

any fraud or undue influence or unfair practice in its procurement. Defendant avers that plaintiff was mentally competent to execute the release and contends that the settlement, as it appeared at the time, was not unfavorable to plaintiff.

Defendant further pleads the bar of the statute of limitations, alleging that the plaintiff's cause of action did not accrue during the three years next preceding the commencement of this action.

The plaintiff, seeking to repel the bar of the statute, alleges that he was wanting in mental capacity, in fact was insane, and, therefore, under disability to sue from the time he sustained his injury, which resulted in his disablement under the terms of the policy, until a time well within the period of three years next preceding the institution of the action, and could not be held, therefore, to have discovered, during that period, the fraud perpetrated upon him.

In view of the conclusion we have reached in this case, much of the evidence need not be restated. We think the case boils down to a consideration of the bar of the statute of limitations and the evidence *pro* and *con* upon this point.

From the record, it appears that the plaintiff sustained his injury on 20 May, 1929. On that day he was run over and trampled by a mule on his farm. The upper vertebra of his neck was broken and he sustained other injuries which necessitated hospital treatment. He was put in a cast which reached from the base of the skull almost to the lower end of the spinal column, and remained in this condition for a long while.

Nurses at the hospital and certain persons who came in contact with him from that time on testified that he was mentally incapacitated from that time down to the trial of the case, and the evidence had sufficient body and probative force to be submitted to the jury on that point, if there is no legal impediment to its consideration. Against this evidence, and in contradiction thereof, the defendant offered much evidence to the effect that the plaintiff was mentally competent to transact business, not only at the time the release was procured, but for a time outside the three-year period, during which, as it contends, his cause of action must have accrued, if he had knowledge of the fraud perpetrated upon him or was put upon inquiry as to it. In support of this contention, the defendant introduced testimony of experts and evidence of many business transactions had between the plaintiff and others during that period which tended to prove him of sound mind.

Also, the defendant introduced records showing that the plaintiff had been committed to the State Hospital as an insane person and guardians appointed for him on 21 March, 1933, and the record of a lunacy proceeding had on 7 November, 1933, in which a jury found the plaintiff to be of sound mind, following which the guardianship ended and he

was restored to the management of his own affairs. In this connection, the defendant contends that under the evidence plaintiff's cause of action accrued during this guardianship, and, in support of that, introduced correspondence between the guardians and the insurance company relating to the insurance and settlement had with plaintiff. The defendant further contends that the order in the lunacy proceeding in which plaintiff was pronounced sane and restored to the management of his affairs is *res judicata* on this point in the present case and bars the plaintiff from asserting a condition of insanity contrary to that finding.

To summarize, the defendant insists, (a) that plaintiff is now barred from maintaining this action, since the statute began to run during the guardianship, and that the bar was effective, therefore, long before plaintiff sued, and (b) that the lunacy proceeding definitely established his status as a sane person; and whether or not the statute had begun to run before that, it must have run from that time, which was several days over the three-year period. This action was begun 28 November, 1936, and the adjudication was 25 November, 1933. This would have left the plaintiff only a part of three days in which to piece together the mental picture and make whatever investigation might be necessary before discovery might be said to be complete.

Defendant points out that since plaintiff is endeavoring to repel the statute, because of fraud practiced upon him, he must show affirmatively that such discovery was made, or that the circumstances putting him on inquiry occurred within the three-year period, and that upon this the record is silent.

Nothing else appearing, this is true; but all of these conditions may be met by proof of mental incapacity until within the statutory period, unless, as a matter of law, the plaintiff is precluded from the benefit of such evidence.

1. The mental capacity of the plaintiff was a fact, capable of proof as any other fact, regardless of the finding of the jury in the lunacy proceeding or the order of court following upon it. Certainly if a person is adjudged sane in a lunacy proceeding, he is no more conclusively so than he might be under natural conditions before the law became concerned with the inquiry, and an adjudication of such a court, when presented in a matter not connected with the immediate purpose and scope of the proceeding, when admissible at all, is no more than evidence. *Sprinkle v. Wellborn,* 140 N. C., 163, 52 S. E., 666.

Between those who are not parties or privies to the proceeding, an order in a lunacy proceeding under the statute adjudging a person of unsound mind, or an order in a subsequent proceeding adjudging a person to be of sound mind and restoring him to the management of his own affairs, is not *res judicata,* and is not necessarily conclusive of the

mental condition of the person discharged. It may serve as evidence of the condition it purports to find, but such presumptions as arise from it are rebuttable; Freeman on Judgments, 5th Ed., p. 1901, sec. 903; *Rippy v. Gant,* 39 N. C., 443; *Christmas v. Mitchell,* 38 N. C., 535; *Parker v. Davis,* 53 N. C., 460; *Slaughter v. Heath,* 127 Ga., 747; *Cathcart v. Massey,* 105 S. C., 329, 89 S. E., 1021; *Watson v. Banks,* 154 Ark., 396, 243 S. W., 844; *Challoner v. New York Evening Post Co.,* 263 Fed., 335; Annotations to *Westerland v. First National Bank,* 7 A. L. R., 568; and the better view is that where the plea of insanity is made, it is not incumbent upon the person who pleads it to specifically show that he became insane after the day of the adjudication. *Emory v. Hoyt,* 46 Ill., 258.

2. The briefs and argument raise the question whether the failure of the guardians to bring action started the running of the statute of limitations against the ward, and the litigants are entitled to the views of the court on that subject.

Decisions are not uniform on this subject. Necessarily, many of them must depend upon the relations between the guardian and the ward and between the two of them and the public, consequent upon statutory enactment. *Funk v. Wingert* (Md.), 6 A. L. R., 1686, 107 A., 345, and cases cited; see annotation, especially p. 1693.

C. S., 407, provides that a person entitled to commence an action (with certain exceptions not pertinent to this case), who is (1) within the age of twenty-one years or (2) insane, "may bring his action within the times herein limited after the disability is removed," with certain exceptions which need not be considered. It is contended that the appointment of a guardian, under our guardianship laws, will not start the running of the statute, but that the provision preserves the right of action to the ward intact when relieved of the disability of insanity, notwithstanding the guardianship. There is support for that position both in the State and Federal Courts with respect to the statutes construed in such supporting opinions. Among those cited are: *Robinson v. U. S.,* 12 Fed. Supp., 160; *Shanbegian v. U. S.,* 14 Fed. Supp., 93; *Johnson v. U. S.,* 87 Fed. (2d), 940; *Texas Utilities Co. v. West,* Tex. Civ. App., 59 S. W. (2d), 459; *Finney v. Speed,* 71 Miss., 32, 14 So., 465; *Bourne v. Hall,* 10 R. I., 139; *Masengale v. Barnes et al.* (Tex. Civ. App.), 106 S. W., (2d), 368; *Funk v. Wingert, supra.* Without analyzing these authorities with reference to the statutes upon which some of the decisions largely rest, we readily concede that they are strongly in support of the contention of the plaintiff on the general law of the subject. But a different rule obtains in North Carolina, and, we think, with reason.

The policy of repose which underlies statutes limiting the time in which actions may be brought would be imperfectly expressed if these statutes did not apply to all those who might bring such actions, and actions which might be brought in their behalf. On that theory, the representation of the ward by the guardian should be complete as to actions which the guardian might bring and which it was incumbent on him to bring, in so far as may be consistent with the limitations of his office.

Among other powers and duties of the guardian laid down in the law, we have the following: "C. S., 2169. To take charge of estate. Every guardian shall take possession, for the use of the ward, of all his estate, and may bring all necessary actions therefor." Under this, we apprehend that it is the duty of the guardian to bring suit, when necessary, upon the choses in action belonging to the ward's estate, and to recover any moneys due him, and to plead any equitable matter that may be necessary for recovery in such action.

A qualification must be made as to suits for realty, where the legal title is in the ward. *Culp v. Lee* (1891), 109 N. C., 675, 14 S. E., 74. Where this obstacle to a suit by the guardian does not arise, ordinarily the failure of the guardian to sue in apt time is the failure of the ward, entailing the same legal consequence with respect to the bar of the statute. *Cross v. Craven* (1897), 120 N. C., 331, 26 S. E., 940. Exposure to a suit by the guardian—one which was within the scope of both his authority and duty—for a sufficient length of time, would constitute a bar to the action of the ward. *Culp v. Lee, supra; Nunnery v. Averitt,* 111 N. C., 394, 16 S. E., 683. The clear import of these cases is against the position taken by the plaintiff.

But the statute we are considering starts running on the maturity of a psychological condition or event—discovery of the fraud or knowledge of circumstances which would put the person claiming the right to sue on inquiry. Upon the pertinent evidence, we are unable to hold, as a matter of law, that such condition existed.

We are of the opinion that the evidence is sufficient to carry the case to the jury, and the judgment as of nonsuit is

Reversed.

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

W. H. DAVIS AND WIFE, MARGARET DAVIS, v. THE FEDERAL LAND BANK OF COLUMBIA.

(Filed 28 February, 1940.)

1. Judgments § 32—Adjudication in foreclosure suit that mortgagors were not entitled to restrain execution of writ of assistance held to bar them from thereafter litigating identical question in subsequent actions.

Judgment by default final was entered in a foreclosure suit. Application for writ of assistance was resisted by the mortgagors on the grounds that they had been induced by fraud not to contest the foreclosure action and that it had been agreed that the mortgagors would be permitted to redeem after foreclosure. Mortgagors appealed from the order of the clerk directing the issuance of the writ. Mortgagors also made a motion in the cause to restrain the execution of the writ upon the same grounds and upon the further ground that the judgment failed to exclude from its effect certain mineral rights not conveyed by the mortgage, which motion was denied and the mortgagors appealed, but failed to perfect same. Thereafter, mortgagors made another motion to restrain execution of the writ upon the same grounds set forth in the prior motion, and further prayed for correction of the foreclosure judgment. This motion was denied and upon appeal to the Supreme Court it was ordered that the foreclosure judgment should be modified so that the mortgagors might litigate their claim to mineral rights, and that upon such modification being made, the plaintiff therein would be entitled to the writ of assistance, and judgment of the Superior Court was entered in accordance therewith and writ of assistance issued, and mortgagors excepted but did not appeal. During the period between the rendition of the decision of the Supreme Court and the modification of the judgment of the Superior Court in accordance therewith, mortgagors instituted two actions, one to adjudicate their claim to the mineral rights and the other to vacate the judgment and restrain the issuance of the writ of assistance. Mortgagors then moved to restrain execution of the writ of assistance by motion and petition which referred to both of the actions instituted by them, and to the foreclosure judgment, and this appeal is from the denial of this motion. *Held:* Even conceding that execution of a writ of assistance can be restrained in an independent action, the right to such relief had been finally adjudicated against mortgagors in the foreclosure suit to which they were parties, and they are precluded by such final adjudication from again seeking the same relief in either of the actions instituted by them.

2. Assistance, Writ of, § 5—

The proper remedy to restrain execution of a writ of assistance is by motion in the cause, since a writ of assistance is in the nature of an execution.

3. Courts § 3—

One Superior Court Judge may not review the judgment of another Superior Court judge or restrain him from proceeding in a cause in which he has full jurisdiction.

DAVIS *v.* LAND BANK.

APPEAL by plaintiffs from *Nettles, J.,* in Chambers, in Rockingham County, 15 August, 1939, from STOKES. Affirmed.

A civil action heard on motion to show cause why a temporary restraining order should not be continued to the hearing.

The defendant Land Bank instituted a civil action in the Superior Court of Stokes County against the plaintiffs herein and others for the foreclosure of a mortgage on a certain tract of land in Stokes County. There was judgment by default and foreclosure was had under the terms thereof, the Land Bank becoming the purchaser of the premises. Thereupon, on 30 December, 1937, the Land Bank applied to the court for a writ of assistance. The defendants in the suit, including the plaintiffs herein, answered denying the Bank's right of possession and resisting the granting of the motion for a writ of assistance for that said defendants, by the false and deceitful representations of the plaintiff therein, had been induced to refrain from filing an answer, and that the plaintiff therein had agreed that upon a foreclosure of said premises said defendants would be permitted to redeem the premises. Upon the hearing of the motion the clerk, on 19 February, 1938, entered his order directing the issuance of the writ. Defendants excepted and appealed. A writ of assistance was issued 14 March, 1938.

On 17 March, 1938, plaintiffs herein filed a petition and motion in said cause seeking an order restraining the plaintiff therein and the sheriff of Stokes County from executing the writ of assistance. The plaintiffs herein alleged in said petition that the judgment of foreclosure was irregular and void for that the said judgment and deed did not except therefrom the mineral rights in that portion of the land described in deed from J. E. Marshal to T. E. Davis; that they are the owners of said mineral rights and that they are tenants of all of said land other than the Marshal tract. They further allege the misrepresentations which induced them not to answer, an agreement not to bid and the alleged contract under which they should be permitted to redeem the property.

On 17 April, 1938, Harding, J., issued a temporary restraining order returnable before Bivens, J. The Land Bank having filed answer, Bivens, J., heard the motion on the order to show cause on 28 April, 1938, and dissolved the temporary restraining order. In his order Bivens, J., found "that the defendants are not entitled to injunctive relief, that their petition is without merit, and that the defendants' petition should be dissolved." He further authorized the said Land Bank and the sheriff of Stokes County to proceed with the execution of the writ of assistance theretofore issued. The plaintiffs herein excepted to the order of Bivens, J., and gave notice of appeal. Subsequently, at the August Term, 1938, Clement, J., found as a fact that the plaintiffs

herein had failed to effect said appeal and had abandoned same and so adjudged.

On 8 October, 1938, plaintiffs herein filed petition, supported by affidavit, in that cause in which they assert in part that they are the owners of the mineral rights in said land; the alleged contract or option to repurchase after foreclosure; the misrepresentations which induced them to refrain from filing answer and the alleged fraud through which the default judgment was procured and pray an amendment to the judgment of foreclosure and that said judgment be vacated. At the October Term, 1938, Clement, J., upon hearing the petition and motion, dismissed the appeal from the order of the clerk granting a writ of assistance and declined to amend the judgment so as to exclude and except the mineral interests from its operation. He likewise denied the motion of defendant therein to vacate the judgment for fraud.

From the judgment thus entered the plaintiffs herein appealed to this Court and this Court directed an amendment of the judgment in such manner as to show that the purchaser at the foreclosure sale acquired all such interest in the land as was conveyed by the mortgage. It further directed that certain language in the judgment should be modified to the end that the plaintiffs herein should not be precluded from thereafter asserting that the mortgage did not convey the mineral interests. *Land Bank v. Davis,* 215 N. C., 100.

Thereafter, in due course, final judgment was signed and entered in the Superior Court of Stokes County in accord with the opinion and judgment of the Supreme Court, and on 15 August, 1939, Nettles, J., issued a writ of assistance, to which the plaintiffs herein excepted but did not appeal.

On 20 April, 1939, plaintiffs herein instituted an action against the defendant to adjudicate their ownership of the mineral rights in said land, including roads, bridges, buildings, etc. They allege ownership by adverse possession; that the defendant is attempting to oust them from the possession of the land and that the possession they are maintaining and are entitled to maintain, is an essential incident to their ownership of the mineral rights. In this action they pray that they be adjudged the sole owners of the mineral rights and that the Court enter an order directing the defendants to refrain from interfering in any wise with the plaintiffs' possession and use, as at present, of the said land for the purpose of developing and working their mineral rights therein.

On 12 May, 1939, plaintiffs instituted another action against the defendant to vacate and annul the judgment in *Land Bank v. Davis, supra,* and to enforce the alleged contract of purchase and sale under which the plaintiffs were to be allowed to redeem. They likewise pray a restraining order against the issuance of a writ of assistance in the Land

Bank case. In this complaint plaintiffs make substantially the same allegations as to the misrepresentations which induced them to refrain from filing answer and as to the alleged contract to redeem and as to the fraud in obtaining the judgment of foreclosure which were contained in the motions filed and heard in the original Land Bank case.

On 11 May, 1939, plaintiffs filed a petition and motion for a restraining order in which reference is made to both of the pending cases, but it does not satisfactorily appear in which case the motion was made. Thereupon, the court issued an order to show cause why a temporary restraining order therein directed should not be continued to the hearing. On 15 August, 1939, the motion to show cause came on to be heard before Nettles, J. Upon the hearing Nettles, J., found "that the plaintiffs are not entitled to the relief prayed for, for the reason that it is not alleged that the plaintiffs have tendered performance of their part of the alleged contract with the defendant and it further appearing to the court . . . that the grounds upon which the plaintiffs seek to procure injunctive relief are virtually the identical grounds upon which the plaintiffs in a former action interposed by a motion in the cause, to restrain the issuance of a writ of assistance, and that upon the matter being heard before Hon. E. C. Bivens, Resident Judge, the Restraining Order was dissolved and from the dissolution of the Restraining Order these plaintiffs in that action did not perfect an appeal." The court further found that the facts presented at the former hearing were substantially those appearing on the motion and that the parties are identical. Thereupon, judgment was entered dissolving the restraining order. The plaintiffs excepted and appealed.

J. W. Hall, Fred M. Parrish, Roy L. Deal, and Benbow & Hall for plaintiffs, appellants.

Ingle, Rucker & Ingle for defendant, appellee.

BARNHILL, J. The record is in a most unsatisfactory condition. There are two complaints, neither one of which appears in the record as an exhibit. It is impossible for us to determine whether the application for the restraining order was made in the action first instituted or in the second action. As to this counsel themselves cannot agree. The plaintiffs assert in their brief that application was made in the action instituted in April. The defendant asserts that it was made in the action instituted in May. The reference in the order of Nettles, J., would seem to make it appear that it was issued in the second action, in which the plaintiffs allege a contract to purchase after the foreclosure. While this has required the statement of facts which would not otherwise be so necessary, perhaps it is not very material. In either event the same question of law is presented.

It seems apparent that the plaintiffs misapprehend the extent of the opinion of *Land Bank v. Davis, supra.* It was not there adjudged that the mortgage under which foreclosure was had did or did not convey the mineral interests. Neither was it adjudged that the plaintiffs are or are not the owners of the mineral interests in said land. It merely directed that the judgment be so amended as to show that the questions as to what the mortgage conveyed and as to the ownership of the mineral interests were reserved for future determination.

It was further decreed that upon the amendment being made the plaintiff therein was entitled to a writ of assistance.

The record discloses that the judgment in that action was amended in accord with the opinion of this Court and that on 15 August, 1939, Nettles, J., issued his order in the nature of a writ of assistance directing the sheriff of Stokes County to remove the plaintiffs herein from said premises and to place the Land Bank in possession thereof. To this order plaintiffs herein excepted but did not appeal.

The plaintiffs were parties defendant in the former action instituted by the Land Bank and are bound by the judgment entered. They twice appeared therein by motion and presented to the court the identical questions they now seek to present. The facts were found adversely to them and judgments were entered accordingly. While they excepted to the judgment entered by Bivens, J., they did not perfect their appeal. When they appealed from the order of Clement, J., the relief they sought was granted only to the extent that a correction of the judgment was directed. The judgments entered in the former action on the motions made therein constituted a final adjudication of their right to an order restraining the service of the writ of assistance issued by Nettles, J. Possession is an incident to ownership and the right of the possession was at issue in that case. Plaintiffs have had their day in court in respect thereto.

Now, by independent action, an effort is made to have another Superior Court judge to review the findings and conclusions of the two judges who heard the motions in the original action in a further effort to prevent the execution of the judgment decreed therein. The plaintiffs may not be permitted to so delay the enforcement of a judgment in an action in which they were parties and by which they are bound. Even if it be conceded that they may seek, in an independent action, injunctive relief against the issuance or the service of the writ of assistance, the matters at issue in that respect have already been adjudicated. It is well established in this jurisdiction that one Superior Court judge may not review the judgment of another Superior Court judge or restrain him from proceeding in a cause in which he has full jurisdiction. *Mitchell v. Talley,* 182 N. C., 683, 109 S. E., 882; *Caldwell v. Caldwell,* 189 N. C.,

805, 128 S. E., 329; *Dockery v. Fairbanks,* 172 N. C., 529, 90 S. E., 501; *Broadhurst v. Drainage Comrs.,* 195 N. C., 439, 142 S. E., 477; *Price v. Ins. Co.,* 201 N. C., 376, 160 S. E., 367; *Newton & Co. v. Mfg. Co.,* 206 N. C., 533, 174 S. E., 449.

The court, on motion in the cause and after notice, may stay or recall an execution. *Greenlee v. McDowell,* 39 N. C., 481; *Williams v. Dunn,* 158 N. C., 399, 74 S. E., 99; *Aldridge v. Loftin,* 104 N. C., 122; *Beckwith v. Mining Co.,* 87 N. C., 155; *Faison v. McIlwaine,* 72 N. C., 312; *Foard v. Alexander,* 64 N. C., 69. A writ of assistance is in the nature of an execution. The motion in the cause to enjoin or stay its issuance, the method first adopted by plaintiffs, was their proper remedy.

Furthermore, in their petition and motion for injunctive relief, whether we consider that it was made in one or both of the pending actions, reference is made to the Land Bank judgment thereby incorporating the same in the motion. Therefore, a consideration of the record leads us to the conclusion that the plaintiffs have failed to establish, in this action, any right to injunctive relief.

The court below has not undertaken to determine, as these plaintiffs assert, the merits of the plaintiffs' cause of action in which they claim the ownership of the mineral rights in the tract of land in question. They are at liberty to pursue this action to its final determination. In the meantime, they must surrender possession of the premises in accord with the former opinion and writ of assistance issued pursuant thereto.

Whether plaintiffs are entitled to such right of ingress and egress, etc., as may be necessary to enable them to make use of the mineral rights they claim to own is not adequately presented.

The judgment below is

Affirmed.

WILLIAM B. OAKLEY v. NATIONAL CASUALTY COMPANY.

(Filed 28 February, 1940.)

1. Insurance § 38—

An accident policy providing benefits if insured should become disabled in consequence of being struck by an automobile, but providing further that motorcycles are "excluded as automobiles under this policy," does not preclude recovery for disability resulting from a collision between an automobile and a motorcycle driven by insured.

2. Same—Definition of terms "unnecessary exposure to danger" and "voluntary exposure to unnecessary danger" used in accident policy.

As used in accident policies in excepting insurer from liability, the term "unnecessary exposure to danger" or "exposure to unnecessary danger"

covers any accident in which negligence of insured is a contributing cause, while the term "voluntary exposure to unnecessary danger" implies gross negligence on the part of the insured in the sense of a conscious exposure to a known peril, and when the trial court gives the definition of both of these terms and applies both to the policy in suit which employs in its exceptive clause only the words "unnecessary exposure to danger" the charge is erroneous as giving conflicting instructions upon a material point.

3. Appeal and Error § 39e—

Conflicting instructions on a material point entitles appellant to a new trial, since the jury cannot be presumed to know which of the conflicting statements is correct.

APPEAL by defendant from *Bone, J.*, at October Term, 1939, of NASH. New trial.

Dan B. Bryan and Harold D. Cooley for plaintiff, appellee.
S. L. Arrington for defendant, appellant.

SCHENCK, J. This is an action on a "special travel and automobile accident policy" issued to the plaintiff by the defendant. The issuance of the policy and the fact that it was in force and effect at the time plaintiff was injured by accident on 7 October, 1936, is admitted. It is the contention of the plaintiff that the policy insured against injury caused by the accident. It is the contention of the defendant that the policy did not so insure.

The policy provides that the defendant will pay to the insured certain benefits for disability resulting solely from bodily injuries effected "in consequence of being struck by an automobile," but "motorcycles . . . are excluded as automobiles under this policy," and "this insurance does not cover any loss contributed to, or caused by any . . . unnecessary exposure to danger."

The evidence tended to show that the plaintiff was riding south on South Church Street in Rocky Mount on a motorcycle and that one J. L. Fowlkes was riding north on said street in an automobile, that Fowlkes turned to his left to enter Union Street, which intersected South Church Street, and that the motorcycle of the plaintiff and the automobile of Fowlkes collided on plaintiff's right-hand side of South Church Street, resulting in the injury and disablement of the plaintiff.

The issues submitted to and answers made by the jury were as follows:

"1. Did the plaintiff sustain bodily injuries through accidental means resulting in his total disability within the meaning of the policy of insurance issued to him by defendant, as alleged in the complaint? Answer: 'Yes.'

"2. If so, was plaintiff's said injury or loss contributed to or caused by his unnecessary exposure to danger, as alleged in the answer? Answer: 'No.'

"3. Is the defendant indebted to the plaintiff, and if so, in what amount? Answer: '$660.00 with interest, as alleged.'"

We are of the opinion that the motion for judgment as of nonsuit lodged under C. S., 567, was properly denied.

Under its exception that the charge of the court did not comply with C. S., 564, the defendant presents the question as to whether certain instructions therein contained were contradictory and conflicting, and therefore should be held for error. The instructions assailed related to the second issue and were in the following language, first: "Unnecessary exposure to danger means the same as exposure to unnecessary danger, and this includes all cases in which the unnecessary danger was due to the insured's own negligence. Unnecessary exposure to danger means unnecessary exposure to obvious risks of injury. Unnecessary exposure to danger means exposure attributable to the negligence of insured and requires the insured to exercise ordinary care and exempts liability in all cases of injury occurring in whole or in part through the failure of the insured to exercise such care. The insurance policy in this case provides that the company shall not be liable for an injury caused by any unnecessary exposure to danger on the part of the insured. The purpose of this provision is to exempt liability in all cases when the injury was caused by unnecessary exposure to danger;" and second: "A provision of this character requires something more than contributory negligence to defeat the rights of the insured. The provision does not mean simply a voluntary performance of an act which results in an injury, but also performed with a consciousness of the danger or that the danger is so apparent that a man of ordinary intelligence would under the circumstances necessarily know it. In other words, the phrase 'voluntary exposure to unnecessary danger' involves the idea of intentionally doing some act which reasonable and ordinary prudence would pronounce dangerous."

This is the first time that the clause of the policy in suit or similar clauses in accident insurance policies have been submitted to this Court for interpretation, but such clauses seem to be in rather general use and have been interpreted by courts of other jurisdictions. Liberally construed, the decisions are to the effect that when the language of the policy excludes from coverage any loss contributed to by unnecessary exposure to danger such exclusion extends to all dangers attributable to negligence of the insured; where as, when the excluding language of the policy contains such words as voluntary exposure, or wanton and willful exposure to unnecessary danger, then something other than the mere

negligence on the part of the insured must appear to bar his recovery, such as the consciousness of the danger of the act he is doing, or the intentional doing of some act which reasonable and ordinary prudence would pronounce dangerous.

The first quoted clause of the charge to the effect that the mere negligence of the insured would bar his recovery was predicated upon the language of the excluding provisions of the policy in suit, namely, "unnecessary exposure to danger," and was correct. The second quoted clause of the charge to the effect that something more than the mere negligence of the insured was required to defeat his recovery was predicated upon the language "voluntary exposure to unnecessary danger," which is not the language of the excluding provision of the policy in suit, although by the charge it was apparently made to refer to such provision by the use of the phrase "a provision of this character," that is, of the character contained in "the insurance policy in this case." The two clauses as presented to the jury are in conflict and since the former is a correct statement of the law it follows that the latter is incorrect.

In *Micca v. Wisconsin National Life Insurance Co.*, 75 Fed. Reporter (2nd), 710 (1935), it is said, "The words 'exposure to unnecessary danger' and the words 'unnecessary exposure to danger' have been held to mean practically the same thing (*Sargent v. Cent. Accident Ins. Co.*, 112 Wis., 29, 87 N. W., 796, 88 Am. St. Rep., 946; *Shevlin v. Am. Mutual Accident Assn.*, 94 Wis., 180, 68 N. W., 866, 36 L. R. A., 52; *Pac. Mutual Life Ins. Co. v. Adams*, 27 Okla., 496, 112 P., 1026, 1030), and have been held to include all cases of exposure to unnecessary danger where such exposure is attributable to negligence on the part of the insured. *Helm v. Commercial Men's Assn.*, 279 Ill., 570, 117 N. E., 63; *Sargent v. Cent. Accident Ins. Co., supra; Shevlin v. Am. Mutual Accident Assn., supra; Pac. Mutual Life Ins. Co. v. Adams, supra.* See, also, *Price v. Standard Life & Accident Ins. Co.*, 92 Minn., 238, 99 N. W., 887." This language is impliedly affirmed by the Supreme Court of the United States by the denial of *certiorari*, 296 U. S., 580.

In *Shevlin v. Am. Mutual Accident Assn., supra,* it is held that when the negligence of the insured is relied upon as a defense the issue must be determined by the terms of the policy, and when the policy contains such words as willfully and wantonly or voluntarily exposing himself to unnecessary danger a greater degree of negligence than a mere failure to exercise ordinary care is required, and when the policy contains this language gross negligence is required to bring the case within the exception, but when the language is simply exposure to unnecessary danger any negligence on the part of the insured is sufficient to bring the case within the exception.

It is said in *Sargent v. Cent. Accident Ins. Co., supra:* "The force and effect of the clause in the policy excepting the defendant from

liability for injuries due to unnecessary exposure to danger has received authoritative construction in this Court in *Shevlin v. Assn.*, 94 Wis., 180, 68 N. W., 866, 36 L. R. A., 52, where it is held to be satisfied by the same acts that would constitute contributory negligence, and a distinction is drawn between the expression present in this policy and the expression a 'voluntary or willful exposure to unnecessary danger,' the latter being construed to describe gross negligence, in the sense of a conscious exposure to a known peril." See, also, *Pac. Mutual Life Ins. Co. v. Adams, supra;* Cyclopedia of Insurance Law (Couch), par. 1260, pp. 4589, *et seq.;* 1 C. J., pars. 111, *et seq.*, pp. 444, *et seq.*

When there are conflicting instructions upon a material point a new trial must be granted, as the jury are not supposed to be able to determine when the judge states the law correctly and when incorrectly. *May v. Grove,* 195 N. C., 235, and cases there cited.

For the error assigned there must be a

New trial.

NANNIE HODGES PAUL v. MINNIE HODGES DAVENPORT, DELLA HODGES CHESSON, CHRISTINE HODGES, EDWARD BLOUNT HODGES, ADEN MURLEN HODGES AND JOHN SWAIN.

(Filed 28 February, 1940.)

1. Wills § 1—

A will, to be sufficient in law to convey any estate, real or personal, must have been written in the testator's lifetime and signed by him, or by some other person in his presence and by his discretion, and subscribed in his presence by two witnesses at least. C. S., 4131.

2. Same—

The right to dispose of property by will is not a natural right, but is one conferred and regulated by statute, and an instrument is effectual as a testamentary disposition of real or personal property only if executed and probated according to law.

3. Wills § 7—

It is not required that testator subscribe the will, it being sufficient if his name appears in his handwriting in the body of the will.

4. Wills § 8—

Witnesses to a will must write their name at the end of the instrument after it is written and after it is acknowledged by the testator. C. S., 4131.

5. Wills § 1—

A codicil must be executed with the same formality as a will, and the requirements of the statute must be strictly observed.

6. Wills § 16—Requirements in probate of wills.

In probating a will, the clerk is required to take in writing the proof and examinations of the witnesses touching the execution of the will and to embody the substance of such proof and examination in his certificate of probate which must be recorded with the will, C. S., 4143, and no will is effectual to pass title to real estate until duly probated in the proper county and recorded in the office of the Superior Court clerk of the county in which the land is situate, C. S., 4163.

7. Wills §§ 7, 8—Writing held not a part of duly executed will and not effectual as a codicil thereto.

The instrument in question was written in longhand but not in the handwriting of testatrix. Testatrix subscribed her name at the end of the writing on the second page and immediately followed the attestation of the subscribing witnesses in proper form. The third page, also in handwriting other than that of testatrix, referred to changed conditions since the execution of the will and directed a different disposition of certain of the property, but the third page was not signed by testatrix nor subscribed to by witnesses, but the certificate of probate appeared thereon. *Held:* The third page cannot be considered a part of the will, since it was written subsequent to the execution of the will, nor is it valid as a codicil, since it was not signed by testatrix nor subscribed to by witnesses, and is further ineffectual as a conveyance of real estate since it was not probated.

APPEAL by plaintiff and defendants from *Carr, J.*, at October Term, 1939, of WASHINGTON.

Civil action in ejectment and to remove cloud from title.

Martha F. Hodges, through whom both the plaintiff and the defendants claim title to the land in controversy, died testate. The will is written in longhand on foolscap paper consuming the first two pages. It is in a handwriting other than that of the testatrix. At the end the due attestation and execution thereof appears as follows:

"IN WITNESS, I the said Martha F. Hodges have hereunto set my hand and seal this 20th day of April, 1898.

MARTHA F. HODGES (SEAL).

"Signed, sealed, published and declared by the said Martha F. Hodges to be her last will and testament in the presence of us, who at her request and in her presence do subscribe our names as witnesses thereto.

W. R. CHESSON
L. H. CHESSON."

There appears on the margin the following:

"Certificate & order in reference to this will recorded in Book of Wills #C, pp. 79 &c.

C. V. W. AUSBON,
Clerk Superior Court."

On the third page of the foolscap paper beginning at the top thereof there appears in a handwriting other than that of the testatrix the following:

"WHEREAS, I Martha F. Hodges having made my last will and testament in writing, bearing date on the 20th day of April, 1898, and thereby made sundry devises and bequeaths according to then existing circumstances of my estate, but which circumstances having been materially changed, I do by this, my writing which I hereby declare to be a codicil to my said will to be taken and construed as part thereof will and direct that in case my daughter Susan L. Blount shall die without an heir, then and in such case my son W. A. Hodges shall be the sole owner absolutely and in fee, of all the land bequeathed her as described in my will."

Then appears on the same page the certificate or probate in the following language:

"NORTH CAROLINA—WASHINGTON COUNTY.

"I, C. V. W. Ausbon, do hereby certify that the due execution of the foregoing will of Martha F. Hodges, was this day proven by the oath and examination of W. R. Chesson and L. H. Chesson, the subscribing witnesses, and admitted to probate.

"This 16th day of April, 1907.

"Witness my hand and official seal, this 16th April, 1907.

C. V. W. AUSBON."

Susan L. Blount died leaving no child or grandchildren surviving her. She left a last will and testament in which she devised the *locus in quo* to the defendants other than John Swain, who is in possession merely as tenant.

Plaintiff claims title under the alleged codicil as the only surviving child of W. A. Hodges.

The parties having waived trial by jury and having agreed that the court should hear the evidence, find the facts and render judgment thereon, the court, after finding the facts, adjudged that the plaintiff is not and the defendants are the owners and entitled to the possession of the property in controversy. The plaintiff excepted and appealed.

The court, during the progress of the hearing having admitted certain parol testimony and evidence of a supplemental probate of the original will made by the clerk 25 November, 1938, entered its order striking such evidence from the record. The defendants excepted and appealed.

W. Blount Rodman, III, and Z. V. Norman for plaintiff, appellant.

W. L. Whitley and S. S. Woodley for defendants, appellants.

BARNHILL, J. If the alleged codicil is valid as such and conveys a defeasible fee to Susan L. Blount then the plaintiff, daughter of W. A. Hodges, is the person to whom title to said land reverts. If the paper writing relied on by plaintiff as a codicil is void and of no effect then the defendants are the owners of the premises.

A will, to be sufficient in law to convey any estate, real or personal, must have been written in the testator's lifetime and signed by him, or by some other person in his presence and by his direction, and subscribed in his presence by two witnesses at least. C. S., 4131.

The right to dispose of property by will is not a natural right. It is conferred and regulated by statute. *Pullen v. Comrs.,* 66 N. C., 361; *Peace v. Edwards,* 170 N. C., 64, 86 S. E., 807. It is not effectual as a muniment of title unless executed as required by law and probated in accord with the terms of the statute.

It is not required that the testator subscribe the will. If his name appears in his handwriting in the body of the will this is a sufficient signing within the meaning of the statute. *Hall v. Misenheimer,* 137 N. C., 183; *Richards v. Lumber Co.,* 158 N. C., 54, 73 S. E., 485; *Burriss v. Starr,* 165 N. C., 657, 81 S. E., 929; *Peace v. Edwards, supra.*

But the statute expressly requires that the will shall be subscribed in the presence of the testator by two witnesses at least. C. S., 4131. And there can be no will until it is written and acknowledged by the testator. Therefore, there can be no witnessing until this is done, and where the statute requires an instrument to be subscribed by witnesses, the names of the witnesses must appear at the end of the instrument. *Richards v. Lumber Co., supra; Peace v. Edwards, supra; In re Fuller,* 189 N. C., 509, 127 S. E., 549.

A codicil must be executed with the same formality as a will and the requirements of the statute must be strictly observed. *Spencer v. Spencer,* 163 N. C., 83, 79 S. E., 291; Mordecai's Law Lectures, Vol. 2, p. 1135.

In probating a will the clerk is required to take, in writing, the proof and examinations of the witnesses touching the execution of the will and to embody the substance of such proof and examination in his certificate of the probate thereof, which certificate must be recorded with the will, C. S., 4143. And no will is effectual to pass title to real estate unless it shall have been duly proved and allowed in the probate court of the proper county and is recorded in the office of the Superior Court clerk of the county wherein the land is situate. C. S., 4163. *Osborne v. Leak,* 89 N. C., 433.

It is apparent on the face of the record that the probate of the clerk related to the will of Martha F. Hodges which had been signed by her and witnesses as required by statute. It further appears from the word-

ing thereof that the alleged codicil was written subsequent to the execution of the will. It expressly refers to a will theretofore made and to material changes in circumstances since arising, and is likewise referred to as a codicil. It cannot be considered as a part and parcel of the original will.

There is no evidence that Mary F. Hodges signed the same or that it has been subscribed by two witnesses to her signature. Nor is it made to appear that it is in the handwriting of the testatrix, or that it was found among her valuable papers and effects or was lodged in the hands of some person for safekeeping. Furthermore, there has been no probate thereof, without which, in any event, it is not effectual as a conveyance of real estate. See *Riley v. Carter,* 158 N. C., 484, 74 S. E., 463; C. S., 4163.

On plaintiff's appeal, the judgment below is

Affirmed.

DEFENDANTS' APPEAL.

In view of the disposition made of plaintiff's appeal the question presented on the appeal of the defendants becomes immaterial. However, on the question as to whether the clerk had the right to amend his original probate reference may be had to *Boggan v. Somers,* 152 N. C., 390, 67 S. E., 965.

Defendants' appeal

Dismissed.

CLYDE FARMER, EMPLOYEE, v. BEMIS LUMBER COMPANY, EMPLOYER, AND CONSOLIDATED UNDERWRITERS, CARRIER.

(Filed 28 February, 1940.)

1. Master and Servant § 39b—Cause remanded for findings necessary to determination, as question of law, whether plaintiff was employed by independent contractor.

In this cause, defendants denied liability under the Workman's Compensation Act on the ground that defendant employer let the work by independent contract and that the contractor subcontracted the work by independent contract to the partners who employed the employee who was injured. The proceeding is remanded for definite findings of fact, independent of conclusions of law, as to whether the respective parties entered into the contracts set out in the exhibits and, if so, the facts with respect to the relationship between the parties and the further fact as to who was the actual employer of plaintiff, in order that it may be determined as a conclusion of law whether claimant was an employee of the defendant within the meaning of the Compensation Act.

2. Master and Servant § 55g—

When the findings of the Industrial Commission are insufficient for a proper determination of the questions involved, the proceeding will be remanded to the Industrial Commission for additional findings.

3. Master and Servant § 52c—

The Industrial Commission should make specific and separate findings of fact and conclusions of law upon those facts even though the matter presented be a mixed question of law and of fact.

APPEAL by defendants from *Hamilton, Special Judge,* at September Term, 1939, of GRAHAM.

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

Plaintiff contends that on 15 June, 1937, while working for defendant Bemis Lumber Company, a corporation, cutting timber and peeling bark, he was injured by accident arising out of and in the course of his employment, resulting in disability.

Defendants deny liability therefor for that they contend plaintiff was in the employment of McKenzie and Evans, independent contractors under contract with A. B. Anderson, who was independent contractor under contract with Bemis Lumber Company.

After hearing evidence offered by the respective parties, the hearing Commissioner "finds the facts in relation thereto" in the main as follows:

(1) The Bemis Lumber Company, a corporation engaged in the lumber business, having contracted to cut, log and bark all the hemlock timber on the Snowbird boundary of and for the Champion Fibre Company, in Graham County, "offers in evidence a contract purporting to show that A. B. Anderson was an independent contractor for the Bemis Lumber Company, and as such had exclusive control over the logging activities on Snowbird; that Bemis Lumber Company carries compensation insurance . . . and . . . had the policy endorsed so as to cover the employees of A. B. Anderson, who the defendants contend was doing the job as an independent contractor under the terms of the contract set out in the record as defendants' Exhibit B, and in turn the independent contractor, under Exhibit B, attempted to re-contract work to McKenzie and Evans, two more independent contractors under the alleged independent contract agreement referred to in the record as defendant's Exhibit A, and the plaintiff was working under the supervision of McKenzie and Evans at the time of the alleged injury; . . . that plaintiff, along with other employees that were working for McKenzie and Evans, were paid their weekly wages by checks issued directly from the defendant, Bemis Lumber Company; . . . that during all of the period of this time the said A. B. Anderson was not only an alleged independent contractor for the Bemis Lumber Company, but was

a paid superintendent and was on the pay roll of the Bemis Lumber Company as a superintendent, which, to say the least, is a most unusual situation that an individual could operate in such a dual capacity; . . . that plaintiff in this case, together with all other employees that worked for McKenzie and Evans and the employees that worked for A. B. Anderson all boarded at a camp known as the 'Bemis Lumber Company camp' that was supervised by Anderson; . . . that neither Anderson nor McKenzie and Evans were independent contractors but they, themselves, in truth and fact, were employees of the Bemis Lumber Company, acting in supervisory and foremanship capacity, and that plaintiff at the time of the alleged injury, on 15 June, 1937, was not an employee of either Anderson nor McKenzie and Evans, but in truth, fact and law, was an employee of the Bemis Lumber Company, and it is of striking interest to note that the work to be done under the original contract of the Bemis Lumber Company with the Champion Fibre Company filtered down the line by the provisions of the purported independent contracts until it reached the point where the work was actually done by thirteen so-called independent contractors, none of whom carrying compensation insurance and all of them keeping their employees to 14 or less, which leads the Commissioner to the opinion that the whole plan is a scheme to avoid responsibility under the Workmen's Compensation Law."

(2) That on 15 June, 1937, "while working for defendant Bemis Lumber Company as heretofore found" the claimant received an injury by accident arising out of and in the course of his employment, as result of which he was disabled for a specified period.

Upon appeal thereto by defendants from award of compensation to claimants, the Industrial Commission, after making certain findings of fact without respect to disability of claimant, affirmed in all other respects the findings of fact, conclusion of law and the award of the hearing Commissioner, all of which was affirmed by judgment on appeal to Superior Court. Defendants appeal therefrom to Supreme Court, and assign error.

Ralph Moody and Mallonee & Mallonee for plaintiff, appellee.
R. L. Phillips for defendants, appellants.

WINBORNE, J. Careful consideration of the record on this appeal shows insufficient findings of fact for a determination of questions presented for decision.

The controversy between the parties raises these factual questions with respect to which the Industrial Commission should make specific findings of fact, independent of conclusions of law:

(1) Did Bemis Lumber Company and A. B. Anderson enter into the alleged written contract referred to as Exhibit B?

(2) If so, what are the facts with respect to the relationship of the contracting parties, and with regard to the performance of the contract?

(3) Did A. B. Anderson and McKenzie and Evans, partners, enter into the alleged written contract referred to as Exhibit A?

(4) If so, what are the facts with respect to the relationship of the contracting parties, as between themselves and with Bemis Lumber Company, and further with regard to the performance of the contract as between them?

(5) By whom was plaintiff actually employed, and for whom was he working at the time of his injury?

Upon findings of fact by the Industrial Commission with reference to the first four questions, when supported by sufficient competent evidence, there will arise questions of law as to whether both A. B. Anderson and McKenzie and Evans, respectively, or either of them, were independent contractors. The legal conclusion thereon, with the facts found in reference to the fifth question, will present the question of law: Was plaintiff in the employment of the Bemis Lumber Company within the meaning of the North Carolina Workmen's Compensation Act at the time of his injury?

When findings of fact are insufficient for proper determination of questions raised, the proceeding will be remanded to the Industrial Commission for further consideration in accordance with orderly practice.

The record on this appeal leads us to say that as basis for an award in proceedings under the North Carolina Workmen's Compensation Act, the findings of fact and the conclusions of law upon those facts should be specifically and separately stated to the end that courts in appellate capacity may properly review the questions of law involved. This practice should be followed even though the matter presented be a mixed question of law and of fact.

Remanded.

ALFRED N. COOK, EMPLOYER, v. BEMIS LUMBER COMPANY, EMPLOYER, AND CONSOLIDATED UNDERWRITERS, CARRIER.

(Filed 28 February, 1940.)

APPEAL by defendants from *Hamilton, Special Judge,* at September Term, 1939, of GRAHAM.

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

Plaintiff claims that on 3 July, 1937, while working for defendant Bemis Lumber Company, a corporation, his knee was cut and injured by accident arising out of and in the course of his employment as a result of which he suffered disability. Defendants deny liability therefor for that, as they contend, plaintiff, at the time of his injury, was in the employment of the partnership of Hooper and Anderson, independent contractors under a contract with Bemis Lumber Company.

After hearing evidence offered by the respective parties, the hearing Commissioner "finds as a fact from the evidence that plaintiff received an injury by accident arising out of and in the course of his employment for the defendant Bemis Lumber Company, on the 3rd day of July, 1937, . . . that the plaintiff at the time of his injury . . . was an employee of the Bemis Lumber Company and was not, in fact, an employee of Hooper and Anderson, a would-be contractor from Bemis Lumber Company. . . ."

Then after stating that "the defendant offered in evidence a contract which they contend established the relations of an independent contractor between Bemis Lumber Company and Hooper and Anderson the Commissioner finds that this contract does not establish the relations of an independent contractor for the reason . . . that A. B. Anderson, one of the partners in the so-called partnership, was the superintendent for the Bemis Lumber Company, and was at all times hereinafter mentioned a superintendent for the Bemis Lumber Company, including the period of operation under the so-called contract, and was on the pay roll of the Bemis Lumber Company as superintendent; . . . that the other partner, Hooper, was an uneducated man and knew very little about the transacting of business and had been an employee of the Bemis Lumber Company for years prior to the 15th of April, 1936, and there was no community of interest between Hooper and Anderson, Anderson being superintendent and Hooper being a mere employee; . . . that the contract which the defendant contends established the relations between the independent contractor and the Bemis Lumber Company was signed by A. B. Anderson; . . . that his co-partner, Hooper, never saw the contract and never signed the same and didn't know what the contents of the same was; that Hooper and Anderson used the equipment in performing the terms of the would-be contract that was the property of Bemis Lumber Company, . . . that the employees of the so-called independent contractors, including the plaintiff, were paid by checks signed by the officers of the Bemis Lumber Company and that the checks were delivered to the plaintiff in this case and to other employees of the so-called independent contractors at the office of the Bemis Lumber Company.

"Therefore, for the reasons heretofore set forth and for other reasons as set out in the record, Commissioner finds as aforesaid, the plaintiff was an employee, not of Hooper and Anderson, but of the Bemis Lumber Company at the time of the alleged injury. The Commissioner further finds as a fact that the company in carrying on their activities had thirteen of the so-called independent contractors, and it so happened that none of the thirteen carried compensation insurance and that none of the thirteen independent contractors employed more than fourteen employees. Therefore, it appears to the Commissioner that the thirteen would-be independent contractors is an effort on the part of the Bemis Lumber Company to avoid responsibility under the provisions of the Workmen's Compensation Law under these circumstances."

Upon appeal thereto by defendants from award of compensation to claimant, the Full Commission affirmed the findings of fact, conclusions of law and the award of the hearing Commissioner, all of which were affirmed on appeal to Superior Court. From judgment in accordance therewith, defendants appeal to Supreme Court and assign error.

T. M. Jenkins for plaintiff, appellee.
R. L. Phillips for defendants, appellants.

WINBORNE, J. The findings of fact presented upon the record on this appeal are insufficient for proper consideration of determinative questions.

The controversy between the parties raises three factual questions relative to which there should be specific findings of fact, independent of conclusions of law.

(1) Did Bemis Lumber Company enter into the alleged written contract with the partnership of Hooper and Anderson, introduced in evidence?

(2) If so, what are the facts with respect to the relationship of each of the contracting parties and with regard to the performance of the contract?

(3) By whom was plaintiff actually employed, and for whom was he working at the time of his injury?

Upon the findings of fact by the Industrial Commission with reference to the first two questions, when supported by sufficient competent evidence, there will arise the question of law as to whether the contract between Bemis Lumber Company and the partnership of Hooper and Anderson, if made, had the effect of creating the relationship of independent contractors. The legal conclusion thereon, with the facts found in reference to the third question, will present the question of law: Was plaintiff, at the time of his injury, in the employment of the Bemis

Lumber Company within the meaning of the North Carolina Workmen's Compensation Act?

For further procedure and practice reference is here made to the concluding paragraphs in opinion in *Farmer v. Lumber Co., ante,* 158, which are here reiterated.

Remanded.

G. L. TEMPLETON v. CLAUDE KELLEY, CHARLES ALEXANDER, BEATY SERVICE COMPANY, A CORPORATION; AND L. L. LEDBETTER, TREASURER OF THE CITY OF CHARLOTTE.

(Filed 28 February, 1940.)

1. Appeal and Error § 43—Petition to rehear allowed in part and denied in part.

The petition to rehear is allowed in this case as to that part of the opinion holding that the trial court erroneously failed to charge on the question of proximate cause, it appearing that the instruction taken contextually as a whole did sufficiently charge on this aspect of the case, but the petition is denied as to the part of the opinion holding that the charge of the trial court contained prejudicial error on another aspect of the case.

2. Appeal and Error § 39e—

Conflicting instructions on a material aspect of the case is perforce prejudicial, since it cannot be assumed that members of the jury are able to determine when the court states the law correctly and when incorrectly.

3. Same—

While the trial court may correct any part of the charge, an additional instruction correctly stating the law on a material aspect of the case cannot be held to correct a prior inconsistent charge on the same question when such additional instruction does not refer to, correct or retract the prior instruction.

4. Automobiles § 24d—Charge on issue of respondeat superior held erroneous.

In this action against the driver of a motor vehicle and his alleged employer, the trial court charged the jury to answer the issue of negligence in favor of plaintiff if they found that the driver was negligent, without charging the jury that the corporate defendant could not be held liable unless the individual defendant was its employee. Later, by additional instructions, the court charged the jury on this aspect of the case. *Held:* The additional instructions cannot be held a correction of the prior instructions, and there being a conflict in the charge on this material aspect of the case, the error is prejudicial.

5. Same—

In this action against the driver of a motor vehicle and his alleged employee, the charge of the court *is held* for error in failing to present the question of whether the alleged employee, at the time of the accident, was about his master's business and acting within the scope of his employment.

PETITION to rehear. Original opinion reported 216 N. C., at p. 487.

Uhlman S. Alexander for plaintiff, appellee.
H. L. Taylor for defendant, appellant.

BARNHILL, J. In the original opinion it is stated that the portion of the charge there quoted is erroneous (1) in that it omits the element of proximate cause, and (2) in that it required an affirmative answer to the issue of negligence as against the alleged employer if the jury should find negligence on the part of the alleged employee. It was further held that the charge of the court on the law controlling the right of pedestrians to cross a public street at a point other than at the intersection, sec. 135 (c), ch. 407, Public Laws 1937, was incorrect.

The petition to rehear is predicated upon the assertion (1) that this Court overlooked instructions of the trial judge on proximate cause immediately following the quoted portion of the charge, as well as in other sections thereof, and that (2) the error, if any, as to the liability of the alleged employer is cured by subsequent instructions thereon. The opinion in respect to the error in the charge as to the right of the pedestrian to cross the street is not challenged.

From a rereading of the charge it is made to appear clearly that there was an inadvertence in the original opinion in respect to the failure of the court below to charge the jury on the element of proximate cause in relation to the first issue. We are now of the opinion that this phase of the law was adequately presented to the jury.

The fact remains, however, that the portion of the charge discussed was defective in that it required the jury, upon a finding of negligence on the part of the alleged employee, to answer the issue of negligence in the affirmative as against the alleged employer. But the petitioner asserts and contends that this error was later corrected by the court.

After the trial judge had completed his charge, addressing counsel, he inquired, "Now is there any particular matter, gentlemen, that the Court has overlooked?" After a conference with counsel for plaintiff he further instructed the jury as follows:

"Now, upon this first issue, gentlemen, going back to that temporarily, you will notice the wording of the issue: 'Was the plaintiff injured by the negligence of the defendant?' As the court originally instructed you, that has no reference to the defendant Ledbetter. He is, so to speak, a nominal party in this suit. It does refer, however, to Claude Kelley and to the Beaty Service Company."

Then, after briefly stating the contentions of the parties as to whether Kelley was an employee of the Beaty Service Company, the court proceeded further:

"Now, remembering the rules that the Court has given you, if you find that the defendant Kelley was responsible for this accident, and that the plaintiff is entitled to recover of him, then the court further charges you, the burden being upon the plaintiff, if you find that Mr. Alexander took his car down to the Beaty Service Company and turned it over to the Beaty Service Company for the purpose of them using it as a taxi, and they in turn made some arrangement with the defendant Kelley, retaining over Kelley the right to hire him and to fire him at their own motion, and, further, that they retained the right to fix the amount of charge that he would make; that they required the said Kelley to report to them any accidents or injuries that might occur, and that they required him to come here to get his gas and oil and his repairs, then the Court charges you that he was a servant of the Service Company, and that you will answer the issue 'Yes'; but if you fail to so find, the burden being upon the plaintiff, then you will answer the issue 'Yes, as to the defendant Kelley.' Is that clear, gentlemen?

"And I forgot to say, gentlemen, that you further find that they put up the deposit as required by the statute covering this particular car. Take the case, gentlemen."

We were cognizant of this later portion of the charge when the original opinion was written. We simply refrained, perhaps unwisely, from extending the discussion to include the principle that where there are conflicting instructions upon a material point we will not assume that the jurors possessed such discriminating knowledge of the law as would enable them to disregard the erroneous and to accept the correct statement of the law as their guide. The members of the jury are not supposed to be able to determine when the judge states the law correctly and when incorrectly. *Edwards v. R. R.*, 129 N. C., 78; *Williams v. Haid*, 118 N. C., 481; *Tillett v. R. R.*, 115 N. C., 663; *Edwards v. R. R.*, 132 N. C., 99; *Hoaglin v. Telegraph Co.*, 161 N. C., 390, 77 S. E., 417; *Champion v. Daniel*, 170 N. C., 331, 87 S. E., 214; *Kimbrough v. Hines*, 180 N. C., 274, 104 S. E., 684; *S. v. Falkner*, 182 N. C., 793, 108 S. E., 756; *S. v. Bush*, 184 N. C., 778, 114 S. E., 831; *Young v. Comrs.*, 190 N. C., 845, 130 S. E., 833; *Warren v. Fertilizer Works*, 191 N. C., 416, 131 S. E., 723; *May v. Grove*, 195 N. C., 235, 141 S. E., 750.

The conflicting instructions were material and prejudicial.

While the court may correct any part of the charge, it is apparent that the last quoted portion was not given as a correction of the error in the former portion. The record discloses that the court instructed the jury at least three times that if it found that the defendant Kelley was negligent (in the manner indicated) that it should answer the first issue "Yes" without reference to the existence or nonexistence of the relationship of employee and employer. We may not assume that the jury

wholly disregarded the charge in this respect and followed the later instructions in arriving at the answer to the first issue.

Furthermore, *non constat* Kelley was a servant of Beaty Service Company, was he about his master's business, acting within the scope of his employment at the time? This is not admitted and the court did not require the jury to so find before answering the issue in the affirmative as against the Beaty Service Company. *Linville v. Nissen,* 162 N. C., 95, 77 S. E., 1096; *Martin v. Bus Line,* 197 N. C., 720, 150 S. E., 501; *Mason v. Texas Co.,* 206 N. C., 805, 175 S. E., 291; *Van Landingham v. Sewing Machine Co.,* 207 N. C., 355, 177 S. E., 126. The last statement of the law on the first issue was, therefore, materially defective.

There are other exceptive assignments of error in the record which are not without merit. As the questions presented thereby may not again arise we did not originally and do not now discuss them.

The case was brought back to the end that we might correct the inadvertence in the former opinion in respect to the statement that the court had failed to properly charge the jury on the question of proximate cause.

The petition is
Allowed in part and
Denied in part.

STATE v. CALEB WRAY, WILLIAM MARTIN AND CLAUD COOK.

(Filed 28 February, 1940.)

1. Criminal Law § 41b—Cross-examination beyond scope of examination-in-chief for the purpose of showing bias rests in the discretion of the trial court.

The extent of the cross-examination of a witness beyond the scope of the examination-in-chief for the purpose of showing bias rests in the sound discretion of the trial court, and the action of the court in sustaining an objection to a question asked for the purpose of showing that the witness was biased cannot be held prejudicial and does not disclose abuse of discretion when it appears that the witness had theretofore answered another question having the same import.

2. Criminal Law § 81c—

Error must be prejudicial in order to entitle defendant to a new trial.

3. Arrest § 3: Assault § 11—

Evidence held sufficient to be submitted to the jury as to each defendant on the charge of obstructing justice in interfering with police officers in the discharge of their duty in making an arrest, and as to one of the defendants on the charge of assault with a deadly weapon.

4. Criminal Law §§ 28a, 53c—

A charge to the effect that, in the absence of an admission or evidence establishing a presumption of guilt sufficient to overcome the presumption of innocence, the most that can be required of a defendant in a criminal prosecution is explanation but not exculpation, *is held* without error.

5. Arrest § 1b—Officers may enter public or private property to investigate disturbance and may make arrest without warrant to prevent breach of peace.

An instruction to the effect that police officers had a right to enter a cafe without a warrant and make whatever investigation they deemed necessary *is held* without error, since the officers have a right to enter a public place as invitees unless forbidden to enter therein, and *further*, officers may enter public or private property upon hearing a disturbance therein and make an arrest without a warrant to prevent a breach of the peace. C. S., 4542, 2642.

APPEAL by defendants from *Nettles, J.*, at August Term, 1939, of ROCKINGHAM. No error.

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

Glidewell & Glidewell for defendants.

SCHENCK, J. The three defendants were convicted of resisting and obstructing public officers in discharging their duties as policemen of Mayodan (C. S., 4378), and the defendant Wray was also convicted of an assault with deadly weapon (C. S., 4215).

The State's evidence tended to show that two policemen of Mayodan entered a cafe operated by the wife of the defendant Wray; that Wray cursed and struck one of the policemen, whereupon the other policeman, the chief, told Wray to consider himself under arrest, and placed his hands upon Wray; that the other two defendants, Martin and Cook, caught hold of the officers and of Wray and stated that the officers should not take Wray to jail, that a struggle with the officers ensued wherein all three defendants were engaged; that the defendant Wray was taken to the town jail and there threw a brass lock weighing a half pound or more at one of the officers.

The defendants' evidence tended to show that officers entered the cafe of the wife of defendant Wray, and without cause grabbed hold of defendant Wray and that Wray struggled to release himself, and that the other two defendants, Martin and Cook, did not enter the struggle or in any way obstruct the officers; that the officers did not have a warrant; and further, that the defendant Wray did not throw the lock at either of the officers at the jail.

The defendants assign as error the following: "On cross-examination Chief Jones (State's witness) was interrogated: 'Q. You have got it in for this boy and some of those other boys, haven't you? A. No, sir. Q. I ask you if you didn't employ private counsel to prosecute them? Objection by the solicitor. Objection sustained. Exception.'" This assignment is untenable.

While it may be that the assignment cannot be denied for the reason that the answer the witness would have made to the interrogatory does not appear in the record, *Newbern v. Hinton,* 190 N. C., 108, since the interrogatory was made upon cross-examination, *Etheridge v. R. R.,* 209 N. C., 326, still when it was sought to go beyond the scope of the examination-in-chief to determine the interest or bias of the witness and to impeach his credibility the method and duration of the cross-examination for these purposes rested largely in the discretion of the trial court. *S. v. Beal,* 199 N. C., 278; *S. v. Coleman,* 215 N. C., 716. It does not appear that there has been any prejudicial abuse of discretion by the trial court, in view of the fact that the witness had been required to answer the interrogatory just preceding the one to which the objection was lodged. The two interrogatories were practically the same in purpose, namely, to show the bias of the witness being cross-examined. It must appear that the ruling complained of was prejudicial to avail the appellant. *S. v. Smith,* 164 N. C., 475; *Collins v. Lamb,* 215 N. C., 719.

The exceptions to the court's refusal to sustain the defendants' demurrers to the evidence lodged under C. S., 4643, were properly overruled, since the State's evidence, if believed, was amply sufficient to sustain the convictions.

The defendants assign as error the following excerpt from the charge: "In the absence of some admission or evidence establishing an opposite presumption, sufficient to overcome the presumption of innocence, the most that can be required of a defendant in a criminal prosecution is explanation but not exculpation." This assignment cannot be sustained. The excerpt in practically *verbatim* language is approved in *Speas v. Bank,* 188 N. C., 524.

The defendants assign as error the following excerpt from the charge: "The court charges you as a matter of law the officers had a right to go upon those premises and investigate any matter they deemed to be needed to be investigated, and that they had a right to go on the premises without a warrant." This excerpt cannot be held for error, since it appears from all the evidence that "those premises" was a cafe, a public place, and the officers were at least invitees thereto until forbidden to enter therein, and, moreover, it was the duty of public officers upon hearing loud noises and swearing emanating from the cafe to investigate and stop the disorder. For the purpose of preventing a breach of the peace

or other crime an officer may enter either public or private property. "Every person present at any . . . breach of the peace, shall endeavor to suppress and prevent the same, and, if necessary for that purpose, shall arrest the offenders." C. S., 4542; *S. v. McAfee,* 107 N. C., 812. And a policeman, who has the same authority to make arrests within the town limits as is vested by law in a sheriff, C. S., 2642, is authorized to make an arrest for a breach of the peace committed in his presence without a warrant. *S. v. McAfee, supra.*

The other exceptions set out in the appellants' brief relating to the court's refusal to set aside the verdict, the refusal to grant new trials for errors, and the judgments entered, are formal, and are disposed of by the discussion of the other assignments of error.

On the record we find

No error.

J. K. JONES, ADMINISTRATOR, v. SOUTHERN RAILWAY COMPANY.

(Filed 28 February, 1940.)

Railroads § 10—Evidence held to require submission of case to jury under doctrine of last clear chance.

Evidence that intestate had been drinking, that he and his companion were seen down between the rails of defendant's track, doubled up and in an apparently helpless condition, and that they were struck by defendant's train approaching along the track which was straight and unobstructed for a distance of seven hundred feet, *is held* sufficient to be submitted to the jury, and judgment of nonsuit is improperly entered.

APPEAL by plaintiff from *Cowper, Special Judge,* at October Term, 1939, of JACKSON.

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.

Plaintiff's intestate was killed on the afternoon of 19 June, 1938, about 2:00 p.m., when he was struck by defendant's eastbound freight train, running between Dillsboro and Barker's Creek in Jackson County. The train was composed of two engines and a caboose. In railroad parlance it was "dead-heading," *i.e.,* running on return trip with only engines and caboose.

It is in evidence that just prior to the injury plaintiff's intestate and one Arthur Roland were seen on defendant's track "doubled up between the two rails . . . kind of wadded up . . . they were both down, and the one that had on the coat (plaintiff's intestate) was nearly

piled up in a wad." They were both drinking and "they looked like they were helpless." It is further in evidence that they could be seen from the west for a distance of 700 feet. "There was no obstruction between where those men were down to this point 700 feet west." They were both run over and killed.

From judgment of nonsuit entered at the close of plaintiff's evidence, he appeals, assigning errors.

Stillwell & Stillwell for plaintiff, appellant.
W. T. Joyner and Jones, Ward & Jones for defendant, appellee.

STACY, C. J. The defendant insisted with quite good fortune in the court below that the case *sub judice* is controlled by the decision in *Lemings v. R. R.*, 211 N. C., 499, 191 S. E., 39, where a nonsuit was sustained when a drunken pedestrian was killed by a moving train while he was sitting on a crosstie, with his elbows on his knees, and with his head between his hands. We think the two cases are sufficiently different to lead to opposite results so far as the motions to nonsuit are concerned. Here, there is evidence permitting the inference that plaintiff's intestate and his companion were down on the track apparently in a helpless condition, while in the *Lemings case, supra,* no such evidence appeared.

The instant case falls within the line of decisions of which *Henderson v. R. R.*, 159 N. C., 581, 75 S. E., 1092, and *Jenkins v. R. R.*, 196 N. C., 466, 146 S. E., 83, may be cited as fairly illustrative. In *Cummings v. R. R., ante,* 127, the pertinent authorities are reviewed and the principles of liability and nonliability in such cases clearly stated. What was there said is applicable here. To reiterate the substance of that opinion would only be to plow again the field which has been so recently furrowed with accuracy and precision.

On the record as presented, there was error in withholding the case from the jury

Reversed.

WACHOVIA BANK & TRUST COMPANY, TRUSTEE UNDER THE WILL OF GEORGE S. KERNODLE, v. SANTIE LAWS ET AL.

(Filed 28 February, 1940.)

1. Trusts § 11: Executors and Administrators § 24—

While a court of equity may have the power to terminate a trust and distribute the trust property prior to the happening of the contingency prescribed by testator for the termination of the trust, when such action is necessary or expedient, or when consented to by all the interested

parties, it is error for the court to do so upon consent of only a few of the beneficiaries and in the absence of any showing of necessity or expediency.

2. Same—

The failure of beneficiaries to file answer to a suit praying for a construction of the will creating the trust and for the advice and instructions of the court in administering same, cannot be construed as a consent to the modification or the termination of the trust.

3. Same—

In an action to modify or terminate a trust, unborn infants who might have some contingent interest in the assets of the trust should be represented by a guardian *ad litem.*

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

APPEAL by plaintiff from *Nettles, J.,* at November Term, 1939, of ROCKINGHAM.

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

W. M. Allen and Hoke F. Henderson for Sophia Kernodle Turner et al., defendants, appellees.

SCHENCK, J. This was an action by the Wachovia Bank & Trust Company as substituted trustee under the will of the late George S. Kernodle for a construction of said will and for advice and instruction in administering the trust therein established.

There were fifty-three named defendants, fourteen of whom filed answers.

The will involved established a trust of the real estate of the testator and provided among other things that the trust should terminate and the funds thereof be distributed upon the death of five *cestuis que trustent,* naming them, and although it appears that two of these persons are still living in the court's judgment decreed the dissolution of the trust and the distribution of the assets at this time. This distribution of the assets necessitated the ascertainment of the heirs of the said five *cestuis que trustent,* including the two living ones, and notwithstanding *nemo est haeres viventis,* the court's judgment designates who these heirs are.

While it may be conceded that a court of equity has the power by consent of the interested parties, or when necessity, or even expediency, impels, to close a trust and distribute the assets thereof sooner than was contemplated by the trustor; or otherwise modify the trust when such modification is so consented to or rendered necessary or expedient, *Reynolds v. Reynolds,* 208 N. C., 578, and cases there cited, still in the case at bar the consent of all the parties interested does not appear in the record, nor does the necessity nor expediency for the closing of the

trust so appear; nor is such closing of the trust prayed for in the complaint. The only consent appearing of record was that of the fourteen answering defendants and of nineteen other defendants whom the court finds were represented by counsel and agreed to and prayed the court for a termination of the trust.

The consent of those defendants not answering and not represented cannot be implied by their failure to answer or appear for the reason that the complaint does not ask for a change or modification of the trust established by the will, but only asks for a construction of the will and advice and instructions in the administering of the trust therein established. It is logical to assume that the unanswering and unrepresented defendants may have been willing to have the will construed and the trustee advised and instructed by the court as prayed for in the complaint, and still have been unwilling to have the trust established by the will prematurely closed, or otherwise modified and changed as was done by the judgment of the court.

The consent or necessity or expediency essential to enable the court of equity to enter the judgment appearing in the record is lacking.

Since the case must be remanded for judgment in accord with the complaint, it might be well to call attention to the fact that while the only infant defendant named seems to have been properly represented by a guardian *ad litem,* no such guardian has been appointed for the unborn infants who might have some contingent interest in the assets of the trust involved and that the appointment of such guardian *ad litem* might be rendered expedient in the event the plaintiff should desire to amend the complaint so as to seek a closing or modification or change in the trust.

Error and remanded.

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

CHARLIE BUCHANAN v. STATE HIGHWAY & PUBLIC WORKS COMMISSION.

(Filed 28 February, 1940.)

1. Master and Servant § 55d—

The Industrial Commission has the exclusive duty and authority to find the facts relative to controverted claims, and its findings of fact, with exception of jurisdictional findings, are conclusive on the courts when supported by any competent evidence.

2. Master and Servant § 40d—Findings held to support conclusion that injury did not arise from accident.

The Industrial Commission found, upon supporting evidence, that claimant became temporarily sick and blind while performing usual manual labor in the usual manner, that his condition improved and he went back to work and that shortly thereafter he again suffered a similar disability. *Held:* The findings support the conclusion that the injury did not result from an accident arising out of and in the course of claimant's employment within the purview of the Workmen's Compensation Act.

APPEAL by defendant from *Alley, J.*, at September Term, 1939, of GRAHAM. Reversed.

Plaintiff's claim for compensation for injury by accident under the North Carolina Workmen's Compensation Act was denied by the Industrial Commission upon the following findings of fact: "The claimant on or about the 8th day of June, 1936, was working for the State Highway Commission in Graham County and his duties required him to lift a scoop filled with dirt in order that it might be turned over by the tractor that was pulling the same and that on the day in question the claimant while lifting the scoop in the usual manner without anything unusual happening turned sick and blind and was unable to work for several days, he improved and went back to work about May 1, and after working for a short time a similar condition came upon the claimant and he was unable to work any more until September 1st. After considering all the evidence in this case; the evidence of Dr. Crawford and Dr. Herbert as to the condition which the claimant was suffering from, the Commission is unable to find that the claimant received an injury arising out of and in the course of his employment which meets the requirements and provisions of the North Carolina Workmen's Compensation Act."

Upon appeal to the Superior Court "the finding, conclusion or award" of the Industrial Commission was reversed, and the Industrial Commission was directed to award compensation to the plaintiff. The defendant appealed to the Supreme Court.

R. L. Phillips for plaintiff.
Charles Ross for defendant.

DEVIN, J. Under the North Carolina Workmen's Compensation Act, dealing with the matter of compensation for injuries due to the hazards of industry, both the duty and the exclusive authority to find the facts relative to controverted claims are vested in the Industrial Commission, and it is provided by section 60 of the act that upon review the award of the Commission shall be conclusive and binding as to all questions of fact. In accord with this statutory provision it has been uniformly

held by this Court that, when supported by competent evidence, the findings of fact by the Industrial Commission are conclusive on appeal, and are not subject to review by the Superior Court or the Supreme Court. *Williams v. Thompson,* 200 N. C., 463, 157 S. E., 430; *Lockey v. Cohen, Goldman & Co.,* 213 N. C., 356, 196 S. E., 342; *Lassiter v. Tel. Co.,* 215 N. C., 227, 1 S. E. (2d), 542; *McNeill v. Construction Co.,* 216 N. C., 744. The only exception to this rule is where the jurisdiction of the Industrial Commission is challenged. *Aycock v. Cooper,* 202 N. C., 500, 163 S. E., 569; *Francis v. Wood Turning Co.,* 204 N. C., 701, 169 S. E., 654. The powers of the Superior Court with reference to appeals from the Industrial Commission are pointed out in *Tindall v. Furniture Co.,* 216 N. C., 306; *Bank v. Motor Co.,* 216 N. C., 432; *Butts v. Montague Bros.,* 208 N. C., 186, 179 S. E., 799; *Byrd v. Lumber Co.,* 207 N. C., 253, 176 S. E., 572.

An examination of the record in the instant case discloses that there was competent evidence to support the findings of the Industrial Commission as to the manner in which the injury complained of was sustained, and we conclude that this was not an injury by accident arising out of and in the course of plaintiff's employment, so as to bring the case within the purview of the Workmen's Compensation Act. *Neely v. Statesville,* 212 N. C., 365, 193 S. E., 664; *Slade v. Hosiery Mills,* 209 N. C., 823, 184 S. E., 844. The facts found by the Industrial Commission in this case differ in material respects from those in *Moore v. Sales Co.,* 214 N. C., 424, 199 S. E., 605, and upon which an award in that case was sustained.

The court below was in error in reversing the findings and award of the Industrial Commission, and the cause is remanded to the Superior Court of Graham County for judgment in accord with this opinion.

Reversed.

MARIE BARRETT v. JOHN T. WILLIAMS ET AL.

(Filed 28 February, 1940.)

1. Adverse Possession §§ 4g, 19—Directed verdict in favor of defendant claiming by adverse possession held error.

The land in question was devised to defendant's grantor by defeasible fee, which was defeated by the death of the grantor without issue. However, the devise was void because the grantor was a witness to the will. There was evidence that the grantor, nevertheless, went into possession claiming as devisee under the will. *Held:* If the grantor went into possession claiming under the will his possession and the possession of defendant claiming under him would be permissive and not adverse to the contingent remainderman up to the time of the grantor's death, and fur-

ther, the burden being upon defendant to prove title by adverse possession, a directed verdict in his favor is erroneous.

2. Adverse Possession § 18—Evidence held competent to show that claimant recognized termination of right to possession upon termination of his grantor's defeasible fee.

The land in question was devised to defendant's grantor by defeasible fee, which was defeated by the death of the grantor without issue. However, the devise was void because the grantor was a witness to the will. After the grantor's death, defendant permitted the land to be sold for taxes and bought in by his wife with money furnished by him. *Held:* The tax foreclosure is some evidence that defendant's possession was not adverse to the person claiming under the contingent remainderman, but that the possession was in subordination to the legal title.

3. Trial § 27b—

It is rarely, if ever, permissible for the court to direct a verdict in favor of a party upon whom rests the burden of proof.

APPEAL by plaintiff from *Thompson, J.*, at January Term, 1940, of PASQUOTANK.

Civil action in ejectment and for redemption and accounting.

From a directed verdict in favor of defendants, the plaintiff appeals, assigning errors.

McMullan & McMullan for plaintiff, appellant.
M. B. Simpson and John H. Hall for defendants, appellees.

STACY, C. J. This is the same case that was before us on defendants' appeal at the Spring Term, 1939, reported in 215 N. C., 131, 1 S. E. (2d), 366, when a new trial was ordered for error in directing a verdict for the plaintiff. Reference to the previous report of the case will suffice for statement of the principal facts.

The present record differs from the one on the former appeal in two particulars:

1. Upon the hearing "it was agreed and stipulated that the testator, J. S. Jones, left him surviving 5 children, to wit, Mrs. Josephine Spence, George Jones, Samuel Jones, Neut A. Jones, and S. Gertrude Sweet, who was the mother of the plaintiff."

2. It is conceded that defendants' possession of the lands in dispute since 1900 has been "open, notorious, continuous and exclusive."

The pivotal point on the defendants' claim of title by adverse possession goes back to the character of Newton A. Jones' possession in 1879. If he entered into possession of the *locus in quo*, claiming it, *pro hac vice*, as devisee under his father's will—and there is some evidence of this—then his possession and those claiming under him up to the time of his death would be permissive rather than adverse to plaintiff's rights under the ulterior limitation. Moreover, the tax foreclosure proceeding

instituted after the death of Newton A. Jones is evidence in support of plaintiff's contention that while defendants' possession has been "open, notorious, continuous and exclusive," since 1900, nevertheless it has not been adverse to her rights, but rather in subordination to the legal title. *Hill v. Bean,* 150 N. C., 436, 64 S. E., 212; *Shaffer v. Gaynor,* 117 N. C., 15, 23 S. E., 154.

Then, again, in respect of defendant's claim of title by adverse possession, the burden of proof rests upon the defendants. *Hayes v. Cotton,* 201 N. C., 369, 160 S. E., 453. It is rarely, if ever, permissible for the court to direct a verdict in favor of a party upon whom rests the burden of proof. *Reed v. Madison County,* 213 N. C., 145, 195 S. E., 620; *Yarn Mills v. Armstrong,* 191 N. C., 125, 131 S. E., 416; *House v. R. R.,* 131 N. C., 103, 42 S. E., 553; *Cox v. R. R.,* 123 N. C., 604, 31 S. E., 848; *Eller v. Church,* 121 N. C., 269, 28 S. E., 364.

It also appears, contrary to the former record, that the testator, J. S. Jones, died leaving him surviving five children. This would become important in case the jury should find that Newton A. Jones entered into possession of the forfeited estate claiming it other than in subordination to the provisions of the will.

On the record as presented, there was error in directing a verdict for the defendants.

New trial.

STATE v. MOSE COX.

(Filed 28 February, 1940.)

1. Criminal Law § 81c—

Where a general verdict of guilty is returned against a defendant prosecuted upon an indictment containing two counts of equal gravity, any error in the judge's charge upon one of the counts is harmless, there being no exceptions to the instructions on the other count.

2. Criminal Law § 79—

An exception not brought forward and referred to in appellant's brief is deemed abandoned, Rule 28.

APPEAL by defendant from *Cowper, Special Judge,* at November Term, 1939, of BEAUFORT. No error.

The defendant was charged with unlawful possession of intoxicating liquor for the purpose of sale, and there was a second count in the warrant charging him with unlawful sale of intoxicating liquor. From judgment predicated upon a general verdict of guilty, the defendant appealed.

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

LeRoy Scott and S. M. Blount for defendant.

DEVIN, J. The only exception referred to in defendant's brief relates to the judge's charge on the first count in the warrant. However, as there was a general verdict of guilty, and there was no exception to the judge's instructions to the jury on the second count which charged sale of intoxicating liquor, any error in the trial judge's statement of the law as to unlawful possession would become harmless. *S. v. Holder,* 133 N. C., 709, 45 S. E., 862; *S. v. Coleman,* 178 N. C., 757, 101 S. E., 261; *S. v. Jarrett,* 189 N. C., 516, 127 S. E., 590. There was no motion for judgment of nonsuit. The appellant did not include in his case on appeal the evidence adduced in the trial, but the statement of the evidence contained in the judge's charge which was sent up, and to which no exception was taken, shows sufficient evidence to support the verdict. The other exception noted by the defendant during the trial was not referred to in his brief, and therefore is deemed abandoned. Rule 28; *S. v. Lea,* 203 N. C., 13, 164 S. E., 737; *In re Beard,* 202 N. C., 661, 163 S. E., 748.

In the trial we find

No error.

R. S. JONES, ADMINISTRATOR OF R. M. WALDROUP, DECEASED, v. HATTIE L. WALDROUP.

(Filed 28 February, 1940.)

1. Evidence § 18: Executors and Administrators § 10—Evidence held relevant as tending to corroborate defendant's evidence and contentions.

In an administrator's action against the widow of intestate to recover certain stock and a note as assets of the estate, testimony of disinterested witnesses of conversations with intestate in which he made statements to the effect that his wife owned or was entitled to the income from a certain business, that he was making investments for her, and that he wanted his property to go to the survivor, *is held* relevant and competent as tending to corroborate defendant's evidence and contention that the property in question belonged to her because purchased with her own money.

2. Evidence § 32—Testimony of possession of stock claimed by administrator held competent as being of an independent fact.

In this action by an administrator against intestate's widow to recover certain stock and a note as assets of the estate, testimony by the widow that she had had possession of the note since it was issued and that she had had possession of the stock for some time prior to intestate's death, *is held* competent as being testimony of an independent fact, notwithstanding the legal implications from such possession, the note being payable

to both intestate and defendant and the stock being issued or assigned to both, and further, the complaint having alleged possession of the choses in action by the widow, the question is academic in this case. C. S., 1795.

3. Estates § 16—

The owners of personalty may create by gift or bilateral agreement a tenancy in common therein with right of survivorship, since C. S., 1735, abolished survivorship in personalty, with an exception relating to partnerships, only when it followed as a legal incident to joint tenancy, and since survivorship in personalty is not against public policy.

4. Same—Assignment and issue of stock by direction of owner to himself or wife held to create tenancy in common with right of survivorship.

Where a husband assigns certain stock to himself or wife, "either or the survivor" by instrument under seal, and surrenders certain other stock originally issued to him to the respective issuing corporations and has the stock transferred on the books of the corporations, and re-issued to himself or wife, and the wife is given possession of the new stock certificates, the assignment, as well as the transfer of the stock on the books of the corporation followed by surrender of dominion of the certificates of stock to the wife, will create a common ownership of the choses in action with the right of survivorship when it appears that this is the intention of the parties.

5. Corporations § 13a—

An assignment of stock is good as between the parties without registration on the books of the corporation, and the legal title may be perfected in the assignee by registry and the delivery of the certificates.

6. Same—

Where the holder and owner of stock surrenders the certificates to the corporation and directs the corporation to transfer same on its books, the transferee acquires title, which is perfected by the surrender or delivery of the new certificate to him. C. S., 1164.

7. Estates § 16—

When the owner of stock has same transferred on the books of the corporation and re-issued to himself "or" wife, the word "or" may be construed "and" when necessary to effect the apparent intent of the parties to create a joint interest in the personalty with right of survivorship.

8. Evidence §§ 7, 8—

While the burden of proof remains on plaintiff throughout the trial to establish his cause of action, the burden is on defendant to establish affirmative defenses relied on by him to defeat the right of recovery.

9. Appeal and Error § 8—

An appeal will be determined in accordance with the theory of trial in the lower court.

10. Executors and Administrators § 10: Trial § 29c—Instruction held for error in failing to charge that burden was on defendant to prove affirmative defense.

In this action by an administrator against intestate's widow to recover certain stock as assets of the estate, plaintiff's evidence disclosed that

intestate had assigned certain of the stock to himself or wife, and had directed that the other stock be transferred on the books of the corporations to himself or wife, that the stock was re-issued in accordance with his instructions and plaintiff alleged that the widow had possession of the choses in action. The case was tried on the theory that the assignment and transfer of the stock created an agency which was terminated by intestate's death. Defendant widow claimed that the stock belonged to her by reason of the fact that it was bought with her own individual money. *Held:* An instruction to the effect that the burden was on plaintiff to establish title, that defendant did not have to prove title, and that if the jury found from the evidence that the stock represented proceeds of an investment made by intestate for defendant to answer the issue of ownership against plaintiff administrator, *is held* erroneous upon the theory upon which the case was tried in failing to place any burden on defendant to prove the affirmative defense relied on by her.

11. Executors and Administrators § 10: Bills and Notes § 25—Possession of note by payee raises presumption of title.

In this action by an administrator against intestate's widow to recover a certain note as an asset of the estate, it appeared that the note was payable to intestate or the widow and that it was in the widow's possession. *Held:* In the absence of evidence of superior title, an instruction that if the jury believed the evidence to answer the issue of ownership of the note in favor of defendant widow is without error.

APPEAL by plaintiff from *Pless, J.*, at December Term, 1939, of MACON. Partial new trial.

The plaintiff administrator claimed the ownership and sued for the recovery of certain certificates of stock, to wit, (a) a certificate of stock (No. 993) in the Mechanics Perpetual Building & Loan Association, of Charlotte, North Carolina, for 50 shares, payable to R. M. Waldroup or H. L. Waldroup; (b) a certificate (No. 882) for 35 shares of stock in the Mutual Building & Loan Association, of Charlotte, North Carolina, payable to R. M. Waldroup or H. L. Waldroup; (c) (d) (e) (f) (g) and (h), Certificates Nos. J-4, 229, 754, 755, 1536, 2474, for an aggregate of 74 shares of stock in the Blue Ridge Building & Loan Association, of Asheville, North Carolina, of the par value of $100.00, all payable to R. M. Waldroup; and (i) one note of the face value of $416.35, made payable to R. M. Waldroup or Hattie L. Waldroup.

In his complaint the administrator alleges: "R. M. Waldroup constituted his wife, Hattie L. Waldroup, his agent to withdraw or otherwise dispose of the stock in the Blue Ridge Building & Loan Association hereinbefore set forth, by a paper writing as follows: 'For Value Received, I hereby transfer, set over and assign to R. M. Waldroup, or Mrs. Hattie L. Waldroup, either or the survivor, all my right, title and interest in and to the following certificates of stock of Blue Ridge Building & Loan Association: Certificate No. 42, for 10 shares in series 65; Certificate No. 299, for 6 shares dated January 1, 1931; Certificate No.

754, for 2 shares dated January 1, 1932; Certificate No. 755, for 2 shares dated January 1, 1932; Certificate No. 1536, for 40 shares dated October 1, 1933; Certificate No. 2474, for 10 shares in series No. 64, a total of seventy shares, and authorize the Blue Ridge Building & Loan Association to make the necessary transfer on the books of the Association. Witness my hand and seal, this 29th day of February, 1936. R. M. Waldroup (Seal). Witness: ....." All of these items are alleged to be in possession of defendant.

In her answer the defendant denies the title of the administrator to the items set up and made the subject of his suit, and avers that she is the sole beneficial owner thereof, not merely by virtue of the conveyance set out in the complaint and there construed as creating an agency, but by reason of the fact, as she alleges, that the stocks and note in dispute were purchased with her own individual money.

The complaint was amended to set up that the sole distributees of the estate of Waldroup were his wife and his mother.

Upon the trial the plaintiff introduced evidence substantially as follows:

Mr. E. Y. Keesler, an employee of the Mutual Building & Loan Association, of Charlotte, identified the certificates of stock issued by that association and these were introduced in evidence.

Mr. Keesler further testified that the certificate identified, payable to R. M. Waldroup or H. L. Waldroup, replaced several prior certificates issued to R. M. Waldroup, and that there was no exchange of funds at the time it was issued; that he did not handle personally the transaction by which the first certificates were issued, and that the records pertaining to the certificates which he identified were not made under his direction and supervison, but that they were handled by a Mr. Long.

Witness further testified that about 22 January, 1935, all these numbered stock certificates, five of them, were sent to the association by Dr. Waldroup for exchange by mail, with instructions that one new certificate be issued in the total sum of $3,500.00, the same aggregate amount, to R. M. Waldroup or H. L. Waldroup. The effective date of that transfer was 1 September, 1934, and in lieu of these five certificates there was issued certificate 882 for 35 shares of stock, which is still outstanding. The checks for dividends were made payable to R. M. Waldroup or H. L. Waldroup. No further correspondence was found with reference to the matter.

Mr. T. G. Barbour, employed as secretary and treasurer by Mechanics Perpetual Building & Loan Association, testified, in substance, that about 31 December, 1929, the corporation sold and issued shares of stock to R. M. Waldroup and issued six certificates, which witness referred to in detail; that afterward the association called in these shares "for the

purpose of receiving cash or a new certificate bearing interest at a lower rate." Under this call Dr. Waldroup surrendered these certificates and a new certificate for 50 shares (No. 993) was issued to R. M. Waldroup or H. L. Waldroup, dated 1 October, 1935. "Dr. Waldroup was notified of the desire of the corporation to call in the certificates by form letter. I do not have the original or duplicate original of that letter. In response to the form letter sent to stockholders, the company received a letter from Dr. Waldroup. The letter is as follows: 'Bryson City, N. C. 12/16/35. Mechanics Perpetual B. & L. Assoc. Please find enclosed my stock certificates for change in interest rate as per your letter. Please write the new stock to "R. M. or H. L. Waldroup." I want both names so if anything should happen the other would cash in without the usual red tape. Yours truly, (Signed) R. M. Waldroup.' " The change in the certificate was made in pursuance to this letter. Dr. Waldroup had been the payee in the former certificates which this replaces.

J. P. Brown testified for plaintiff that he was receiver of the Blue Ridge Building & Loan Association and had custody of the books extending back to 1929, in which is recorded the shares of stock issued, and to whom. That the record showed the original shares of stock issued to R. M. Waldroup, except certain shares of stock issued to others, as, for instance, Mrs. Mona Baskeete, and transferred to Waldroup.

Plaintiff introduced the stubs of the certificates originally issued to Waldroup.

Mrs. E. H. Bailey testified for plaintiff that she was employed by the receiver of the Blue Ridge Building & Loan Association and had worked for the association itself, prior to the receivership, continuously down to the time of the receivership. The witness denied any personal knowledge of the transactions save that which was a matter of record, but testified as to certain of these certificates issued to Dr. Waldroup in the year 1927, and that the records showed that Dr. Waldroup had procured a loan of $6,000 on that stock. In October, 1933, the $10,000 of stock was canceled, the $6,000 stock loan repaid, and $4,000 stock issued to Dr. Waldroup. Witness testified that she was personally acquainted with Dr. Waldroup and did not know of any other person having anything to do with the stock. She testified that dividends were paid to Dr. Waldroup. Witness testified that she was witness to the paper executed by Mrs. Baskeete to Dr. Waldroup transferring certain shares of stock. The paper writing contained the entry that the stock was payable to "R. M. Waldroup or Mrs. Hattie L. Waldroup, either, or the survivor." Continuing, on cross-examination, this witness testified that pursuant to this paper writing by Dr. Waldroup, and witnessed by herself, she transferred the stock on the books in accordance with his direction.

The plaintiff lodged numerous exceptions to the cross-examination, in which the witness was permitted to say that she transferred the stock upon the books. Witness further testified that all the stock was fully paid for.

The defendant's evidence may be summarized as follows:

Mrs. Hattie L. Waldroup testified, over objection of the plaintiff, that she had been in the possession of Certificate No. 882 in the Mutual Building & Loan Association of Charlotte since some time in January, 1935, and that she kept it in her own private desk. She testified to the same effect as to Certificate No. 993, issued by Mechanics Perpetual Building & Loan Association of Charlotte, which had been introduced in the evidence. As to the certificates of stock issued by the Blue Ridge Building & Loan Association, she testified that she had had them in her possession since soon after they had been issued and had kept them in her private desk at home. As to the note which the plaintiff sought to recover, the witness testified that she had had it in her possession since it was issued.

Witness further testified that since the year 1927 she owned and operated a business in Bryson City known as the "Ice Plant business," and that her net annual income was from $2,500.00 to $3,000.00 a year, and that she still owned the ice plant.

E. H. Corpening testified for the defendant that he had lived in Bryson City since 1912 and was acquainted with R. M. Waldroup from that time until his death; that he had had a conversation with Dr. Waldroup concerning his business affairs on two occasions; first, during the summer of 1934. That conversation took place in the office of the register of deeds of Swain County at the time witness was chairman of the board of county commissioners.

Over objection, the witness was permitted to testify that the conversation principally concerned some deeds that transferred property; that witness had drawn two different deeds for Dr. Waldroup. At this time, Dr. Waldroup made certain statements concerning previous deeds. "He mentioned a deed to Mrs. H. L. Waldroup in 1927. He mentioned concerning that deed that the reason for that deed was he wanted his property to go to the survivor, and we drew two deeds that way. He talked to me concerning the Ice Plant property, and the income from the Ice Plant. He said the income from it, which was two or three thousand dollars a year, went to Mrs. Waldroup. He did not state definitely who owned it, but the income from it was hers."

Over further objection by plaintiff, the witness testified that Dr. Waldroup mentioned two blocks of building and loan stock, one the Charlotte stock and the other the Asheville stock, and stated that one was in the name of R. M. or H. L. Waldroup and the other he had made

an assignment for. There was objection to this on the part of the plaintiff. The witness testified that Dr. Waldroup discussed his affairs with him frequently and said that he wanted the stock to go to the survivor.

The other conversation was about Thanksgiving, 1936. At this time, also, Dr. Waldroup mentioned the building and loan stock, making practically the same statement with regard thereto and supplementing this with some reference to his state of health. Witness testified that he saw Dr. Waldroup frequently and for a large part of the time talked to him every day.

The plaintiff entered objection to the testimony concerning conversations with Dr. Waldroup.

Mrs. Maude Hunter testified for the defendant substantially that she had lived in Bryson City forty-six years and had talked with Dr. Waldroup before his death. Over objection she was permitted to state that Dr. Waldroup told her that he was investing in the building and loan association of Asheville, Blue Ridge Building & Loan Association, and Building & Loan Association of Charlotte, for Mrs. Waldroup. She testified that the conversation was brought up just after her husband died, about 1930, at which time witness' mother had money to invest in building and loan. She got Dr. Waldroup to write letters for her. Plaintiff moved to strike out all of this testimony.

At the close of all the evidence, plaintiff moved for a directed verdict in favor of the plaintiff on the issues tendered, the motion was denied, and plaintiff excepted.

The following issues were submitted to the jury without objection and answered as appears:

"1. Is the plaintiff the owner and entitled to the possession of 50 shares of stock in Mechanics Perpetual Building & Loan Association of Charlotte, N. C., evidenced by Certificate No. 993, bearing date on or about October 1, 1935, payable to R. M. Waldroup or H. L. Waldroup, as alleged in the complaint? Answer: 'No.'

"2. Is plaintiff the owner and entitled to the possession of 35 shares of stock in Mutual Building & Loan Association, of Charlotte, N. C., evidenced by Certificate No. 882, bearing date on or about January 22, 1935, payable to R. M. Waldroup or H. L. Waldroup, as alleged in the complaint? Answer: 'No.'

"3. Is the plaintiff the owner and entitled to possession of the 70 shares of stock in the Blue Ridge Building & Loan Association, of Asheville, N. C., represented by Certificate J-42 for 6 shares, Certificate No. 229 for 6 shares, Certificate No. 765 for 2 shares, Certificate No. 755 for 2 shares, Certificate No. 1536 for 40 shares, and Certificate No. 2474 for 10 shares, as alleged in the complaint? Answer: 'No.'

"4. Is the plaintiff the owner and entitled to the possession of a note

for $416.35, dated on or about December 9, 1935, executed by T. W. Porter, administrator of the estate of J. W. Porter, deceased, to Dr. R. M. Waldroup or Hattie L. Waldroup, as alleged in the complaint? Answer: 'No.'"

On these issues the court, amongst other instructions to the jury, charged as follows: "The court instructs you that the burden is on the plaintiff, the administrator, to establish his ownership to the stock, and that the defendant does not have to prove she is the owner, but that the plaintiff must affirmatively establish that he is the owner. And if from the evidence you find that the stock was the proceeds of an investment made by Dr. Waldroup for Mrs. Waldroup, then she would be the owner of the stock regardless of the name to whom it was made out, and then in that event it would be your duty to answer that issue 'No.' finding that the property did not belong to the administrator, but to Mrs. Hattie L. Waldroup."

After instructing the jury that the fact that the original issues of stock were made to Waldroup would, in the absence of rebutting evidence, raise the presumption that he was the owner, the court charged: "Now you will notice that in giving you that instruction that the court made the statement that in the absence of rebutting evidence or nothing else appearing, it would be your duty to make certain findings. The court instructs you that if you should find there is rebutting evidence or that something else appears, to wit, if you shall find this stock was the proceeds of the moneys of Mrs. Waldroup which was invested for her by her husband, Dr. Waldroup would in that event not be the owner of it, and it would be your duty to answer the issue 'No.'"

Similar instructions were given upon the other issues.

All issues were answered in favor of defendant; thereupon, judgment was entered in favor of the defendant, and plaintiff appealed, assigning error.

G. A. Jones, B. C. Jones, and Gray & Christopher for plaintiff, appellant.

Edwards & Leatherwood for defendant, appellee.

SEAWELL, J. A careful scrutiny of the evidence to which plaintiff objected fails to disclose reversible error.

The two more serious challenges to the introduction of that evidence are directed to the testimony of E. H. Corpening and Mrs. Maude Hunter, who testified as to conversations had with Dr. Waldroup with reference to the stock now sought to be recovered from this defendant. In view of the construction which the court must give to the action of Dr. Waldroup in causing the transfer of stock in some of the several

associations concerned and of the paper writing admitted by both sides to have been executed by Dr. Waldroup transferring stock to himself and wife jointly, it seems clear to us that the statements of Dr. Waldroup disparaging to his own exclusive ownership are strongly corroborative of the defendant's position with regard to these disputed transactions and are relevant and admissible. *Wilson v. Williams,* 215 N. C., 407, 2 S. E. (2d), 19; *Wilder v. Medlin,* 215 N. C., 542, 2 S. E. (2d), 549.

It has also been suggested that Mrs. Waldroup was incompetent to testify as to the possession of the several certificates of stock and of the note in controversy as being excluded under the provisions of C. S., 1795, as an interested party. This is upon the theory that such statement implied a delivery of the stock to the witness by Dr. Waldroup himself, such delivery constituting a personal transaction between the two having an important bearing on the transfer of title.

Although there are authorities supporting such a position (see 70 C. J., 313), the better opinion is clearly in favor of the competency of such evidence. Citation *supra. McCombs v. McCombs,* 204 Wis., 293, 234 N. W., 707. But it is not an open question in this State. In *Thompson v. Onley,* 96 N. C., 9, 13, where the issue was between the defendant and the administrator of the deceased person to whom an unendorsed note in defendant's possession is payable, and where, of course, the question of delivery was paramount, defendant was permitted to testify that the note was in her possession at the commencement of the action. Passing on this the Court said: "It cannot be seen that the only source of the witness' information was a personal transaction or communication between her and the deceased." In the case at bar the fact of possession implies, perhaps even more strongly, that the possession had been derived from the corporations who issued the stock, and as to the note, from the maker of it, since it was payable to either plaintiff's intestate or defendant.

The question, however, seems to be academic in the case at bar, since the fact of possession is not in dispute. The plaintiff brings an action for the recovery of the specific items, and in his complaint alleges the possession of the defendant. The inference of delivery of the certificates of stock and note by Dr. Waldroup is as strongly raised by the admitted facts as it would be by the testimony of the witness alone.

Under the *Onley case, supra,* the testimony must be regarded as an independent fact. See comparison of cases in *Wilder v. Medlin, supra; Sutton v. Wells,* 175 N. C., 1, 3, 94 S. E., 688; *In re Will of Saunders,* 177 N. C., 156, 98 S. E., 378.

There are exceptions to the charge, relating to the burden of proof, with which we cannot deal adequately without attempting to remove

from the case some misapprehension of law respecting the theory on which the case was tried.

It was understood by the plaintiff, and the theory adopted by the court, without much protest on the part of the defendant, that the paper writing in which Dr. Waldroup purported to convey the Blue Ridge stock to himself and wife, with the rights of survivorship, as well as his conduct in requiring that new issues of stock in the other building and loan companies be made to himself and wife, with an indication that he intended survivorship, had no other effect than to create an agency in Mrs. Waldroup, terminated by the preceding death of her husband. This view is not consonant with the facts, or with a proper interpretation of either the paper writing referred to or the transaction by which Waldroup caused the new issues of stock to be made to himself and wife; and that view is not supported by the authorities cited in plaintiff's brief.

C. S., 1735, abolished survivorship in joint tenancy, with an exception as to partners, so that the surviving partner might apply the partnership assets to the partnership debts. After this has been accomplished, the remainder goes, under the Statute of Distributions, to those entitled.

But this statute abolished survivorship only where it follows as a legal incident to an existing joint tenancy. It did not, and does not, prevent persons from making agreements as to personalty such as to make the future rights of the parties depend upon the fact of survivorship. *Taylor v. Smith,* 116 N. C., 531, 535, 21 S. E., 202. Since there is nothing in public policy to prevent it, the right should be upheld.

Defendant cites in the brief *Jones v. Fullbright,* 197 N. C., 274, 148 S. E., 229, and *Nannie v. Pollard,* 205 N. C., 362, 171 S. E., 341, both of which cases concern a joint checking account at the bank; and there is nothing in the evidence in those cases to indicate that the ownership of any part of the account had been transferred from the husband. Such an account might run from one cent to millions, and in its fluctuation the original items of deposit may have disappeared in the process of checking many times. The cases are not analogous to the one at bar. The other cases cited—*Graham v. Graham,* 9 N. C., 322; *Morrow v. Williams,* 14 N. C., 263; *Dail v. Jones,* 85 N. C., 221; *Outlaw v. Taylor,* 168 N. C., 511, 84 S. E., 811; *Speight v. Speight,* 208 N. C., 132, 179 S. E., 461; *Nixon v. Nixon,* 215 N. C., 377, 1 S. E. (2d), 828—all relate to attempts *totidem verbis* to reserve a life estate in personalty with remainder over. This has nothing to do with a joint tenancy in personalty with survivorship created by contract—either bilateral agreement or gift. *Taylor v. Smith, supra.*

We construe the conveyance, admittedly made by Dr. Waldroup, with reference to the Blue Ridge stock, as creating a common ownership in

the property which is its subject until one of them should die, with the right of survivorship.

As to the other corporations involved, just as in all corporations, the title of the stock might be by assignment, without reference to registry on the books of the company—which is good *inter partes*—following which the legal title might be perfected by such registry and the delivery of the certificates. *Havens v. Bank,* 132 N. C., 214, 43 S. E., 639; *Cox v. Dowd,* 133 N. C., 537, 45 S. E., 864. But this is by no means an exclusive method of transfer. It may be done by direction of the holder and owner of the stock upon the books of the company which, followed by delivery, or a surrender of the dominion of the certificates to the transferee, would make the title complete. C. S., 1164; *Mitchell v. Realty Co.,* 169 N. C., 516, 86 S. E., 358; *Bleakley v. Candler,* 169 N. C., 16, 84 S. E., 1039; *Richardson v. Emmett,* 61 App. Div., 205, 70 N. Y. S., 546, 170 N. Y., 412, 63 N. E., 440; *Chicago Title & Trust Co. v. Ward,* 332 Ill., 126, 163 N. E., 319.

The position of the defendant here is even stronger, because Waldroup required the issue of new stock to himself or wife, which was so registered upon the books of the company, under his instruction, under circumstances which might be evidence of a gift *inter vivos,* creating an estate for the common enjoyment of himself and wife, with the right of survivorship upon the death of one of them.

In all these matters we are dealing with certificates of stock issued to plaintiff's intestate and Hattie L. Waldroup. We use the term "and" advisedly, because consistently with the apparent intention of the assignment appearing in the record, the letters and conduct of Dr. Waldroup in having the stock issued that way and so registered upon the books of the corporations, the disjunctive (used no doubt to emphasize the survivorship) "or" may be read as the conjunctive "and." *Ham v. Ham,* 168 N. C., 487, 84 S. E., 840; *Pilley v. Sullivan,* 182 N. C., 493, 109 S. E., 359; *Richmond v. Woodward,* 32 Vt., 833, 838; *Litchfield v. Cudworth,* 32 Mass., 23, 27.

Under this evidence and its legal implications, it is clear that the plaintiff was not entitled to the instruction that if the jury believed the evidence they should find in his favor.

On the issues relating to the ownership and right to possession of the stocks in the building and loan associations, the judge gave instructions to the jury, of which the following is typical: "The court instructs you that the burden is on the plaintiff, the administrator, to establish his ownership to the stock, and that the defendant does not have to prove she is the owner, but that the plaintiff must affirmatively establish that he is the owner. And if from the evidence you find that the stock was the proceeds of an investment made by Dr. Waldroup for Mrs. Wal-

droup, then she would be the owner of the stock regardless of the name to whom it was made out, and then in that event it would be your duty to answer that issue 'No.' finding that the property did not belong to the administrator, but to Mrs. Hattie L. Waldroup." The plaintiff complains that this instruction placed a greater burden upon him than the law requires.

It is true that the burden of an affirmative issue, such as those submitted to the jury in the instant case, is upon the plaintiff and does not shift during the course of the trial. *Everett v. Mortgage Co.,* 214 N. C., 778, 1 S. E. (2d), 109; *Benner v. Phipps,* 214 N. C., 14, 197 S. E., 549; *Williams v. Ins. Co.,* 212 N. C., 516, 193 S. E., 728; *Stein v. Levins,* 205 N. C., 302, 171 S. E., 96; *Hunt v. Eure,* 189 N. C., 482, 127 S. E., 593. But the burden is upon one who asserts an affirmative plea to establish it by appropriate proof. *Benner v. Phipps, supra; Everett v. Mortgage Co., supra; Mitchell v. Whitlock,* 121 N. C., 166, 28 S. E., 292; *Mayo v. Jones,* 78 N. C., 402.

The trial judge placed the claim of the plaintiff and the claim of the defendant in apposition in this instruction, and the jury may have been led to believe that it was incumbent upon the plaintiff to overcome the evidence of the defendant as to her affirmative plea by preponderating proof without regard to any burden in that respect which the law of evidence placed upon the defendant.

This case, as we have seen, was tried upon the theory that the assignment of the Blue Ridge stock, and the acts of Dr. Waldroup in causing new stock to be issued to himself and wife, and so registered on the books of the corporations of the two other building and loan associations, created merely an agency in Mrs. Waldroup, which terminated at the death of Waldroup. Under this theory, the only avenue of approach to a consideration of the subject permitted the jury was toward a consideration of the equitable claim asserted by Mrs. Waldroup. However erroneous this theory was, it is impossible for us now to say what the jury might have done if the case had been tried otherwise; and upon the theory adopted, the instruction was erroneous and confusing as to the burden of proof.

It is to be observed here that the same evidence of plaintiff which was considered to establish his *prima facie* title to the stocks also disclosed their assignment by Dr. Waldroup and their transfer upon the books of the corporation and new issue of stock according to his instructions. The defendant made no appropriate motion with regard to the effect of this evidence legally considered, and we make no decision here as to its sufficiency in establishing plaintiff's title. If it merits submission to the jury, the burden which rests upon the plaintiff with regard to it should be

properly explained, as well as the burden which rests upon the defendant to support her affirmative claim with the requisite degree of proof.

But the result of the trial with regard to the note should not be disturbed.

The plaintiff contends that the judge erroneously instructed the jury that the possession of this note raised a presumption of ownership which he says is not true as against a payee, and cites *Hayes v. Green,* 187 N. C., 776, 123 S. E., 7. In the cited case the unendorsed note payable to plaintiff was in the hands of a holder who was not payee. In this case both Mrs. Waldroup and plaintiff's intestate were payees, and the plaintiff has shown no superior right of ownership or possession. The judge was correct in his instruction to the jury that if they believed the evidence they should find in favor of the defendant.

For the errors pointed out, the plaintiff is entitled to a new trial, with respect to the stocks mentioned in the first three issues, and it is so ordered. With respect to the fourth issue, involving the note, we find no reversible error.

Partial new trial.

A. S. BARNES, ADMINISTRATOR OF THE ESTATE OF ELMO D. BARNES, DECEASED, v. TOWN OF WILSON, A MUNICIPAL CORPORATION.

(Filed 28 February, 1940.)

1. Trial § 22b—

Upon motion to nonsuit, the evidence tending to support plaintiff's cause of action will 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. Municipal Corporations § 14—Evidence of municipality's negligent failure to use due care to keep street in reasonably safe condition held for jury.

The evidence tended to show that defendant municipality had scraped the dirt street involved in this action three months before the accident, that a manhole cover about two feet in circumference was allowed to remain in a depression about five inches deep, with hard earth surrounding it, that the manhole was east of the center of the street, and that plaintiff's intestate, driving a motorcycle on his right side of the street at a speed of about twenty-five miles per hour, struck the depression, causing his motorcycle to bounce and get out of control, resulting in fatal injury. *Held:* The evidence was properly submitted to the jury on the issue of defendant municipality's negligence in failing to exercise due diligence to keep its street in a reasonably safe condition.

3. Same—Duty of municipality to keep streets in reasonably safe condition.

While a municipality is not an insurer of the safety of its streets, it is under duty to make reasonable inspection and to repair dangerous defects

and conditions of which it has notice, either actual or implied, regardless of whether the defects are caused by it or by others, and, in the exercise of such reasonable diligence, to keep its streets in a reasonably safe condition for travel by all vehicles having the right to use the streets, whether automobiles, motorcycles, bicycles or wagons.

4. Same—

Nonsuit on the ground of contributory negligence on the part of plaintiff's intestate, killed in an accident occurring when the motorcycle he was riding hit a manhole cover in a depression in a street, *held* properly denied.

5. Appeal and Error § 39e: Death § 8—Charge on issue of damages for wrongful death held without prejudicial error when construed as a whole.

In this action for wrongful death, the charge on the issue of damages *is held* not to contain prejudicial error because of the use by the court of the words "gross income" in stating the rule for the ascertainment of the present cash value of the net pecuniary worth of intestate, since, construing the charge as a whole, it is apparent that the court was not referring to the total amount intestate would have earned during his life expectancy, but to such sum less his living expenses. An instruction to the effect that interest for the period of intestate's life expectancy should be deducted from his net pecuniary worth to ascertain the present cash value of his net pecuniary worth, disapproved, since intestate's earnings would not be postponed until the end of his life expectancy.

6. Appeal and Error § 39a—

An error in favor of appellant cannot entitle him to a new trial.

7. Appeal and Error § 29—

Only exceptive assignments of error brought forward in appellant's brief will be considered. Rule of Practice in the Supreme Court, No. 28.

BARNHILL, J., dissenting.

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

APPEAL by defendant from *Thompson, J.*, at June Term, 1939, of WILSON. No error.

This is an action for actionable negligence brought by plaintiff, administrator, for killing his intestate, Elmo D. Barnes, alleging damage; the alleged injury being caused by the negligence, or the lack of due care, of the defendant in not keeping a manhole in its street in a reasonably safe condition, which the defendant knew, or in the exercise of due care should have known that it caused a direct hazard to persons operating motor vehicles and motorcycles, and that said negligence was the proximate cause of plaintiff's intestate being killed. Plaintiff's intestate was riding a motorcycle, which he was accustomed to riding, at the time of the fatal injury. The defendant denied negligence and set up the plea of contributory negligence.

The evidence on the part of plaintiff was to the effect that Elmo D. Barnes, plaintiff's intestate, was riding a motorcycle on Maury Street in the city of Wilson, which runs North and South. The street is four blocks long and is 20 feet wide at the manhole where the fatal injury occurred. It is 8 feet from the center of the manhole to the ditch on the east side and 12 feet to the west side of the street. A part of the street is soft but at the place where the accident occurred the ground approaching the manhole was hard. There are dwelling houses on both sides of the street. The manhole cover was about 5 or more inches deeper or lower than the street; the top lower than the street and about 5 inches larger than the manhole, in the shape of a bowl. The cover of the manhole is about 20 inches and the cast around it makes it about 2 feet. The drop was about 5 inches. The town worked the street with a scraper 3 months before the accident.

Henry Denkins testified, in part: "Elmo D. Barnes was running about 25 miles an hour. Manhole in the middle of the street, or whatever it was, and when he hit that hole the front wheel bounced up that high. When the front wheel bounced up the back wheel done the same thing and he lost control of it and the motorcycle throwed him. He was in a straddled position; the motorcycle on top of him. He made no evidence to kick, lying on this side, looked like this side of his eye was about out and his ears and nose bleeding. . . . I looked at the manhole and it was about like that below the surface of the street; about 6 inches or 5½. Kinder round; that is the place he hit riding. The motorcycle went about 10 steps before it stopped. He fell kinder to the left of the center of the road; manhole kinder on the side. The manhole was kinder on the right side the way he was going."

Booker T. Denkins testified, in part: "Saw this man riding the motorcycle. He came across the manhole riding about 25 miles an hour and his back wheels went into a bounce as the front wheels reared up and it throwed him off and the motorcycle went about 10 feet. There was a drop of about 6 inches; I didn't measure it; 6 inches is about a full hand. It was in the shape of a bowl. The general nature of the soil was real hard."

The accident occurred about 6:00 o'clock in the evening of 16 September, 1938. The motorcycle had no lights on it, it was not dark enough for lights. It was in evidence that Elmo D. Barnes worked for different concerns and earned from $18.00 to $25.00 per week.

Mrs. Elmo D. Barnes testified, in part: "I would say his own living expenses at the time of his death and for a year or two before that were approximately between $10.00 and $15.00. I would say that his actual living expenses for a year before his death were $15.00 per week. He was in good health; good habits; raised in Wilson. He lived about one

mile from the Imperial Plant; he walked to work and did not own a motorcycle. He had ridden a motorcycle before the 16th day of September, off and on since we were married. . . . He died Sunday night at 11:30, the 18th of September. The accident occurred Friday, the 16th. He lacked 6 days of being 27 years old."

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

"1. Was the plaintiff's intestate injured and killed by the defendant, as alleged? Ans.: 'Yes.'

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

"3. What damage, if any, is plaintiff entitled to recover of the defendant? Ans.: '$8,000.'"

The court 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 considered in the opinion.

Charles M. Griffin, D. M. Hill, and Donnell Gilliam for plaintiff.
Finch, Rand & Finch and W. A. Lucas for defendant.

CLARKSON, J. At the close of plaintiff's evidence and at the conclusion of all the evidence, the defendant made motions in the court below for judgment as in case of nonsuit. C. S., 567. The court below refused these motions and in this we can see no error.

The evidence which makes for plaintiff's claim, or tends to support his cause of action, is to be taken in its most favorable light for the plaintiff, and he is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom.

In 28 Cyc., pp. 1358, 1359, 1360, the rule as to reasonable care and safety is thus stated: "Where the municipality is chargeable with notice or knowledge of defects or obstructions, the general municipal duty to exercise ordinary care to keep its streets in a reasonably safe condition is continuing and constant. Its liability is for negligence, however, and for negligence only. It is not liable for damages for every accident that may occur within its limits; it is not an insurer against all defects or obstructions in its streets and is not required or expected to do everything that human energy or ingenuity can do to prevent injury to the citizen; but its duty is to exercise reasonable care, and only this degree of care, to make and maintain its streets and walks reasonably safe for the purposes to which such respective parts are devoted, and for the use of persons traveling thereon in the usual modes, by day or by night, and who are themselves in the exercise of reasonable care, whether the defect

or condition causing the injury was created by the municipality itself or was created by some third person or by natural causes, and should in the exercise of ordinary care have been discovered and repaired. After it has notice, either express or implied, of the existence of defects or obstructions, no matter how they are caused, the obligation immediately arises to exercise reasonable care to restore the street, that it may again be reasonably safe for ordinary travel." The duty above set forth is on all who have the right to use its streets, automobiles, motorcycles, bicycles, wagons, buggies, etc.

In an action for personal injury from stepping into a hole in a sidewalk, defendant's negligence in removing a water meter and leaving a hole in the sidewalk four to seven inches deep for from 6 to 12 months held for the jury. *Sehorn v. Charlotte,* 171 N. C., 540. Whether hydrant attached to building and projecting nine inches over sidewalk constitutes nuisance is jury question. *Swinson v. Realty Co.,* 200 N. C., 276.

In *Gasque v. Asheville,* 207 N. C., 821, the plaintiff was injured by stepping on the lid of a partly covered water meter box about 6 inches from the outside of the street. It tilted back and forth—the lid did not fit. The occurrence was about 9 o'clock at night in April. The charge of the court below (by Schenck, J., then on the Superior Court bench) was approved by this Court.

"The governing authorities of a city are charged with the duty of keeping their streets and sidewalks and water meter boxes in a reasonably safe condition; and their duty does not end with putting them in a safe and sound condition originally, but they are required to keep them so to the extent that this can be accomplished by proper and reasonable care and continuing supervision. It is the duty of the city of Asheville to keep the streets, including the sidewalks and meter boxes thereon and nearby, in proper repair; that is, in such condition as that the people passing and repassing over them might at all times do so with reasonable care, speed and safety. It is not the duty of the city, however, to warrant that the condition of its streets and sidewalks and meter boxes shall be at all times absolutely safe. The city is not an insurer of their safety; the city is only required to exercise ordinary or reasonable care to make them safe. The city is only responsible for negligent breach of duty and to establish such responsibility it is not sufficient to show that a defect existed and an injury has been caused thereby. It must be further shown that the officers of the city knew or by the exercise of due care might have known of the defect, and that the character of the defect was such that injury to travellers therefrom might be reasonably anticipated. It will be observed that actual notice of a dangerous condition or defective structure is not required, but notice may be implied from

circumstances, and will be imputed to the city if its officers could have discovered the defect by the exercise of due care or proper diligence. Actual notice is not a necessary condition to render the city liable for a defect which causes an injury. Under its duty of actual diligence, a municipal corporation is bound to know the condition of its sidewalks or meter boxes, where the opportunity of such knowledge exists; the opportunity of knowing stands for actual knowledge. A city is presumed to have notice of such defects as it might have discovered by due care or reasonable diligence, but the most that is required of a city is the use of ordinary diligence by making inspections and examinations with reasonable frequency and due care to ascertain and remedy them. It is the duty of a city to exercise due care to keep its streets and sidewalks and meter boxes in good condition and repair, so that they will be safe for the use of its inhabitants, or those entitled and having occasion to use them. If they become unfit for use by reason of defects which could not be anticipated, and consequently guarded against, the municipality must have some notice of the defect before it can be held liable for any injury proximately caused thereby. Sometimes notice of such defects is actual or express, and, again, sometimes such notice is constructive or implied. It is the duty of a city to exercise a reasonable and continuing supervision over its streets and sidewalks in order that it may know they are kept in safe condition." *Bailey v. Winston,* 157 N. C., 252 (257); *Bailey v. Asheville,* 180 N. C., 645; *Markham v. Improvement Co.,* 201 N. C., 117; *Debnam v. Whiteville,* 211 N. C., 618; *Ferguson v. Asheville,* 213 N. C., 569.

Nonsuit on the ground of contributory negligence was properly denied. *Cole v. Koonce,* 214 N. C., 188; *Ferguson v. Asheville, supra.* The issue addressed to this defense was submitted to the jury with appropriate instructions, to which no exception was noted.

The defendant also noted exception to the charge on the issue of damages, and contends that the use of the phrase "this gross amount" in referring to the sum from which the present cash value of the pecuniary worth of the deceased was to be ascertained, was erroneous and constituted reversible error. While these words standing alone and disconnected from the words immediately preceding might be so construed, however, taken contextually, we find the charge free from error prejudicial to defendant. After charging the jury in accord with the rule laid down in *Mendenhall v. R. R.,* 123 N. C., 275, and *White v. R. R.,* 216 N. C., 79, the trial judge used this language: "I charge you that the measure of damages in the case is the present value of the net pecuniary worth of the deceased to be ascertained by deducting the cost of his own living and expenditures from the gross income, based upon his life expectancy. . . . Now, after you have fixed upon the amount repre-

senting the yearly earnings of the deceased, that is to say, his net annual income and the number of years he probably would have lived, you can, by multiplying the one by the other, determine approximately what would have been the gross amount of his net income during his whole life. This amount, this gross amount, must be reduced to its present cash value which would necessarily be less than the gross amount, and which may be arrived at by dividing the gross sum by one dollar plus the legal rate of interest (6%), for the expectancy years of the deceased, as the present worth of a sum payable at some future period without interest is such an amount as being put at interest will amount to the sum at the period when it becomes due."

It is thus apparent that the words "this gross amount" must be taken in connection with the sentence immediately preceding, and the pronoun "this" understood to refer to the gross amount of his net income during life. The use of the mathematical formula employed in the instant case was criticized in *Ward v. R. R.*, 161 N. C., 179, and it was there recommended that its use be discontinued. In applying it here the base period employed was the entire period of the expectancy, which was erroneous, as the contemplated earnings would not have been postponed until the end of decedent's life. However, this error was one in favor of the appealing defendant and against plaintiff, and, as stated by *Hoke, J.*, in *Ward v. R. R., supra* (187), "The mistake in the charge being in his favor, it may not be held for reversible error." However, the defendant makes no point as to this method of calculation. The only exception to the charge on the issue of damages referred to in defendant's brief relates to the use of the word "gross" hereinbefore discussed. Rule 28.

We conclude that in the trial below there were no prejudicial or reversible errors.

No error.

BARNHILL, J., dissenting: The manhole of Maury Street (on which the deceased was traveling on a motorcycle) was located in the street. It was constructed so that its top was below the surface of the street as is usual when located in an unimproved street. It was a part of the system of public utilities maintained by the town for the promotion of the health and convenience of its citizens and it was constructed in accord with approved engineering practice. It has existed in its present location, so far as the evidence discloses, from the time of its original construction as a part of the original plan. Furnishing the convenience, of which the manhole was a part, in promoting the health of the community, was a governmental function. For this reason it may be that the defendant is not chargeable with negligence by reason of the condition complained of which was incidental thereto. *Klingenberg v. Raleigh,*

212 N. C., 549, 194 S. E., 297. As this question is not presented, I refrain from expressing an opinion.

A municipality is only required to exercise ordinary care to maintain that portion of its streets set apart for vehicular traffic in a reasonably safe condition for those traveling on vehicles who exercise ordinary care for their own safety. *Oliver v. Raleigh,* 212 N. C., 465, 193 S. E., 853; *Ferguson v. Asheville,* 213 N. C., 569, 197 S. E., 146. "The object to be secured is reasonable safety for travel considering the amount and class of travel which may fairly be expected upon the particular road." *Kelsey v. Glover,* 15 Vt., 708; *Molway v. Chicago,* 239 Ill., 486, 88 N. E., 486.

The duty of a municipality is to exercise reasonable care to keep highways in suitable condition for ordinary travel; *Koch v. Denver,* 133 Pac., 1119, and not to take extraordinary precautions to maintain them free from ruts, holes and unevenness specially adapted to use thereon of bicycles, tricycles, etc. McQuillin Mun. Corp. (2d), Vol. 7, sec. 2948. "If the streets of cities and towns 'are reasonably safe and convenient for travel generally they are not liable for a failure to make special provisions required only for the safety and convenience of persons using . . . bicycles.'" *Bethel v. St. Joseph,* 171 S. W. (Mo.), 42; *Molway v. Chicago,* 239 Ill., 486, 88 N. E., 486. The defect which renders municipalities liable must be such as would make a street or highway unsafe for the use of vehicles generally. *Molway v. Chicago, supra,* 23 L. R. A. (N. S.), 543. A municipality owes no greater duty to bicyclists than to persons riding or driving a horse. *Bills v. Salt Lake City,* 38 Utah, 507, 109 Pac., 745. The street need not be kept so that it will be specially adapted to the use of bicycles. *Pueblo v. Smith,* 57 Col., 500, 143 Pac., 281; *Emelle v. Salt Lake City,* 54 Utah, 360, 181 Pac., 266. This rule would apply with equal force to two-wheel, motor-driven motorcycles.

In determining whether ordinary care has been exercised a distinction must be drawn between improved and unimproved streets. Likewise, consideration must be given to the location—whether it is in the thickly settled section of the town or in its outlying territory where its use is not so general. What is ordinary care is to be determined from the circumstances. Dirt streets cannot be maintained with that degree of smoothness and regularity a traveler has a right to anticipate in a paved street. Both the elements and the traffic of vehicles will cause irregularities, depressions, bumps and ridges.

In *Koch v. Denver, supra,* the evidence disclosed three depressions in close proximity, one of which ranged from 5 to 8 inches in depth, one 3 to 4 inches in depth about 18 inches long and from 8 to 10 inches wide, and the third from 1 to 2 inches deep. The court said "such

depressions can hardly be avoided on dirt thoroughfares." Of this fact a motorist, when using a dirt street, must take notice.

The manhole was to the right of the center of the street going in the direction the deceased was traveling. The dirt was worn away so that the irregularity in the street caused by the location of the manhole below the level of the surface was saucer or basin shaped and its depth was estimated by witnesses to be from 4 to 6 inches. Actual measurement disclosed that when a straight edge 6 feet long was placed over it the hole was 2 inches deep and when a strip 12 feet long was used the hole was 4 inches deep. There was at least 7 feet of clear and unobstructed road to the right of the hole and at least 11 feet to the left. It was not concealed but could be easily observed and seen by those using the street. So testified witnesses for the plaintiff and for the defendant, and there is no evidence *contra*. And, as stated, ample space existed on each side for vehicles to pass in safety. Under these conditions it did not constitute such a defect as would cause a person of ordinary prudence to anticipate that it was dangerous or likely to cause injury to occupants of vehicles using the street. *Ferguson v. Asheville, supra; Houston v. Monroe,* 213 N. C., 788, 197 S. E., 571, 13 R. C. L., 398.

It is only against danger which can or ought to be anticipated in the exercise of ordinary care and prudence that the municipality is bound to guard. *Dillon v. Raleigh,* 124 N. C., 184, 32 S. E., 548; *Fitzgerald v. Concord,* 140 N. C., 110, 52 S. E., 309; *Sehorn v. Charlotte,* 171 N. C., 541, 88 S. E., 782; *Ferguson v. Asheville, supra.*

I am of the opinion, therefore, that there is no sufficient evidence of negligence on the part of the defendant.

Even if negligence be conceded the plaintiff should not be permitted to recover. The street on which deceased was traveling was not a principal thoroughfare—nor was it a main artery for the residential section. It was a graded, unimproved "top soil" dirt street only four blocks long, located in the suburban manufacturing and residential section connecting the Southern Oil Company plant with Barnes Street—apparently opened and maintained primarily as an outlet for the Southern Cotton Oil Company. The deceased was riding a motorcycle—a two-wheel vehicle, much more easily thrown out of control than the average conveyance. Under these conditions it was his duty to anticipate irregularities in the street and exercise commensurate care for his own safety.

A person traveling on a street is required, in the exercise of due care, to use his faculties to discover and avoid dangerous defects and obstructions, the care required being commensurate with the danger or appearance thereof. *Rollins v. Winston-Salem,* 176 N. C., 411, 97 S. E., 211; *Russell v. Monroe,* 116 N. C., 721, 21 S. E., 550. He is guilty of contributory negligence if by reason of his failure to exercise such care he

fails to discover and avoid a defect or obstruction which is visible and obvious. *Pinnix v. Durham,* 130 N. C., 360, 41 S. E., 932; *Ferguson v. Asheville, supra.*

The depression could be seen when he was 50 or more feet away. His machine could have been stopped within 6 feet. If he was keeping a proper lookout he disregarded the defect and drove into the basin shaped hole. If he was not keeping a proper lookout he was not exercising that degree of care the law required of him. *Ferguson v. Asheville, supra.*

He had a perfectly safe way to go, either to the right or to the left, but he chose, either purposely or by reason of his own inattention, the alleged dangerous way. *Groome v. Statesville,* 207 N. C., 538, 177 S. E., 638; *Dunnevant v. R. R.,* 167 N. C., 232, 83 S. E., 347.

The following cases, in principle, are likewise in point: *Watkins v. Raleigh,* 214 N. C., 644, 200 S. E., 424; *Speas v. Greensboro,* 204 N. C., 239, 167 S. E., 807; *Rollins v. Winston-Salem,* 176 N. C., 411, 97 S. E., 211; *Alexander v. Statesville,* 165 N. C., 527, 81 S. E., 736; *Stone v. Benson,* 214 N. C., 280, 195 S. E., 25; *Burns v. Charlotte,* 210 N. C., 48, 185 S. E., 443; *Finch v. Spring Hope,* 215 N. C., 246, 1 S. E. (2d), 634; *Lalor v. N. Y.,* 208 N. Y., 431, Ann. Cas., 1916-E, 431.

In the *Finch case, supra,* it appeared that the plaintiff was walking on an unimproved sidewalk in the nighttime and stumbled over the roots of a tree which extended 4 or 5 inches above the surface of the sidewalk. It was held that the motion to dismiss as of nonsuit should have been sustained.

In the *Lalor case, supra,* it was held that it did not constitute negligence to permit the existence in a street of a hole the size of a barrel head and four inches deep.

There is not a scintilla of evidence in the record that the deceased could not have seen or that he did not see the alleged defect in ample time to avoid it; and it was his duty to avoid a defect that was obvious and apparent. The record, therefore, discloses contributory negligence as a matter of law.

When it appears from all the evidence that the plaintiff ought not to recover it is the duty of the Court to say so. *Houston v. Monroe, supra,* and cases there cited.

I do not consider that the authorities cited in the majority opinion in support of the position that there is evidence of negligence are in point. In each a pedestrian was involved. Naturally a hole or defect which would not be at all dangerous for a vehicle might create a serious hazard for one walking on the sidewalk.

In *Sehorn v. Charlotte, supra,* the defect was a hole 16 to 18 inches in diameter about one-half way on the sidewalk and which was originally knee deep. At the time it was partly filled with untamped dirt and was

at least 4 to 7 inches deep. As a new trial was granted it is not made to appear whether the occurrence was during the day or night.

Swinson v. Realty Co., 200 N. C., 276, 156 S. E., 545, was an action against a private corporation for damages resulting from the maintenance of a hydrant which projected 9 inches over the sidewalk, thereby creating a public nuisance. The plaintiff, a pedestrian, came in contact therewith. It was during the nighttime and no light was provided.

In *Gasque v. Asheville,* 207 N. C., 821, 178 S. E., 848, a pedestrian at night stepped on a defective water meter lid that gave way and precipitated the plaintiff into a deep hole. There was evidence that the lid was of an unsafe type and had been used for a long period of time and that the condition thereof could not be seen by the plaintiff. The charge of the court quoted in the opinion deals, generally, with the duty of a municipality in respect to the maintenance of its streets. It was not the subject of an exceptive assignment of error and was not, therefore, before the Court for review.

Likewise, the authorities cited in support of the position that the question of contributory negligence was for the jury, are not in point.

In *Cole v. Koonce,* 214 N. C., 188, 198 S. E., 637, there was evidence tending to show that the defendants' agent had parked a truck so that it extended over the paved portion of the road; that there was no light burning on the truck; that it was about 5 a.m., dark and foggy, and the lights on the plaintiff's car did not disclose the presence of the truck in time for him to avoid a collision.

Ferguson v. Asheville, supra, involves an obstruction in the street. The plaintiff was traveling on an automobile at night and there is evidence that the obstruction could not be seen. It is there said by the Court: "If, under these circumstances and the condition surrounding the ramp, the plaintiff, E. J. Ferguson, Jr., saw or by the exercise of reasonable care could have seen the ramp in time to have avoided the accident, and the accident followed as a result of his failure so to do, the plaintiff, E. J. Ferguson, Jr., would be guilty of such negligence as would insulate any negligence of the defendant in permitting the ramp to remain on the street unguarded." *Hughes v. Luther,* 189 N. C., 841, 128 S. E., 145; *Weston v. R. R.,* 194 N. C., 210, 139 S. E., 237; *Davis v. Jeffreys,* 197 N. C., 712, 150 S. E., 488; *Speas v. Greensboro,* 204 N. C., 239, 167 S. E., 807.

But even if we concede that there was sufficient evidence to require the submission of the issues to a jury, it clearly appears to me that the defendant is entitled to a new trial for error in the charge on the issue of damages.

After explaining to the jury that it was not to give the equivalent of human life and should allow nothing for suffering or out of sympathy

the court explained the method to be followed in determining the income of the deceased during the period of his expectancy of life. It then charged the jury:

"This amount, this gross amount, must be reduced to its present cash value which would necessarily be less than the gross amount and which may be arrived at by dividing the gross sum by one dollar plus the legal rate of interest (6%), for the expectancy years of the deceased, *as present worth of a sum payable at some future period without interest is such an amount as being put at interest will amount to the sum at the period when it becomes due.*"

It will be noted that the court used the term "gross" rather than "net" three separate times. A careful examination of this feature of the charge as a whole convinces me that the meaning of the term "gross" as used by the court, is not so explained as to make the patent error harmless. My conclusion that it was harmful is fortified by the amount of the verdict when it is considered in the light of the evidence.

Furthermore, if the members of the jury were able to interpret and understand the last clause above quoted (which was a material part of the charge), they possess an acuteness of mind to which I make no claim. To me it is unintelligible and meaningless; and serves only to confuse.

For the reasons stated I am unable to agree with the majority.

STACY, C. J., and WINBORNE, J., concur in this opinion.

H. S. WARD, GUARDIAN OF LEON HOWARD, v. LEON HOWARD; RALPH HILTON, HUSBAND OF MARY ELIZABETH PRESNELL HOWARD HILTON; AND ESTATES ADMINISTRATION, INC., GUARDIAN OF MARY ELIZABETH PRESNELL HOWARD HILTON.

(Filed 28 February, 1940.)

1. Descent and Distribution § 6—

The right of an adopted child to inherit from its adopting parents is in derogation of succession by heritable blood, and the adoption proceedings must be in strict conformity with the statutory procedure in order to confer the right of inheritance upon the adopted child.

2. Adoption §§ 3, 4—

Consent of the living parent or proof of abandonment of the child is necessary to an adoption and must be made to appear to the court as a jurisdictional matter.

3. Adoption § 4: Clerks of Court § 7—

The Juvenile Court Act is in no respect an amendment to the Adoption Law, and does not affect the procedure therein prescribed for the adoption of minors.

4. Clerks of Court § 7—

The juvenile court has no power to place a child anywhere for adoption, Michie's Code, 5044, and when it orders a child committed to an asylum upon its finding that the child is a neglected child, Michie's Code, 5039, the further provision of the order that the asylum should have power to place the child in a home for adoption is void. Michie's Code, 5044.

5. Adoption § 3—Evidence held not to show abandonment of child by mother or her consent to adoption, and adoption was void.

The evidence disclosed that the juvenile court, in a proceeding in which the child's mother was present, ordered the child committed to an asylum upon its finding that the child was a neglected child, with further provision that the asylum should have power to place the child in a home for adoption. It appeared that the child's father was dead and that its mother had been in the County Home for 12 months. The child was later adopted upon the consent of the asylum, without notice to or consent by its mother. *Held:* The adoption was void, since the proceedings in the juvenile court do not disclose that the mother had abandoned the child or that she therein consented to the adoption, since at that time even the identity of the adopting parents was not known, and such identity is an essential feature of consent, and since the provision of the order of the juvenile court that the asylum should have power to place the child in a home for adoption was void and not binding on the mother.

6. Statutes § 5e—

Ordinarily, a curative statute can validate irregular procedure only when the procedural requirements not complied with could have been dispensed with by the Legislature in the first instance, and the Legislature is without power to cure a defect arising from a want of authority in the court to act in the matter.

7. Adoption § 4—

Ch. 171, Public Laws of 1927, cannot be held to validate an order of adoption theretofore entered by the court when such order is void because of want of consent of the living parent of the child or proof of abandonment, since even if the curative act be construed as retroactive, the defect is one of jurisdiction. Whether the General Assembly could provide for the adoption of children without notice to their parents or proof of abandonment, Constitution of North Carolina, Art. I, sec. 17, *quære.*

8. Descent and Distribution § 6—

The right of an adopted child to inherit from its adopting parents is based upon the creation of the relationship of parent and child established by the adoption, and when the adoption proceedings are void, no right of inheritance can be predicated thereon.

APPEAL by defendant Leon Howard from *Nimocks, J.* From BEAUFORT. Reversed.

H. S. Ward, the petitioner in this case, guardian of Leon Howard, held in trust $1,200 in assets and funds of the estates of F. W. Howard and Bennie Howard, his wife, and, as his ward was about to attain his

majority, filed a final account with the clerk, intending to turn the funds over as soon as the account was approved. Before that was done, the respondent, Mary Hilton, (*née* Mary Elizabeth Presnell), and her husband, Ralph Hilton, intervened, claiming a share of the estate by reason of an alleged adoption of the *feme* respondent by F. W. Howard and Bennie Howard. Petitioner, as a stakeholder, then applied to the court to determine the right of the parties respectively to the estate.

The pleadings also raise the question of the respective interests of Leon Howard and Mary Hilton in certain lands descended from Bennie Howard, who died intestate, consisting of three tracts of land, two in the village of Pinetown and one, a small farm, nearby, the title to which depends upon the same question as does the title and right to the personal property held by the intervener, Ward.

The case was heard upon agreed facts, the pertinent parts of which may be summarized as follows:

The petition for adoption alleged that Mary Elizabeth Presnell was a ward of the "Children's Home Society of North Carolina, Inc.," the office of which was located at Greensboro, North Carolina; that the child at that time was living with the petitioners and dependent upon the Children's Home Society of North Carolina for support, and that legal custody of the ward was vested in the society. The petition asks that Mary Elizabeth Presnell be given the name of Mary Elizabeth Howard, and the adoption is for life.

Formal consent to this adoption was given by the Children's Home Society of North Carolina, Inc. Thereupon, an order was made as follows: "Order Granting Letters of Adoption. State of North Carolina—Guilford County. In the Superior Court—Before the Clerk. In Matter of the Adoption of Mary Elizabeth Presnell. This cause coming on to be heard upon the allegations of the petition and being heard, and it appearing to the court that Mary Elizabeth Presnell is a child without any estate and it appearing that the legal custody of said child has been vested in the Children's Home Society of North Carolina, Inc., Greensboro, Guilford County, North Carolina, and that F. W. Howard and Mrs. Bennie Howard, his wife, of Pinetown, N. C., County of Beaufort, North Carolina, are suitable persons to have custody of said child, desires to adopt said child for life; and that the Children's Home Society of North Carolina, Inc., upon whom the said child is dependent for support, consents thereto.

"It is, therefore, ordered and adjudged by the court that letters of adoption be and the same are hereby granted to the said F. W. Howard and wife, Mrs. Bennie Howard, to the end that the relations of parent and child be established for life between the said F. W. Howard and wife, Mrs. Bennie Howard, and the said child, Mary Elizabeth Presnell,

with all the duties, powers, and rights belonging to the relationship of parents and child.

"This the 29 day of February, 1924. M. W. Gant, Clerk Superior Court."

Letters of adoption followed.

It is agreed that the mother had no notice of this adoption proceeding and did not consent thereto, unless consent can be inferred from a proceeding in the juvenile court of McDowell County, a record of which forms a part of the agreed facts.

The record shows that Mary M. Greenlee filed a petition with the court some time in December, 1923, alleging that Mary Elizabeth Presnell, a child under the age of sixteen years, then in the custody or control of the County Home of McDowell County, was a neglected and dependent child, without means of maintenance and support; that her father was dead and her mother "not physically, morally or financially fit or able to provide a suitable home"; and that the mother had been in the County Home of McDowell County for approximately twelve months.

Upon this petition the child was brought into court on 17 December, 1923, "the said child appearing by and with its mother, who has legal custody of it," and the court, thereupon, found Mary Elizabeth Presnell a neglected child within the meaning of the law, made the child a ward of the court, and committed it to the "Children's Home Society of North Carolina," to remain in custody until further order of the court; and attached the following condition: ". . . the condition of such custody is that the Children's Home Society of North Carolina is given legal guardianship of the child with power to place it in a home for adoption."

It is agreed between the parties to this proceeding that the rights of the respondent, Mary Hilton, depend upon the following: "She was a minor with mother, and father dead prior to December 18, 1923, residing in McDowell County, North Carolina. That Mary Greenlee filed petition in juvenile court of McDowell County on that date. Copy of same follows as a part of the record, including the judgment of the juvenile court. She was committed to the Children's Home Society of North Carolina on the date of the judgment.

"It is admitted that the Children's Home Society of North Carolina is an institution chartered by the State and licensed and approved by the State Board of Charities and Public Welfare in accordance with section 5006, paragraph 5, Consolidated Statutes, and was in 1923 and 1924."

From a judgment sustaining the validity of the adoption and upholding the claim of Mary Hilton and dividing the assets of the estate equally between her and Leon Howard, the latter appealed.

H. S. Ward for Leon Howard, appellant.
Mangum Turner and Geo. R. Holton for defendant, appellee.

SEAWELL, J. Since early days, the attitude of the North Carolina Court toward the law of real estate, descent and inheritance, and distribution, has been classic. The result has been an exactness and a certainty with respect to this subject that gave to the decisions of the Court a very extended reputation.

Out of this legal atmosphere came the Adoption Law of 1872, and particularly that portion of our law existing at the time the adoption proceeding under consideration was had—chapter 2, section 184, Consolidated Statutes of 1919—which fixes the most important of the conditions upon which adoption can be made effective. Subsequent decisions of the Court have attributed an imperative character to this condition, prompted by the relation of the proceeding to the laws of real estate and inheritance, requiring the proceeding to partake of the same certainty as the laws to which they were ancillary, and to the basic principles of which they offered a substitution.

Truelove v. Parker, 191 N. C., 430, 132 S. E., 295, construed the statute with which we are dealing and declined to rationalize it in any way to obviate the necessity of consent by a parent, if living, to validate the adoption. While as a social institution benefiting society much by the care and promise which it gives to neglected youth, these purposes are served by the custodial care and parental relations established in that regard; but inasmuch as the proceeding is in derogation of succession by heritable blood, the adoption proceeding, when it comes to the phase of descent and distribution of property, must be strictly construed.

The decision in *Truelove v. Parker, supra,* was a well considered and deliberate decision by the Court on a matter concerning property rights, and the principle of *stare decisis* must apply. The construction given to the law therein is simple and easily understood, and both the legal fraternity and all others having to do with adoption had full notice of the necessity of compliance with the provisions of the act requiring consent of the living parent or proof of abandonment.

There is no evidence here of abandonment of this child by her mother, and the sole question presented is whether or not she consented, or is presumed to have consented, to the adoption through the proceeding in the juvenile court, which took the custody of her child, or whether that proceeding rendered her consent unnecessary.

Doubtless the law originally contemplated that consent be made in the proceeding itself, as it was unaffected by any other statute bearing upon any termination of the relation between parents and children, or of the

complicated juvenile court acts and welfare acts of the present day, which here and there refer to the subject. That such consent must be made to appear to the adopting court, as a jurisdictional matter, is, we think, self-evident.

It cannot be contended from any evidence in the record, or derived from the juvenile court proceeding, that she had abandoned the child. The charge there was that the child was neglected. The mother was in the poorhouse. The sole contention is that because of the order of the juvenile court, in a proceeding of which she had notice and was present, the child was placed in a home for adoption—adoption when, where, how, why, to whom, or under what conditions, the order gave to the mother no information.

The purpose of the Juvenile Court Act was to protect both society and minor children, which form such a large part of it, from the effect of delinquency on the part of the child and neglect on the part of parents and custodians—not any more as to parents than as to others having the care and custody of children. It is in no respect an amendment to the Adoption Law, nor can it be considered as relieving against the stricter provisions of that law, where the Adoption Law itself speaks upon the subject.

The procedure in the juvenile court, made a part of the record, discloses that on the petition of Mary M. Greenlee, Mary Elizabeth Presnell was brought into the court, in company with her mother, on 17 December, 1923, charged with being "a neglected child." Michie's Code, section 5039. At that time the petition shows that the mother had been in the County Home approximately twelve months. The order of the court placed the child in the Children's Home Society of North Carolina until further orders of the court, adding, "the condition of such custody is that the Children's Home Society of North Carolina is given legal guardianship of the child with power to place it in a home for adoption."

The consent of the mother is not evidenced in any other way, and it is assumed by respondent that this proceeding canceled her out of the picture.

An examination of the Juvenile Court Act of 1919—chapter 97, Public Laws of 1919, see especially sections 5039, 5047, Michie's Code of 1935—discloses that the juvenile court had no power to place the child anywhere for adoption; and that part of the order is outside of the pale of the court's jurisdiction, ineffective and void, and does not in any way affect the right of the mother as to the adoption proceeding suggested, or the necessity of her consent in that proceeding.

As to what time—relative to the adoption proceeding—consent of the living parent may be obtained, whether before or after the institution of such proceeding, we need not here consider. The consent must at least

be in fair contemplation of the proposed adoption, and this includes its most essential feature—the identity of the adoptive parents. Except in the case of abandonment, it is not without reason that society looks first to the concern and foresight of the natural parents in the selection for the child adoptive parents into whose hands they surrender the duties and burdens of custody, training, and tuition; and when we come to the question of property rights affected, the proceeding concerns a public policy, which does not rest alone upon custodial right.

The Juvenile Court Act—Michie's Code of 1935, sec. 5044—requires that the parents, if living, be brought in by summons, in order to show cause why the child shall not be dealt with according to the provisions of the law, and if this summons is not obeyed, and there is no sufficient excuse, the parent may be proceeded against as for contempt. Chapter 97, section 8, Public Laws of 1919; Michie's Code, section 5046. The mother must, therefore, be regarded as being in the juvenile court *in invitum,* and she is certainly not bound by any part of the decree of that court which is plainly without its jurisdiction.

It remains to be considered whether the status of respondent is affected by later statutes amendatory of the Adoption Law in effect when this proceeding was had—that is, the law construed in *Truelove v. Parker, supra.*

By chapter 171, Public Laws of 1927 (ratified 8 March, 1927), sections 185 and 189 of the Consolidated Statutes were amended and a section added, intending to validate "all proceedings for the adoption of minors in courts of this State." The amendments to sections 185 and 189 should probably be considered as prospective, but any argument as to the effectiveness of these amendments, conceding them to be intended as retroactive, is met by the same difficulties which attend the direct attempt to validate "all proceedings" in the second section of the act (misnumbered section 3).

Whether such a sweeping cure-all is not too general to be given effect as to defects not pointed out in the statute, we hardly need inquire. Other principles control.

Ordinarily, curative acts of the Legislature may be effectively applied where the Legislature might have dispensed originally with the portion of the required proceeding, the nonobservance of which has rendered the proceeding void. *Taylor v. Tennessee & Florida Land Investment Co.,* 71 Fla., 651, 72 So., 206; *Gallimore v. Thomasville,* 191 N. C., 648, 132 S. E., 657; *Kinston v. Trust Co.,* 169 N. C., 207, 209, 85 S. E., 399. But the Legislature is without power to cure a want of authority in the court to act at all, where the defect goes to the jurisdiction. *Montgomery v. Town of Branford,* 107 Conn., 697, 142 A., 574; *People v.*

Van Nuys Lighting District of Los Angeles County, 173 Cal., 792, 162 P., 97. We think it unquestionable that the jurisdiction given to clerks of the Superior Court in the matter of adoption is, by the statute itself creating it, made to depend upon the consent of the parent, if living. *Truelove v. Parker, supra.* Indeed, regardless of the question of jurisdiction as settled by the wording of the statute itself, it may be doubted whether the State can, through any sort of law, exercise the Spartan privilege of taking a child from the home and custody of a parent and engrafting it into another family without notice to the parent, or proof of the existence of a condition—as of complete abandonment on the part of the parent—that would render such notice unnecessary. Constitution, Article I, section 17.

In an adoption proceeding under this law, inheritance is a statutory consequence of the parental relation created between the parties and legally inseparable from it. In other words, inheritance is made a statutory incident to the more important relationship of parent and child established by the adoption. Want of original jurisdiction cannot be cured by subsequent attempts at validation.

The 1929 amendments were repealed, with the original statutes which they amended, by chapter 243, Public Laws of 1935. Subsequent amendments to the Adoption Law contain no retroactive features and are, therefore, not pertinent to this inquiry.

The institution of adoption is a very worthy response of the law to social needs, although legislation in that direction seems not to have been enacted in this State until after the Civil War. Instances of its beneficent effect may be found in the history of men and women who have been aided to become prominent in all lines of private and public service, and in the consolation it has given to hundreds of childless homes. But, while both the courts and the law are deeply concerned with the humanities, and with social adjustments which they require, the positive terms of the law may not be made to yield to either our sentiment or our desire.

For the reasons assigned, we must hold the adoption proceeding insufficient to confer upon Mary Elizabeth Presnell (now Hilton), any right of inheritance or distribution in the estate under controversy. *Truelove v. Parker, supra.*

The judgment of the court below is

Reversed.

F. E. FREEMAN, E. Y. PONDER, FOR AND ON BEHALF OF THEMSELVES AND SUCH OTHER CITIZENS AND TAXPAYERS OF MADISON COUNTY AS MAY MAKE THEMSELVES PARTIES TO THIS ACTION, v. THE BOARD OF COUNTY COMMISSIONERS OF MADISON COUNTY.

(Filed 28 February, 1940.)

1. Public Officers § 10—

Taxpayers may not maintain an action to determine title to a public office, neither claimant to the office being a party, since plaintiffs are not the real parties in interest, C. S., 446.

2. Public Officers § 9—

Injunction is not the proper remedy to try title to public office.

3. Counties § 17—

Taxpayers of a county may maintain an action to restrain the board of county commissioners from making illegal disbursements of public funds by the payment of salaries to unauthorized persons.

4. Statutes § 12—

Ordinarily, a local statute is not repealed by a general statute dealing with the same subject matter, even when the general statute is later enacted.

5. Counties § 1—

The General Assembly has the power to create county highway commissions.

6. Same—

The General Assembly has the power to create county sinking fund commissions.

7. Public Officers § 4b—

Ch. 341, Public-Local Laws of 1931, providing that the chairmen of certain county boards of Madison County should elect a tax manager for the county, merely imposes additional duties *ex officio* upon the said chairmen, and does not provide that any one of them should hold two public offices in violation of Art. XIV, sec. 7, of the Constitution of North Carolina.

8. Public Officers § 6: Constitutional Law § 12—Public officers continue in office until their successors are chosen and qualify.

Public officers continue in office until their successors are chosen, Art. XIV, sec. 5; C. S., 3205, and therefore, the General Assembly having failed to appoint or provide for the election of successors to the highway and sinking fund commissioners of Madison County, who were appointed for a four or six-year term by ch. 341, Public-Local Laws of 1931, the General Assembly is presumed to acquiesce in their continuance in office, and the General Assembly having power to terminate, change or continue the appointments, it will not be held that it intended to create perpetuities or exclusive emoluments in violation of any of the provisions of Art. I of the Constitution, and said commissioners continue to hold office with power to discharge the duties thereof.

9. Public Officers § 2: Counties § 7—Ch. 341, Public-Local Laws of 1931 held to provide exclusive method for appointment of Madison County tax manager or collector.

The appointment of a tax manager or collector for Madison County by the chairmen of the highway and sinking fund commissions and the chairmen of the board of county commissioners and the board of education in accordance with ch. 341, Public-Local Laws (the statutes creating the jury and tax commission and the board of health of the county being unconstitutional), *is held* to preclude the board of county commissioners from taking over the office of county tax collector, and taxpayers of the county may enjoin the commissioners from paying to the person appointed to this office by them public funds of the county.

10. Counties § 1—

Counties are political subdivisions of the State, and the General Assembly has control and supervision over them, limited only by restrictions prescribed by the State Constitution and the powers granted to the Federal Government in the Constitution of the United States.

11. Same: Counties § 7—

The General Assembly has power to provide for the appointment of a tax collector or manager for a county of the State, the fiscal powers granted the county commissioners by Art. VII, sec. 2, being subject to modification or abrogation by statute by express provision of Art. VII, sec. 14.

12. Same: Counties § 5—County commissioners of Madison County held to have authority to appoint delinquent tax collector for the county.

There being no provision in ch. 341, Public-Local Laws of 1931, for the election of a delinquent tax collector for Madison County, the board of county commissioners of the county has authority to appoint a delinquent tax collector for the county to collect delinquent taxes and those taxes uncollected by the tax manager appointed under provision of the public-local act, and taxpayers of the county are not entitled to enjoin the county commissioners from paying the salary of the delinquent tax collector appointed by them.

APPEAL by defendant from *Nettles, J.*, at October Term, 1939, of MADISON. Modified and affirmed.

Plaintiffs as citizens and taxpayers of Madison County instituted this action to restrain the board of county commissioners (1) from electing or appointing W. G. Buckner tax collector, or permitting him to exercise the duties of tax collector; (2) to restrain the defendant from permitting J. M. Baley, Sr., to have the delinquent tax books, or to perform duties as delinquent tax collector; (3) to restrain defendant from paying any county funds to W. G. Buckner or J. M. Baley, Sr., or any other person elected by defendant as tax collector. A temporary restraining order issued accordingly, with notice to defendant to show cause why the order should not be continued to the hearing. On the return day of the notice, after considering the complaint, answers and affidavits, judgment was rendered for plaintiffs, enjoining defendant and its employees, W. G.

Buckner and J. M. Baley, Sr., from interfering with Roy Wade Ponder in the performance of the duties of tax manager or tax collector, and requiring the delivery of the tax books, and other property used in the collection of taxes, to Roy Wade Ponder, who was held to be the legally elected and qualified tax manager or tax collector of the county. The defendant was further enjoined from paying any county funds to said Buckner or Baley in connection with tax collections, and required to pay the salary of tax manager to Roy Wade Ponder, and also to pay the premiums on the surety bond of said Ponder.

The method of selecting a tax collector or tax manager for Madison County is prescribed by sec. 4, ch. 341, Public-Local Laws 1931, as follows: "That from and after the ratification of this act no auditor or tax collector shall be elected for Madison County in any other way or manner save that provided in this section. That on the first Monday in December, one thousand nine hundred and thirty-two, the chairman of the board of education, the chairman of the board of county commissioners, the chairman of the board of health, the chairman of the sinking fund commission, and their successors in office, and the chairman of any other boards that may be created by this Legislature, for Madison County, shall meet and elect an auditor by a majority of the votes of the various chairmen. . . . That the office of tax collector of Madison County is hereby abolished except, however, that the present tax collector shall continue to collect taxes that are now in his hand. That the chairmen of the various boards referred to in this section shall meet on the first Monday in August, one thousand nine hundred and thirty-one, and by a vote of the chairmen of the said boards and in the manner hereinbefore provided, elect a tax manager for a period of two years, whose duty it shall be to collect the taxes, and the chairmen of the various boards shall fix the tax manager's salary and prescribe his duties, and said salary shall be paid by the board of county commissioners out of the general county funds, and thereafter the said tax manager shall be elected biennially by the chairmen of the said boards herein referred to."

The pertinent findings of fact of the court below may be briefly stated as follows: On the first Monday in August, 1931, the designated chairmen, including chairman of the defendant board, elected J. K. Wilson as tax manager for the county, and biennially thereafter reëlected him up to and including August, 1939. The defendant board recognized the validity of these acts by participating in the election of tax manager thereunder, turning over the tax books to him and making annual settlements with him, and paying the premium on his surety bond. In October, 1939, Wilson tendered his resignation effective upon the election and qualification of his successor, and thereupon written notice was given the proper chairmen, including chairman of defendant board, of meeting

to elect a successor to Wilson. At the meeting Roy Wade Ponder was duly elected as tax manager of the county to fill out the unexpired term ending August, 1941. Roy Wade Ponder promptly qualified and gave bond approved by the sinking fund commission, and demanded possession of the tax books and property incident to tax collection. The defendant declined to comply and turned the books over to W. G. Buckner, whom it had attempted to elect as tax collector and to whom it intends to pay from the public funds for services as tax collector $125 per month. The defendant also attempted to appoint J. M. Baley, Sr., "delinquent tax collector," and turned over to him the delinquent tax books, proposing to pay him $100 per month from the county funds. The said Buckner has not had his bond approved in the manner required by ch. 183, Public-Local Laws 1931.

The court below adjudged that W. G. Buckner was not the tax collector of Madison County, either *de jure* or *de facto,* and that Roy Wade Ponder was the duly and legally elected tax manager or tax collector, and alone charged with duty of collecting all current and delinquent taxes, and that the appropriation of county funds to pay the proposed salaries of Buckner and Baley would be unlawful. It was also adjudged that the defendant pay the costs.

The defendant excepted to the findings of fact and the judgment of the court below, and appealed to the Supreme Court.

Smathers & Meekins for plaintiffs, appellees.
Roberts & Baley and Jordan & Horner for defendant, appellant.

DEVIN, J. This action was instituted by two citizens and taxpayers of Madison County. They are the only plaintiffs. The defendant is the board of county commissioners. The action concerns the title to the office of tax manager or tax collector of the county. The plaintiffs allege that Roy Wade Ponder is the legally elected and qualified tax officer, while the defendant asserts that W. G. Buckner is the lawful incumbent of the office. But neither of the rival claimants is party to the suit. In that respect the plaintiffs are not the real parties in interest. C. S., 446. Moreover, the attempt to try the title to a public office by injunction has been held improper. *Jones v. Comrs. of Granville County,* 77 N. C., 280; *Rogers v. Powell,* 174 N. C., 388, 93 S. E., 917. If there were nothing more in the action than this, it might be readily dismissed. But the plaintiffs as citizens and taxpayers of the county have also sought in this action to restrain the board of county commissioners from making illegal disbursements of public funds by the payment of salaries to unauthorized persons. For this purpose the plaintiffs have a standing in court as parties with a legal interest in the controversy, and the ques-

tion is raised whether the proposed payments to W. G. Buckner and J. M. Baley, Sr., for services as tax collectors are unlawful.

Hence, on this record as the action is now constituted, the only question properly presented for determination is the ruling of the court below on the plaintiffs' suit to restrain the defendant board of county commissioners from making unlawful appropriations of the county funds to the payment of the persons attempted to be elected by the defendant as tax collectors for the county. On this point the plaintiffs' contention is the defendant had no lawful authority for the election of the persons named as tax collectors, for the reason that the statute regulating the selection of persons to collect the county taxes sets forth an exclusive method for so doing, which defendant has not observed.

It is apparent that unless the method of selecting the tax collecting officer for Madison County, prescribed by sec. 4, ch. 341, Public-Local Laws 1931, can be disregarded, the defendant board was without authority to elect Buckner and the proposed payment of county funds to him as tax collector would be unlawful.

An examination of the Public-Local Laws of 1931 reveals that the General Assembly at that session created for Madison County four boards or commissions, to wit: Jury and tax commission (ch. 177), sinking fund commission (ch. 183), board of health (ch. 322), and highway commission (ch. 343). The chairmen of these boards, together with the chairman of the county board of education and the chairman of the board of county commissioners, six in number, originally composed the body charged with the duty of electing a tax manager or tax collector for the county. However, the act attempting to create the jury and tax commission was held by this Court, Spring Term, 1938, to be violative of Art. XIV, sec. 7, of the Constitution of North Carolina, and the persons named in the act (ch. 177) were adjudged incompetent to perform any duty thereunder. *Brigman v. Baley,* 213 N. C., 119, 195 S. E., 617. This act being void from the beginning, the named chairman was without power to act. He, however, took no part in the election of a successor to J. K. Wilson as tax manager. Likewise, the act attempting to create a board of health for Madison County (ch. 322) may be regarded as inoperative on constitutional grounds, and the chairman of that board accordingly held without power to perform any official duty thereunder. This would leave four chairmen apparently capable of acting, to wit, the chairman of the board of county commissioners, the chairman of the county board of education, the chairman of the sinking fund commission, and the chairman of the highway commission.

The validity of the act creating a highway commission for Madison County may not be successfully attacked. The local act (ch. 343) was passed after the enactment of the general statute (ch. 148, Public Laws

1931), but even if passed prior thereto would not have been invalid for that reason, as pointed out by *Schenck, J.*, in *Rogers v. Davis,* 212 N. C., 35, 192 S. E., 872. This act (ch. 343) was referred to in *Waldroup v. Ferguson,* 213 N. C., 198, 195 S. E., 615. The power of the Legislature to create highway commissions to take over the duties of the boards of county commissioners is well recognized. *Comrs. v. Bank,* 181 N. C., 347, 107 S. E., 245; *Ellis v. Greene,* 191 N. C., 761, 133 S. E., 395. The act creating a sinking fund commission for Madison County (ch. 183) may also be regarded as a valid exercise of legislative power. *Jones v. Comrs. of Madison County,* 137 N. C., 579, 50 S. E., 291; *Audit Co. v. McKensie,* 147 N. C., 461, 61 S. E., 283. It appears that Buckner has not filed bond approved by the sinking fund commission as required by this act.

It may be noted that the act relating to the election of a tax manager does not fall under the condemnation of *Brigman v. Baley, supra,* for here these chairmen were not required to qualify or take oath of office. This act merely provides that new and additional duties *ex officio* were imposed upon those holding these offices. This was held in *McCullers v. Comrs.,* 158 N. C., 75, 73 S. E., 816, not to violate the prohibition of Art. XIV, sec. 7, of the Constitution.

The defendant contends that the act, chapter 341, Public-Local Laws 1931, is ineffective to provide exclusive machinery for the election of a tax collector on the ground that, by the language of the 1931 act creating the several boards or commissions, the terms of office of the members were limited to four and six years, and that in 1939, after the expiration of their terms, the chairmen of these boards were without power to act, thereby causing the machinery to collapse, and that consequently there was no legal restraint upon the power of the board of county commissioners to fill the vacancy. It will be observed, however, that the statutes prescribe terms of four and six years "from the date of ratification of this act and until their successors are appointed and qualified." It is further provided that in case a member of a board shall for any cause cease to act the remaining members shall elect his successor. As the General Assembly appointed the members of the boards, it had unrestricted power to appoint their successors, or provide for their election, and having failed to do so up to the present, is presumed to have acquiesced in their continuance in office, but always with power to terminate, change or continue the appointment. Hence, it may not be held that the Legislature intended or attempted to create a perpetuity or to violate any of the provisions of Art. I of the Constitution. Both the Constitution (Art. XIV, sec. 5) and the general statute (C. S., 3205) expressly authorize the continuance in office of public officers until their successors are chosen. *Markham v. Simpson,* 175 N. C., 135, 95 S. E., 106.

It is further objected that since the body empowered to elect the tax manager was originally composed of six persons, chairmen of designated boards or commissions, the incompetency of two of the electors has rendered the remaining four without power to act.

Without making a ruling on the record as it is now constituted, in the absence of a direct attack by proper proceeding, it would seem that the action of the electing body, under the facts found by the court below, is at least *prima facie* in accord with the statute, and that the machinery therein provided excludes authority on the part of defendant board to take over the office of county tax collector. It was found from the pleadings and affidavits that, after proper notice of meeting of the chairmen for the purpose of electing a successor to Wilson for the unexpired term, Roy Wade Ponder was "duly elected," that is, elected in accordance with the act. There is nothing in the defendant's answer or affidavits to the contrary. It may be further noted that whether the electing chairmen were acting *de jure* or not, they were acting in the performance of a public duty imposed upon them by law, and for five successive terms had elected the tax manager for the county and their action had been given unquestioned recognition by the people of the county and by the defendant board, and the taxes were collected and accounted for pursuant to the election by the designated chairmen. There was no vacancy or hiatus in the functioning of the exclusive machinery for electing a tax collector, so as to permit authority in this respect to devolve upon the board of county commissioners. *Norfleet v. Staton,* 73 N. C., 546; *S. v. Lewis,* 107 N. C., 967, 12 S. E., 457; *Baker v. Hobgood,* 126 N. C., 149, 35 S. E., 253; *Smith v. Carolina Beach,* 206 N. C., 834, 175 S. E., 313; C. S., 3204.

It is urged that the entire plan, by which the General Assembly, through the creation of boards and by naming the members thereof, undertook to control the local affairs of Madison County, should be struck down by the court. But it must be remembered that the General Assembly has power to create counties and to regulate their affairs unless restricted by constitutional provision. Counties are political subdivisions and instrumentalities of the State by means of which the State performs certain of its governmental functions within its territorial limits. *S. v. Jennette,* 190 N. C., 96, 129 S. E., 184. It was said in *Jones v. Comrs. of Madison County,* 137 N. C., 579, 50 S. E., 291, speaking of the power of the Legislature over counties: "In the exercise of ordinary governmental functions they are simply agencies of the State, constituted for the convenience of local administration in certain portions of the State's territory, and in the exercise of such functions they are subject to almost unlimited legislative control, except when this power is restricted by constitutional provision." *Trustees v. Webb,* 155

N. C., 379, 71 S. E., 520; *Bell v. Comrs.*, 127 N. C., 85, 37 S. E., 136; *Martin v. Comrs.*, 208 N. C., 354, 180 S. E., 777. The power to levy taxes is vested in the legislative branch of the government. "For this purpose, under the Constitution," said *Winborne, J.*, in *Henderson County v. Smyth*, 216 N. C., 421, "it is within the exclusive power of the Legislature to provide the method and prescribe the procedure."

While the levying of county taxes and the general supervision of county finances were by Art. VII, sec. 2, of the Constitution, placed within the province of the county commissioners, by a later section, Art. VII, sec. 14, the power of the General Assembly, by statute, to modify or abrogate the provisions of sec. 2 was expressly reserved.

It has been declared frequently by this and other courts that the power of the Legislature 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 declare an act void or nullify the manifest purpose of legislative will. *Kornegay v. Goldsboro*, 180 N. C., 441, 105 S. E., 187.

The expressive language of *Mr. Justice Holmes* in *Tyson v. Banton*, 273 U. S., at page 446, aptly states the guiding principle of judicial construction as follows: "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."

There is no provision in ch. 341 authorizing the chairmen of the designated boards to elect a delinquent tax collector for Madison County. Consequently, the power of defendant board to provide for the collection of delinquent taxes and those taxes uncollected by the tax manager for the previous years is not affected by this act. The court below was in error in holding that the defendant was without authority to employ a person to collect delinquent taxes, and in restraining the defendant from making appropriation of public funds to the payment of compensation therefor. Sec. 1718 (d), ch. 310, Public Laws 1939. It appears also that the incumbent J. M. Baley, Sr., has been so employed, without objection, since August, 1937.

We are of opinion, and so hold, that the attempt to determine the title to the office of tax manager or tax collector of Madison County, or to require payment of the salary of that office to a particular person, or the premium on his surety bond, is beyond the scope of the judicial inquiry and not determinable in this action. The judgment must be modified

accordingly. Nor should judgment for costs of action be entered as part of the order continuing the temporary restraining order to the hearing.

The ruling of the court below in restraining the defendant from making payments of county funds to Buckner as tax collector, on the findings and evidence, must be upheld.

As herein modified, the judgment is affirmed.

Modified and affirmed.

JOHN A. WILKINSON AND DORA B. WARD v. HOLT LEO BOOMER AND WIFE, ERCIL BOOMER, AND THE BOARD OF DRAINAGE COMMISSIONERS OF PANTEGO RUN DRAINAGE DISTRICT, BEAUFORT COUNTY DRAINAGE DISTRICT No. 14, SOUTHERN LOAN & INSURANCE COMPANY, TRUSTEE, AND VIRGINIA-CAROLINA JOINT STOCK LAND BANK.

(Filed 28 February, 1940.)

1. Drainage Districts § 1—

Drainage districts are political subdivisions of the State, created for a public purpose.

2. Drainage Districts § 16—

Since drainage districts are political subdivisions of the State, all statutory remedies and provisions for, or securing payment of the bonds issued by a district under authority of law, which are in effect when the bonds are issued, become a part of the contract between the drainage district and the bondholders.

3. Drainage Districts § 12—

The lien of a drainage assessment is *in rem* and attaches to the land in the same manner as a lien for taxes, and creates no personal liability on the part of owners of land in the district.

4. Drainage Districts § 15—Procedure for collection of drainage assessments by the public authorities.

It is provided by statute that drainage assessments shall be collected in the same manner as taxes are collected, C. S., 5361, and such liens may be collected by sale of the land by the sheriff, C. S., 8010, with issue of certificates of sale, C. S., 8024, with right in the holder of the certificates to foreclose in due time, C. S., 8037; or by foreclosure of the lien in a suit instituted by the district or the holder of a tax deed or certificate, in the nature of an action to foreclose a mortgage, C. S., 7990, and this remedy for the collection of such assessments is adequate, and assessments collected are public funds although they are to be used solely for the purpose of paying principal and interest on drainage bonds.

5. Drainage Districts § 16—Holder of drainage bonds may not foreclose drainage liens on lands within the district.

The remedy provided by statute to the holders of drainage bonds to enforce payment of their obligations is by action against the drainage district and its commissioners and the tax collector and treasurer of the county to compel these officers to perform their legal duties in pursuing the statutory procedure for the collection and application of drainage assessments, which remedy is adequate and exclusive, C. S., 5356, and the holder of past-due bonds may not maintain an action against the owner of land within the district to enforce the lien of delinquent drainage assessments against the land.

APPEAL by plaintiffs from *Nimocks, J.*, at December Term, 1939, of BEAUFORT.

Civil action to enforce lien of drainage district bonds, heard upon demurrers to complaint.

Plaintiffs in complaint filed make substantially these allegations:

1. That defendant, Pantego Run Drainage District, Beaufort County Drainage District No. 14, embracing lands in said county, was organized under the provisions of chapters 442 and 509, Public Laws of 1909, and amendatory acts; that all things required by law to be done to complete the establishment of said district have been done; that a board of commissioners, composed of the defendants J. M. Benson, P. H. Johnson and N. B. Marriner were elected and qualified; and that said "board is now, as to its entire personnel, in existence and operating."

2. That in accordance with the provisions of the said acts, bonds in the amount of $18,000 were issued and sold and "the proceeds expended in the construction of original canals and other necessary work for the construction and operation of said district."

3. That the General Assembly of North Carolina, by chapter 357, Public-Local Laws 1925, declared said bonds to be "valid and a first lien on all the lands of the district"; that the validity of the bonds was sustained by judgment of Superior Court in an action entitled "Board of Drainage Commission, etc., *v.* J. S. Wilkinson," which was affirmed on appeal to Supreme Court, 193 N. C., 830; and that thereafter, in September, 1934, in a civil action in the District Court of the United States for the Eastern District of North Carolina at Washington, a judgment was entered in favor of Safe Deposit & Trust Company of Baltimore, trustee, the then holder of all said bonds, and against board of drainage commissioners for said district in the principal sum of $9,000, represented by the bonds maturing in the years referred to in the complaint there filed.

4. "That from time to time and as law required for the several years since the establishment of the district, correct assessment rolls have been prepared by the secretary of the board of drainage commissioners and

duly filed in the official file of this court, which . . . show the amount of the sum total of said assessments upon which it is hereinafter alleged that the lands hereinafter described are liable and subject to the lien of said assessments."

5. That plaintiffs, by purchase for value from the Safe Deposit and Trust Company of Baltimore, trustee, are the owners of and hold all the outstanding unpaid bonds of the said original issue.

6. That the assessment rolls filed as alleged show assessments against certain specifically described lands of defendant Hoyt Leo Boomer and wife, Ercil Boomer, in the total amount of $860.52, to be due and unpaid for the years 1926-1937, inclusive.

7. That on 1 December, 1934, defendants Hoyt Leo Boomer and wife, Ercil Boomer, executed a deed of trust to defendant Southern Loan and Insurance Company, trustee, for defendant, Virginia-Carolina Joint Stock Land Bank of Elizabeth City, registered as alleged, which has not been discharged, and is a lien on said lands of defendants Boomer subject to the first lien of the drainage assessment as above described.

8. That by reason of the facts as above alleged plaintiffs are entitled to payment of the amount of said assessments, due and unpaid, and to judgment so declaring and for the appointment of a commissioner to make sale of the lands of defendants Boomer for the enforcement of said rights.

Defendants demur to the complaint for that upon the face thereof it appears that facts sufficient to constitute a cause of action are not stated, in that, mainly and substantially: (1) The statute under which the bonds were issued and the assessment made provides an adequate remedy for the enforcement of collection of assessments; (2) in the event of failure to pay either principal or interest represented by the bonds, the statute gives to the holder of the bonds right of action against the drainage district or the board of drainage commissioners wherein writ of *mandamus* may issue as there prescribed, and the right to such other remedies "as may be authorized by law," and (3) in the enforcement of collection of drainage assessments, the bondholders are not given right of action in the nature of an action to foreclose mortgage.

From judgment sustaining demurrers filed, plaintiffs appeal to Supreme Court and assign error.

H. S. Ward for plaintiffs, appellants.
Worth & Horner and Rodman & Rodman for defendants, appellees.

WINBORNE, J. The question for decision is this: Where bonds regularly issued by a drainage district duly established, organized and existing under and by virtue of chapter 442, Public Laws of 1909, as

amended, subchapter III of chapter 94, section 5312 *et seq.*, of Consolidated Statutes of 1919, as amended, pertaining to the establishment of drainage districts, for the payment of which assessments duly made under authority of said act are due and unpaid, may the holder of such bonds maintain an action against an individual owner of land within the district for the foreclosure of the lien of such unpaid assessments? The answer is "No."

It is noted at the outset that the Legislature has declared: "That the State having authorized the creation of drainage district and having delegated thereto the power of levying a valid tax in furtherance of the public purposes thereof," such districts "are created for a public use, and are political subdivisions of the State." Public Laws 1921, chapter 7, section 2, amending C. S., 5360.

It is a basic principle that the legislation by authority of which bonds of a municipal corporation or other political subdivision of the State are issued, and their payment provided for, becomes a constituent part of the contract with the bondholders. So the provisions of the statutes regarding the issuance of drainage bonds and the levying, assessing and collecting of assessments, as well as remedies generally existing for the enforcement of such assessments, in effect at the time the bonds are issued, become a part of the contract between the district and the bondholders. Jones on Bonds and Bond Securities, sec. 527, Vol. 1, page 590.

What then are the provisions of the statute under which the bonds held by the present plaintiffs were issued, regarding the collection of the assessments levied for the payment of those bonds?

Section 5360 of Consolidated Statutes, as amended, provides that the assessment roll, after the clerk of Superior Court has appended thereto an order directing the collection of such assessments, "shall thereupon have the force and effect of a judgment as in case of State and county taxes."

Section 5361 of Consolidated Statutes declares in part that: "The assessments shall constitute first and paramount lien, second only to State and county taxes, upon the lands assessed for the payment of the bonds and interest thereon as they become due, and shall be collected in the same manner and by the same officers as the State and county taxes are collected."

Adverting to these and other provisions of the drainage act, in the case of *Comrs. v. Lewis,* 174 N. C., 528, 94 S. E., 8, *Allen, J.,* said: "The assessments are to be collected by the sheriff, who collects the taxes; they are to be paid over by the sheriff to the county treasurer; they are protected by the bonds of these public officers, and they are the only means provided in the statute for their collection, custody and protection." See, also, *Canal Co. v. Whitley,* 172 N. C., 100, 90 S. E., 1.

The statutes relating to sale of real estate for the nonpayment of taxes which are a lien thereon shall be made by the sheriff or other tax collecting officer, C. S., 8010, who issues to the purchaser a written certificate of sale. C. S., 8024. The county, municipality or individual holder of such certificate of sale may in due time foreclose the lien of such certificate under the provisions of C. S., 8037. *Guilford County v. Estates Administration, Inc.,* 213 N. C., 763, 197 S. E., 535.

However, the county or municipality levying taxes or assessments which are a lien upon real estate may at its election proceed under the provisions of C. S., 7990 to enforce the lien in an action in the nature of an action to foreclose a mortgage in which the court shall order a sale of the real estate. *Wilmington v. Moore,* 170 N. C., 52, 86 S. E., 775; *Cherokee v. McClelland,* 179 N. C., 127, 101 S. E., 492.

The right of a drainage district to so proceed in its own name is recognized in *Drainage District v. Huffstetler,* 173 N. C., 523, 92 S. E., 368; *Commission v. Epley,* 190 N. C., 672, 130 S. E., 497.

"Throughout all the authorities a clear distinction seems to run between the cases where a private plaintiff brings an action to compel and levy the collection of taxes to pay a debt due him, and where the sovereign seeks to collect its own taxes for the general purpose of government. The citizen has only such remedies as are given to him; the State has inherently all remedies not voluntarily and unequivocally relinquished." *State and Guilford County v. The Georgia Co.,* 112 N. C., 35, 17 S. E., 10.

The provisions of C. S., 7990, are only available to a private individual or a private corporation "holding a certificate of tax sale or deed under a tax sale, whether as original purchaser at a tax sale or as assignee of the county or other municipal corporation or of any other holder thereof."

The remedies provided for the collection of taxes are adequate. Speaking thereto in *Cherokee v. McClelland, supra, Hoke, J.,* said: "The laws of the State make comprehensive provision for the collection of public revenues affording to the officers charged with the duty adequate remedies for the purpose, both by action and by summary proceeding."

This Court has considered the drainage act in many decisions. It is held that the lien of drainage assessment does not arise *ex contractu,* and is not a debt of the owner of land in the drainage district, but is a charge solely upon the land. *Pate v. Banks,* 178 N. C., 139, 100 S. E., 251; *Canal Co. v. Whitley, supra; Drainage Co. v. Huffstetler, supra; Comrs. v. Sparks,* 179 N. C., 581, 103 S. E., 142; *Com. v. Epley, supra; Foil v. Drainage Com.,* 192 N. C., 652, 135 S. E., 781; *Branch v. Saunders,* 195 N. C., 176, 141 S. E., 583.

It has also been held that the moneys collected from drainage assessments, although devoted to the definite purpose of paying the principal and interest of drainage bonds issued under authority of the drainage act, are public funds. *Comrs. v. Lewis, supra.*

"The bonds issued for the improvement of the district, like bonds issued for public roads or other purposes, become an indebtedness of the district and not of any landowner therein. . . . They are a 'public charge' which falls upon the land in the district *in rem* and are to be collected in the same manner as all other public charges." *Clark, C. J.,* in *Pate v. Banks, supra.*

The drainage act under which the bonds in question here were issued provides in part that: "If any installment of principal or interest represented by the bonds shall not be paid at the time and in the manner when the same shall become due and payable, and such default shall continue for a period of six months, the holders of such bonds upon which default has been made may have a right of action against the drainage district or the board of drainage commissioners of the district wherein the court may issue a writ of *mandamus* against the drainage district, its officers, including the tax collector and treasurer, directing the levying of a tax or special assessment as herein provided, and the collection of same . . . and such other remedies are hereby vested in the holders of such bonds in default as may be authorized by law; and the right of action is hereby vested in the holders of such bonds upon which default has been made authorizing them to institute suit against any officer on his official bond for failure to perform any duty imposed by the provisions of this subchapter. The official bonds of the tax collector and county treasurer shall be liable for the faithful performance of the duties herein assigned." C. S., 5356.

No other remedy is given by statute to the holders of such bonds in default. Hence, the remedies provided are exclusive.

In *Bar Association v. Strickland,* 200 N. C., 630, 158 S. E., 110, *Brogden, J.,* said: "The courts everywhere are in accord upon the proposition that if a valid statutory method of determining a disputed question has been established, such remedy so provided is exclusive and must be first resorted to and in the manner specified therein." This principle was quoted with approval in *Maxwell, Comr., v. Hinsdale,* 207 N. C., 37, 175 S. E., 847, and applied in *Rigsbee v. Brogden,* 209 N. C., 510, 184 S. E., 24.

Applying these principles to the case in hand, it clearly appears that the holders of bonds in default may not by direct action against the landowner proceed to enforce the lien of drainage assessment on his land, but must resort to the remedies provided in the statute.

There are cases in other jurisdictions sustaining the right of the holder of an improvement bond to maintain an action to foreclose on assessment lien, but, in such cases which have come to our attention, the right is derived from grant of specific legislative authority.

The judgment below is

Affirmed.

MRS. W. S. BLASSINGAME, WIDOW; PEGGY ANN BLASSINGAME, MINOR DAUGHTER OF W. S. BLASSINGAME, DECEASED, EMPLOYEE, v. SOUTHERN ASBESTOS COMPANY, EMPLOYER, AND MARYLAND CASUALTY COMPANY, CARRIER.

(Filed 6 March, 1940.)

1. Master and Servant § 37: Statutes § 5a—

Chapter 123, Public Laws of 1935, expressly repealing all laws and clauses of laws in conflict therewith, is an amendment to chapter 120, Public Laws of 1929, and must be construed *in pari materia* therewith, and the amendment should be construed to repress the evils arising under the old act and to advance the remedy provided in the new.

2. Master and Servant § 47—

When an employee dies as a result of an occupational disease, but had no knowledge that he had contracted or was suffering from the disease, he has no "distinct manifestation" of the disease within the purview of sec. 50½ (o), ch. 123, Public Laws of 1935, and his failure to give notice thereof to his employer does not bar his dependents from recovering compensation for his death.

3. Same—

When a widow does not know that her husband had an occupational disease resulting in death until after the autopsy report, almost two months after his death, notice and claim filed with the employer by her within 90 days after the report is sufficient, since under the circumstances it would be humanly impossible for her to have given notice and filed claim within 90 days of her husband's death.

4. Same—

The provision of sec. 50½ (o), ch. 123, Public Laws of 1935, does not provide that notice to the employer should be a condition precedent to recovery of compensation, the provision that the claim "shall be forever barred" applying only to the requirement that claim for disability or death should be made within one year after the disablement or death, and not to the requirement of notice to the employer within 90 days from the date of death.

5. Master and Servant § 40b—

Expert opinion evidence in this case *held* sufficient to sustain the findings of the Industrial Commission that the deceased employee suffered from asbestosis which resulted in pneumonia causing his death.

6. Master and Servant § 55d—

The findings of fact of the Industrial Commission are conclusive on the courts when supported by competent evidence, notwithstanding that some of the evidence sustaining the findings may be objectionable under technical rules of evidence appertaining to courts of general jurisdiction.

7. Master and Servant § 52b—

In this hearing before the Industrial Commission, the hypothetical questions asked witnesses assumed only facts established by the evidence either directly or by fair and necessary implication, and were competent.

8. Master and Servant § 47—

The Compensation Act must be liberally construed to effectuate its intent and compensation will not be denied by a strict, strained or technical construction.

SEAWELL, J., concurring.

BARNHILL, J., dissenting.

STACY, C. J., and WINBORNE, J., concur in dissenting opinion.

APPEAL by defendants from *Johnston, Special Judge,* at 16 October, 1939, Extra Term, of MECKLENBURG. Affirmed.

This is a claim made by plaintiffs against the defendants before the North Carolina Industrial Commission, under the N. C. Workmen's Compensation Act, for the death of W. S. Blassingame, who was an employee of the Southern Asbestos Company, the employer, and defendant Maryland Casualty Company, carrier.

The claim was for injury resulting in death, on 1 April, 1937, in Lithonia, Ga. It is alleged that the death was caused by pulmonary asbestosis resulting in lombar pneumonia. On the hearing before Commissioner J. Dewey Dorsett, the claim was denied, and on appeal the hearing Commissioner was reversed by the Full Commission.

The evidence was to the effect that W. S. Blassingame, upon his death on 1 April, 1937, left a widow and one child, a minor, the plaintiffs. That he worked for defendant Southern Asbestos Company for seven years, off and on. The last period was from January, 1936, until he died. From 1933, while working for defendant, he developed a slight cough which continued until his death. It got worse and worse from 1 January, 1936, until his death.

Mrs. W. S. Blassingame testified, in part: "Q. What was the condition of his health with reference to his coughing in the spring of 1936? Ans.: It was terrible, that is when it was so bad. Q. Well, now, just describe to the court how he was affected, what effect this coughing had on him? Ans.: Just at the time his feet hit the floor in the morning he would start coughing. I have never heard anybody cough like he did. Plenty of times I have seen him cough until his fingernails would be black, as black as they were when he died, his head and face would be just as red as fire, he coughed continually from the time he got up in

the morning until he had eaten breakfast. After he ate breakfast it seemed just to get a little better, he'd have a bad coughing spell and get over this. He coughed continually from the time his feet hit the floor in the morning until he had eaten breakfast every morning. Q. Did that coughing continue on up until his death? Ans.: Yes. . . . Q. State, Mrs. Blassingame, whether or not he was examined by doctors and if so, when and what doctors? Ans.: You mean at the plant? Ans.: Yes. Ans.: Well, the State doctor from Raleigh, Dr. Easom, examined him in January, 1936, that is just a few days after he came back here and went to work and then they examined him on Tuesday before we left here to go to Georgia; Friday, I think it was March 23, if I am not mistaken, anyway it was on Tuesday before Easter Sunday, they examined him again. . . . Q. I believe you say he was re-examined March, 1937? Ans.: March 23, 1937. Q. Between January 27 and March 23, was he treated by any other doctor? Ans.: Dr. Gallant. . . . Dr. Gallant examined him on Friday and two weeks from that day he was buried, which was the second day of April. Q. Dr. Gallant examined him before his last examination by Dr. Easom? Ans.: Yes."

Neither doctor advised her as to what his trouble was. W. S. Blassingame died in Lithonia, Ga., where his wife's people lived. They went down on a vacation, left Charlotte in an automobile Friday morning about 8:00 o'clock and reached Lithonia about 5:00 o'clock that evening. On the way the deceased had headaches. "Q. When you reached Lithonia about 5:00 o'clock in the afternoon what was his condition at that time? Ans.: He was still suffering with the headache and I would think he was running a temperature then, his face was just as red as could be and when we got there he got out of the car and walked in the house and lay down across the bed. . . . I didn't think that he would get up any more that night, I felt like he was too sick, I insisted that he undress; just about the time I got him undressed he had a chill and that is when I sent for the doctor. Q. And what doctor did you send for? Ans.: Dr. Thos. W. Stewart. Q. About when did he get there? Ans.: I think it was around 7:30 or 8:00; I will say it was around 8:00 o'clock. Q. I believe Dr. Stewart finally pronounced it pneumonia, did he? Ans.: Yes, sir. Q. That was on March 26? Ans.: Yes, sir. Q. He died on April 1, I believe? Ans.: Yes, sir. Q. Mrs. Blassingame, during the period from the time of your marriage, did Mr. Blassingame have any other illness of any consequence? Ans.: No, sir, nothing except catarrh, he was kind of bothered with catarrh of the head, that was the only thing I ever heard him complain of except this cough."

Dr. R. M. Gallant, a medical expert, testified, in part: "Q. Did you know W. S. Blassingame? Ans.: Yes, sir. Q. Were you ever called to treat him? Ans.: Yes, sir. Q. When was that? Ans.: Some time about March, 1937. Q. About the first or latter part of March? Ans.: I don't remember. Q. What was his condition, what was his complaint at that time? Ans.: He complained of a persistent cough which came on with paroxysms, uncontrollable by any ordinary means, accompanied by shortness of breath and general weakness. Q. What kind of treatment did you give him? Ans.: Well, he did not have any temperature, and he had some paroxysms of coughing and spells of coughing while I was examining him, it kind of baffled me from the beginning, with all the cough and perhaps a rapid pulse which he had, which I figured might be due to his spells or paroxysms of coughing, I didn't know hardly what to think of it, no temperature, but I gave him the ordinary usual treatments for a simple bronchitis and told him to come back at such and such a time, which he did and to come back sooner if the medicine didn't seem to relieve him, well he came back sooner and said it done him absolutely no good. Well, after 22 years experience I have always been able up until I saw him to at least relieve anybody temporarily, even though I wasn't able to cure them, I gave him the strongest cough sedatives that I knew, including some morphine in it, he came back and said absolutely no relief and with his chest symptoms that he had I told him I just didn't know what the trouble was, he had some kind of peculiar condition in his chest that in 22 years experience I had never seen anything like it, the only thing I saw to do was to treat him symptomatical and wait for developments, I knew he was up against it, I didn't know what to do, I told him I would either suggest some so-called specialist or he could stick to me and I'd do the best I could, he came back and a time or two seemed to be a little bit better, the treatment seemed to be no good, the next thing I heard he was dead down in Georgia. . . . Q. Did you ever see copy of the report of the autopsy made by the U. S. Public Health Service? Ans.: Yes, sir, I was sent a copy of it and also I received a very nice, courteous letter from the doctor who treated him. Q. Dr. Stewart? Ans.: Yes, sir, saying that he had sent the letters properly prepared—saying that he had sent the lungs properly prepared in formaldehyde to the State Laboratory, he had asked them to also send me a copy of the report and which I thought was very nice indeed and which I received in due time. Q. Did you study this report on the autopsy? Ans.: Yes, sir. Q. Did you get also a copy of Dr. Easom's report of his two examinations? Ans.: Yes, sir. Q. Did you study that? Ans.: Yes, sir. Q. Well, doctor, from your examinations of the report of the autopsy made by the U. S. Public Health Service and the report of Dr. Easom's examinations of the

Medical Advisory Board and if the Commission should find that W. S. Blassingame at the date of his death was 27 years of age, that he had worked approximately 7 years in an asbestos plant as a weaver, that he had apparently been in good health prior to the spring of 1936, at which time he started coughing very badly and continued to do so especially in the mornings until the date of his death on April 1, 1937, that he was examined by medical experts on January 27, 1936, and at that time an X-ray made of his lungs which showed a ground glass appearance, in the wall portion of either lung field and was diagnosed as asbestosis No. 1; that in the early part of March, 1937, he was treated by a doctor for a peculiar chest or bronchial condition characterized by uncontrollable coughs, even after administering sedatives or narcotics which usually controls or relieves same for a short time at least; that he was reëxamined on March 23, 1937, by medical experts; that the examination of his lungs at that time showed inconstant, dry crackling rales in both bases, both anteriorly and posteriorly, the diaphragm seemed to descend wholly on both sides, his condition at that time was diagnosed as asbestosis, that he went to Lithonia, Ga., on March 26, 1937, arriving there about 5:00 p.m.; that he was sick when he arrived and before 8:00 o'clock p.m. of the same day developed a chill and high fever, was coughing and expectorating prune-colored sputum, had a most peculiar sounding lung, sounding very different than that, that was found in ordinary pneumonia cases, his condition was diagnosed as pneumonia, lobar, right upper and middle lobes, from which he died on April 1, 1937, if the Commission should find those facts from the testimony and greater weight, have you an opinion satisfactory to yourself as to what the proximate cause of his pneumonia was. Ans.: I do. Q. What is that opinion? Ans.: Pneumonia-asbestosis. Q. What do you mean by that? Ans.: I mean pneumonia which was brought on by lowered resistance due to previously having had asbestosis. (On cross-examination.) Q. At that time you knew he was working? Ans.: As well as I remember he wasn't working regular, if he was he wasn't able to work. Q. If it should be found that he was working regularly from the time you first saw him the first week in March up until March 25, have you an opinion satisfactory to yourself as to whether or not he was able to work? Ans. Yes, I have. Q. What is that opinion? Ans.: I don't think he was able to work, any man with the condition he had and shortness of breath, should have been in bed. Q. You don't think he should have worked even though he worked? Ans.: He should not have worked even though he did work."

Without setting them forth in detail, we think the hypothetical question was premised on the facts of record in this case.

Dr. J. Rush Shull, admitted to be an expert, testified in part: "Q. Dr. Shull, I believe you have had considerable experience in examination and observation of asbestosis cases, have you not? Ans.: Yes, I have had a fair experience with it in the last 4 years. Q. Doctor, have you ever performed or entered in the performance of an autopsy on an asbestosis victim? Ans.: Yes, sir, I have had four. Q. Doctor, have you read and studied the report of Dr. Miller of the United States Public Health Service and report of Dr. Easom of the Medical Advisory Board? Ans.: About this case? Q. Yes, sir. Ans.: Yes, I have." He was asked the same hypothetical questions as Dr. Gallant, and answered: "Q. Where I said 1933, I meant 1936 and 1937? Ans.: Yes, I think his asbestosis was a proximate cause of his death. Q. In other words, what was the proximate cause of his pneumonia, the question was, have you an opinion satisfactory to yourself as to what the proximate cause of the pneumonia was? Ans.: Yes, I have an opinion. Q. What is that opinion? Ans.: The asbestosis that he had."

Dr. W. M. Summerville testified, in part: "Q. Where did you get your medical training? Ans.: University of North Carolina and Emory University. Q. You specialize in pathology? Ans.: Yes, sir. Q. You have practiced your profession here in Charlotte since you graduated? Ans.: Yes, sir. Q. Have you had any experience with asbestosis cases? Ans.: Yes, sir. Q. How many cases have you seen? Ans.: I have done autopsies on two. Studied three others clinically and studied the tissue from four. (By the Court.) Let the record show he is an expert. Q. Have you read the report of the Medical Advisory Board and also Dr. Miller's report of autopsy in this case? Ans.: Yes, sir." He was asked the same hypothetical question as Dr. Gallant, and answered: "I do. Q. What is that opinion? Ans.: I think the pneumonia was the contributory cause or proximate cause, the asbestosis was the proximate cause of pneumonia and pneumonia caused his death. Q. Was the proximate cause of pneumonia and pneumonia caused his death? Ans.: Yes."

W. S. Blassingame was a weaver in defendant Southern Asbestos Company's plant—a broadcloth weaver.

Dr. H. F. Easom, an expert, testified for defendant in part: "Q. What is asbestosis? Ans.: Asbestosis is defined as a disease of the lungs caused by the prolonged inhalation of the asbestos dust and characterized by the forming of fibrous tissue throughout the lungs. Q. In lay language, what is fibrous tissue that you find in the lungs of asbestosis victims? Ans.: Fibrous tissue is commonly known as scar tissue and it is the response of normal tissues to injury. Q. What does it do to the lung? Ans.: It eventually encroaches on the air containing portions of the lung and destroys them. Q. What are the usual symptoms that you find in a man or a woman suffering with the disease known as asbestosis, that is,

the clinical symptoms? Ans.: Well, for quite a while you may not have any symptoms, any characteristic symptoms, that is, in the early stages, but usually the most prominent and most existent symptom is shortness of breath. Q. Usually associated with coughing? Ans.: Yes, sir." He was asked substantially the same hypothetical question that Dr. Gallant had answered, and testified: "I think that possibly the asbestosis was a contributory cause in his death. I realize too that such a person might easily die with pneumonia that didn't have asbestosis at all so that my opinion would be that probably the asbestosis was a contributory cause. (On cross-examination.) Q. Doctor, I believe you stated what asbestosis is and you have stated what the reaction of the lungs was to asbestosis, I wish you would explain that just a little more fully, the reaction of the lungs to asbestosis? Ans.: You mean description of the damage done by the dust? Q. Yes. Ans.: The dust fibers usually lodge in the bronchial and there they in some manner irritate the tissues as they also gain entrance to the surrounding tissues surrounding the bronchials and the air sacs and set up irritations which causes the development of this scar tissue we refer to. Q. And whenever these particles of dust get and set up this irritation causing fiber tissues that closes that particular portion of the lung, in other words, cuts off that portion of the lung, does it not? Ans.: Eventually."

Dr. G. W. Murphy, an X-ray expert, testified in part: "Q. Did you see an X-ray picture of this particular subject, Mr. Blassingame? Ans.: Yes, sir. Q. Doctor, what did you find in that picture with reference to any abnormalities of his lungs? Ans.: Well, he has a typical fibrosis in his lungs that we consider characteristic of an asbestosis. Q. Where is that fibrosis located, throughout the lungs or any particular part of them? Ans.: Largely confined to the lower half. Q. Both lungs. Ans.: Both lungs." To the hypothetical question, he answered that it did not play any appreciable part.

Dr. J. Donnelly, an expert, testified in part: "Q. From the reports of the films what did you conclude to the findings upon autopsy of the condition of the lungs? Ans.: I think he had an early asbestosis." To the hypothetical question he said: "Didn't play any part." The X-ray report is what he went by. On cross-examination: "Q. So the asbestosis in those cases where they died—in what cases then could asbestosis be a proximate cause of a disease causing the death of the patient? Ans.: Well, I don't know whether you'd call it a disease, most asbestotics die from a progressive heart failure on account of tremendous amount of fibrosis in the lungs."

Diagnosis: His lungs were examined by Dr. J. W. Miller, Pathologist, Laboratory of Industrial Hygiene, Office of Industrial Hygiene & Sanitation, U. S. Public Health Service. His diagnosis was as follows:

"Pneumonia, lobar, right upper and middle lobes; Asbestosis, early," etc.

The hearing Commissioner found: "The deceased did not suffer an injury by accident arising out of and in the course of his employment resulting in his death. He did not suffer an occupational disease described in section 50½ of the compensation law known as asbestosis that caused or had any connection with his death or the pneumonia from which he died," and award was denied. An appeal was taken to the Full Commission, which found: "The Full Commission, after a careful study of the evidence and opinion, orders that the Findings of Fact, Conclusions of Law and the award of the hearing Commissioner, wherein compensation was denied, be vacated and set aside and in lieu thereof the following Findings of Fact, Conclusions of Law and Award be substituted." The Full Commission carefully found many "Findings of Fact" and from the evidence made its "Conclusions of Law" and held, "Therefore, the Full Commission concludes as a matter of law, under section 50½ of the compensation law, that this death case is compensable." An award was made for plaintiffs.

The defendants made numerous exceptions and assignments of error and appealed to the Superior Court. The court below rendered the following judgment: "This cause coming on to be heard at the October 16, 1939, Extra Term of the Superior Court for Mecklenburg County, and being heard before his Honor, A. Hall Johnston, upon appeal by defendants from the North Carolina Industrial Commission, and the exceptions to the findings of fact, conclusions of law and award of the Commission, after hearing argument of counsel for plaintiffs and defendants, the court overrules the exceptions of the defendants and affirms the findings of fact, conclusions of law, and award of the North Carolina Industrial Commission. This 21st day of October, 1939. A. Hall Johnston, Judge Presiding."

The defendants excepted and assigned error to the judgment as signed and appealed to the Supreme Court. The exception and assignment of error, and other necessary facts for the determination of this cause, will be set forth in the record.

James L. DeLaney for plaintiffs.
W. C. Ginter and J. F. Flowers for defendants.

CLARKSON, J. We do not think that the exception and assignment of error made by defendants to the judgment, as signed by the court below, can be sustained. Asbestosis cases have been before this Court heretofore. *McNeeley v. Asbestos Co.*, 206 N. C., 568 (1934); *Swink v. Asbestos Co.*, 210 N. C., 303. These cases were prior to the amendment of 1935.

The General Assembly of North Carolina, at its regular session of 1935, passed a comprehensive act (chapter 123) in reference to occupational diseases, amending the Workmen's Compensation Act, Public Laws 1929, chapter 120, "And to provide for securing the payment of compensation in certain cases of occupational disease." The pertinent parts—chapter 123. . . . Sec. 50½. (a) The disablement or death of an employee resulting from an occupational disease described in paragraph (b) of this section shall be treated as the happening of an injury by accident within the meaning of the North Carolina Workmen's Compensation Act and the procedure and practice and compensation and other benefits provided by said act shall apply in all such cases except as hereinafter otherwise provided. The word 'accident,' as used in the Workmen's Compensation Act, shall not be construed to mean a series of events in employment, of a similar or like nature, occurring regularly, continuously or at frequent intervals in the course of such employment, over extended periods of time, whether such events may or may not be attributable to fault of the employer, and disease attributable to such causes shall be compensable only if culminating in an occupational disease mentioned in and compensable under this act: Provided, however, no compensation shall be payable for asbestosis and/or silicosis as hereinafter defined if the employee, at the time of entering into the employment of the employer by whom compensation would otherwise be payable, falsely represented himself in writing as not having previously been disabled or laid off because of asbestosis or silicosis. (b) The following diseases and conditions only shall be deemed to be occupational diseases within the meaning of this act: . . . (24) Asbestosis. (25) Silicosis. . . . (c) The term 'disablement' as used in this section as applied to cases of asbestosis and silicosis means the event of becoming actually incapacitated, because of such occupational diseases, from performing normal labor in the last occupation in which remuneratively employed,' " etc. The act provided money through the Industrial Commission for medical and engineering studies, examinations, etc. The United States Public Health Service supplemented these funds through the North Carolina State Board of Health. As a result the Division of Industrial Hygiene was established in North Carolina.

The act also provides for "Advisory Medical Committee": " '(m) Except as herein otherwise provided, in case of disablement or death from silicosis and/or asbestosis, compensation shall be payable in accordance with the provisions of the North Carolina Workmen's Compensation Act.' . . . '(o) Unless written notice of the first distinct manifestation of an occupational disease shall be given to the employer in whose employment the employee was last injuriously exposed to the hazards of such disease or to the Industrial Commission within thirty

(30) days after such manifestation, and, in case of death, unless also written notice of such death shall be given by the beneficiary hereunder to the employer of the Industrial Commission within ninety (90) days after occurrence, and unless claim for disability and/or death shall be made within one (1) year after the disablement or death, respectively, all rights to compensation for disability or death from an occupational disease shall be forever barred,' " etc.

The Commission set forth "The deceased had been employed in the asbestos industry in North Carolina almost continuously since 1925. For some time before his death and during his last illness he had all the characteristic symptoms of a true asbestosis, but no doctor had so diagnosed it and told him; therefore, the deceased did not have a 'distinct manifestation' as provided for in section 50½ (o). The Commission has held in several cases against the Standard Mineral Company that the 'first distinct manifestation' is when the employee is told by competent medical doctors that he has asbestosis or silicosis. No claim for compensation could be filed until there was a diagnosis of asbestosis. The first diagnosis of asbestosis was the autopsy report."

The Commission found: "That Dr. Easom's X-ray diagnosis, based upon two examinations, January 27, 1936, and March 23, 1937, was first degree ground glass appearance and asbestosis of both lower lung fields."

The Commission found: "That the widow first knew that her husband, W. S. Blassingame, had asbestosis some time after the autopsy report was filed, May 10, 1937; that notice and claim for compensation were made out July 19, 1937, and filed both with the defendant employer and the Industrial Commission July 20, 1937, or within 90 days as required in section 50½ (o)." The Occupational Disease Act, including "asbestosis," was passed in 1935—chapter 123. It was an act to amend the Workmen's Compensation Act (chapter 120, Laws 1929). This act says that "All laws and clauses of laws in conflict herewith are hereby repealed." Therefore, the Occupational Disease Act must be construed *in pari materia.*

In *Real Estate Co. v. Sasser,* 179 N. C., 497 (499), it is said: "Amendments are to be construed together with the original act, to which they relate, as constituting one law. The old law should be considered, the evils arising under it, and the remedy provided by the amendments adopted, which shall best repress the evils and advance the remedy. 36 Cyc., 1164, and cases cited." *S. v. Kelly,* 186 N. C., 365 (372).

The following provisions were then in existence, in which there is no conflict: Section 8081 (dd), in part: "Every injured employee or his representative shall immediately on the occurrence of an accident, or as soon thereafter as practicable, give or cause to be given to the employer a written notice of the accident. . . . Unless it can be shown that

the employer, his agent or representative, has knowledge of the accident, or that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity, or the fraud or deceit of some third person; but no compensation shall be payable unless such written notice is given within thirty days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby."

Section 8081 (ff): (a) The right to compensation under this article shall be forever barred unless a claim be filed with the Industrial Commission within one year after the accident, and if death results from one accident, unless a claim be filed with the Commission within one year thereafter." This section, like the amendment of 1935, says, similar to the old act, "shall be forever barred."

The claim was filed within two weeks after date of letter of Dr. Easom transmitting his report, and the autopsy report of the United States Public Health Service to Dr. Stewart, of Lithonia, Ga. The Commission has found that the widow first knew that her husband had asbestosis some time after 10 May, 1937, which was the date of the autopsy report of the United States Public Health Service; that notice and claim was made 19 July, 1937, and filed 20 July, 1937. Thus it will be seen that it was humanly impossible for the widow to have given notice of such death (death resulting from asbestosis) within ninety days after the death. To construe this section as contended by the defendants would be to deny the benefits conferred by the act in this and all similar cases. The context of the Compensation Act does not favor such a strained or technical construction. The cause of deceased's death could only be ascertained by autopsy, as above set forth, and notice was given within ninety (90) days after discovery and action brought within one (1) year.

In *Johnson v. Hosiery Co.*, 199 N. C., 38 (40), this Court said: "It is generally held by the courts that the various Compensation Acts of the Union should be liberally construed to the end that the benefits thereof should not be denied upon technical, narrow, and strict interpretation." We see nothing prejudicial to defendants.

In II Schneider, Workmen's Compensation Law (2nd Ed.), part sec. 554, at pp. 2002-3, we find: " 'The courts may not interfere with the findings of fact, made by the Industrial Commissioner, when these are supported by evidence, even though it may be thought there be error.' 'The rule . . . is well settled to the effect that, if in any reasonable view of the evidence it will support, either directly or indirectly, or by fair inference, the findings made by the Commission, then they must be regarded as conclusive' (citing a wealth of authorities). Courts cannot

demand the same precision in the finding of Commission as otherwise might be if the members were required to be learned in the law."

In IV Schneider, Workmen's Compensation Law (supplement), page 592, it is said: " 'Undoubtedly, if any party feels that the Commission's findings of fact are not clear, leave the reason for its conclusion and award in doubt, or should be amplified for any other reason, he should ask the Commission to modify them by making additional findings instead of complaining in the appellate court that findings of fact, which are not inconsistent with the result reached, do not contain a finding concerning all disputed questions of fact which must necessarily have been decided in order to make and support the award.' *State ex rel. Probst v. Haid* (Mo.), 62 S. W. (2d), 869 (August, 1933), quashing *certiorari* (App.), 52 S. W. (2d), 501."

There is no evidence that the Commission found that the lack of the notice was prejudicial to the employer. The statute does not provide that the notice to the employer is a condition precedent (*Wilson v. Clement Co.*, 207 N. C., 541), but it does provide that the claim, if not made within one year by the claimant, "shall be forever barred." This provision does not apply to the 90 days, and from a reasonable construction of the statute it seems to have been intentionally omitted. The Commission found that the widow filed the notice "within 90 days" as required by sec. 50½ (o), *supra*. If the widow is barred, what about the minor? Taking the intent of the statute, that under the facts and circumstances of this case it was never contemplated that the widow should make claim without being able to make a truthful one, and this was an impossibility until after the autopsy. By analogy see *Nelson v. Ins. Co.*, 199 N. C., 443.

In *S. v. Humphries*, 210 N. C., 406 (410), *Devin, J.*, for the Court says: "The object of all interpretation is to determine the intent of the lawmaking body. Intent is the spirit which gives life to a legislative enactment. The heart of a statute is the intention of the lawmaking body. *Trust Co. v. Hood, Comr.*, 206 N. C., 268; *S. v. Earnhardt*, 170 N. C., 725. In the language of *Chancellor Kent:* 'In the exposition of a statute the intention of the lawmaker will prevail over the literal sense of the terms and its reason and intention will prevail over the strict letter. When the words are not explicit, the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt and the remedy in view, and the intention is to be taken or presumed according to what is consonant with reason and good discretion.' 1 Kent Com., 461."

In Cooley Blackstone, Intro. sec. 2, page 53, we find: "Intent as expressed. The fairest and most rational method to interpret the will of the legislator is by exploring his intention at the time when the law

was made, by *signs* the most natural and probable. And these signs are either the words, the context, the subject matter, the effects and consequences, or the spirit and reason of the law. . . . (p. 54) As to the *effects* and *consequences,* the rule is, that where words bear either none, or a very absurd signification, if literally understood, we must a little deviate from the received sense of them. Therefore the Bolognian law, mentioned by Puffendorf, which enacted 'that whoever drew blood in the streets should be punished with the utmost severity,' was held after long debate not to extend to the surgeon, who opened the vein of a person that fell down in the street with a fit."

The Industrial Commission found, among other facts, the following: "That the immediate cause of the death of the deceased was pneumonia superimposed upon asbestosis; that the degree of asbestosis with which the deceased was suffering prior to contracting pneumonia had the effect of lowering his resistance to the pneumonia germ which, according to medical science, is ever present in the human body; that the general condition of the deceased produced by such lowered resistance or inability to ward off pneumonia was the inciting or proximate cause of the fatal development of pneumonia and death of the deceased was proximately caused by the condition of the deceased which was produced and brought about by a weakened condition and lowered resistance due to asbestosis with which the deceased was and had been suffering for some time prior to the time he was stricken with pneumonia. . . . That the widow first knew that her husband, W. S. Blassingame, had asbestosis some time after the autopsy report was filed May 10, 1937; that notice and claim for compensation were made out July 19, 1937, and filed both with the defendant employer and the Industrial Commission on July 20, 1937, or within 90 days, as required by section 50½ (o); that the deceased never knew he had asbestosis."

The only exception and assignment of error made by the defendants is to "the judgment as signed."

In *Lassiter v. Telephone Co.,* 215 N. C., 227 (230), it is said: "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."

In *Tindall v. Furniture Co.,* 216 N. C., 306 (310), it is written: "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 pointed out in *Maley*

v. Furniture Co., 214 N. C., 589, and *Consolidated Edison Co. v. National Labor Relations Board,* 305 U. S., 197." There was circumstantial evidence.

The hypothetical question we think proper under our decisions. A similar hypothetical question was admitted in *Shaw v. Handle Co.,* 188 N. C., 222 (tried before *Devin, J.*), and approved by this Court. In that case the question was the cause of the death of two men in the cabin of a boat. It was alleged that the boat was operated by a gasoline engine which was old, worn out and defective and would blow gas fumes out of the engine into the cabin. The weather was cold and the windows closed. The hypothetical question was answered: "Gas poisoning, monoxide poisoning" (carbon monoxide gas). *Cabe v. Parker-Graham-Sexton, Inc.,* 202 N. C., 176; *Keith v. Gregg,* 210 N. C., 802 (807). In this case we think the hypothetical questions assume facts which the evidence directly, fairly and reasonably tends to establish, and were competent. The probative force was for the Commission.

The facts were fully sufficient to justify the Industrial Commission's finding of fact that the proximate cause of death was asbestosis. The facts are distressing—a young man, a bread-winner with a wife and child, in the performance of his duty to his employer, in an industry fraught with danger, was weakened by the inhaling of asbestos dust, and died from its effects. His lungs were practically closed by "ground glass appearance."

None of the contentions of the defendants can be sustained. There was sufficient competent evidence for the Commission to find the facts upon which they found defendants' liable. It has been said repeatedly by us that the findings of fact are binding on us.

We see no error in law. The judgment of the court below is

Affirmed.

SEAWELL, J., concurring: Since it is the duty of the court below, and also this Court, to sustain a finding by the Industrial Commission, when there is any evidence to support it, I do not see why we should argue further whether the deceased came to his death by reason of asbestosis, or why we should pick out the less favorable testimony of one expert as against several others who testified plainly that he did.

Pneumonia is indeed an infectious disease, but we are made to understand that just as the vulture swoops upon his disabled prey while yet there may be life, the latent germs of pneumonia are ready to take over the lung area when resistance has been destroyed. Pneumonia is such a close incident to lung injuries, and indeed to other injuries, that it is sometimes apparently regarded as merely the hand that opens the gate for the final flight.

Following *McNeeley v. Asbestos Co.*, 206 N. C., 568, 174 S. E., 451, when silicosis, an occupational disease, was treated as an accident already within the scope of the then existing Workmen's Compensation Act, and as such compensable, the Legislature of 1935 added to the list of things compensable under that act a large number of occupational diseases, including asbestosis. We may assume that in part, at least, this addition to the statute was made for the protection of industry, through the regulation of the conditions upon which compensation might be made for occupational diseases. If there is observable in the statute the suggestion of a policy supposed to protect the industry against imposition, we are not required to go beyond the terms in which it is expressed. Whether the employer has the "edge" of advantage in these positions is a matter for the Legislature and not for us, but it is our duty to approach this case with some degree of liberality toward the labor employed in the industry, since the rule is universally accepted that statutes like the one under consideration are to be liberally construed in favor of the employee. While this does not permit us to set aside any rule established by the Legislature consistent with constitutional limitations, it nevertheless strongly enjoins upon us the duty of resolving fifty-fifty doubts in favor of compensation.

In the present instance we are dealing with what I should consider a very harsh provision of the law, operating more for arbitrary exclusion of asbestosis victims than for the reasonable protection of employers against imposition, unless its terms may be rationally explained.

Here are the conditions which have been suggested as standing in the way of compensation: Chapter 123, Public Laws of 1935; Michie's Code of 1935, section 8081 (7) (o), requires a written notice to an employer within thirty days after a distinct manifestation of an occupational disease, and in case of death, also, a written notice of such death within ninety days after the occurrence. With special reference as to asbestosis, section 50½, subsection (g), of the 1935 Law, Michie's Code of 1935, section 8081 (7) (g), provides: "An employer shall not be liable for any compensation for asbestosis, silicosis or lead poisoning unless disablement or death results within three years after the last exposure to such disease, *or, in case of death, unless death follows continuous disability from such disease, commencing within the period of three years limited herein, and for which compensation has been paid or awarded or timely claim made as hereinafter provided and results within seven years after such last exposure.*"

We have here alternative conditions affecting compensation in case of death: first, if death follows continuous disability for which compensation has been paid or awarded; and, second, timely claim made, as hereinafter provided. Obviously, if payment has been made for a disability

caused by asbestosis, or an award made therefor, the employer has notice that such a condition exists. If that has not occurred, then he is entitled to a notice of the condition within thirty days after its manifestation, and notice must be given within ninety days after the death. It is, therefore, first and last, a question of notice to the employer, and it was not intended that in the absence of such a written notice within thirty days after the manifestation of the asbestosis condition it should put the claimant against the alternative bar of his claim, upon the ground that death had not followed continuous disability. What we must deal with—and I see no disagreement as to this—is the question of notice which the statute requires to be given within thirty days after the distinct manifestation of asbestosis, and the ninety days notice after the death.

Similar provisions in insurance policies, as drastic if literally construed, have been relieved against upon the accepted theory that the law does not intend an unreasonable requirement which would defeat justice between the parties, especially when the party charged with liability has not been prejudiced by want of notice. *Nelson v. Insurance Co.,* 199 N. C., 443, 154 S. E., 752; *Gorham v. Ins. Co.,* 214 N. C., 526, 200 S. E., 5; *Woodell v. Ins. Co.,* 214 N. C., 496, 199 S. E., 719; *Allgood v. Ins. Co.,* 186 N. C., 415, 119 S. E., 561; *Ball v. Assurance Corp.,* 206 N. C., 90, 172 S. E., 178. The Court would be loath to admit that the ends of justice were achieved in these cases by court repeal, rather than legitimate construction.

It is clear from the evidence that the deceased had no knowledge of the cause of his serious condition and, therefore, had no occasion to file any notice of it; nor, indeed, was there such a distinct manifestation of his disease as would inform him, a layman, of the condition, and apparently no physician or other competent person had given him any such information. His disease was a fact but he was unaware of it. A similar situation prevailed with regard to the widow in filing her claim. She had no knowledge whatever that the deceased had asbestosis or was suffering from any other compensable disease. She was informed of this after the autopsy, and the Commission, properly I think, found that she filed her claim within the ninety days after it was incumbent upon her so to do. This is the reasoning applied in the analogous cases cited, where the doctrine of liberal construction was not so imperative. Is the rule less commendable where our construction is required to be liberal?

In no event has the defendant been prejudiced by a want of notice, unless, indeed, the technical defenses upon which it relied have not been found good. The fact that the man was afflicted with asbestosis, and the manner in which it had affected his lungs, was made clear by the autopsy. It was a condition which could not be simulated, faked, or suddenly produced; and, inevitably, it came from years of inhalation of asbestos

dust and particles, and the daily lesion of lung tissue, and the filling up of the lungs with inert matter and scar tissue through all that period. Whether the provisions in the original unamended act, Michie's Code of 1935, section 8081 (dd), relating to the finding by the Commission that an employer is not prejudiced by want of notice, applies to this case, I do not think it necessary to inquire. If it does, the Commission in setting forth the facts with regard to the notice, and adjudging the claim to be compensable thereunder, may be deemed to have found that a want of notice is not prejudicial to the employer.

The independent fact whether the deceased was disabled from normal labor has been questioned. Attention has been called to the fact that he did labor up to the time he left for Lithonia, Ga., as conclusive on the point. The expert evidence in this case clearly indicates that he was disabled from normal labor, notwithstanding the fact that he did actually labor, and notwithstanding the fact that he gave no notice of the condition, himself being unaware of it. There is no question here of *total* disability. Whether his labor was actually *normal,* we may judge from the circumstances.

For a long period of time the deceased had violent paroxysms of coughing during the mornings. The paroxysms were so violent as to force the blood into the vesicles of his skin until his face became violently red. The absence of oxygenation was apparent from the fact that at such times his nails became black. Here was the most violent attempt of nature to expel not only the grinding asbestos particles with which his lungs were subsequently found to be impregnated, but also the fibrous scar tissue which had taken the place of the open air cells, necessary to his existence by the intake of air and oxygen. The condition of his lungs, although the cause of it was not apparent to the deceased, was indicated by the rales which accompanied his difficult breathing. Thus, with his lungs torn by asbestos particles, which it was impossible for him to absorb or cough up, and filled with fibrous instead of cell tissue, he left his employment and went to Georgia, where the condition continued—without the abnormal temperature which would indicate that pneumonia had supervened, for a period of time. Then pneumonia ensued, which the expert witnesses stated was the result of the asbestosis. When the time came to fight this, he was already half drowned with solid matter.

But even if the man worked down to the last moment, this is not conclusive as to his disability. The distinction is clearly brought out in the evidence of the experts who testified that he was disabled and should not have been at work.

Men are constituted differently. One may be inclined to quit work, and do so, when his physical powers are attacked by disease or injury,

and consider himself totally disabled or disabled from normal employment. Conscientious experts passing on his case will agree with him. Another, who has suffered greater impairment, will desperately arise to the emergency under the pressure of what is euphoniously called "economic necessity," and which often means the necessity of fighting off starvation from the hungry mouths of his dependents, and will fight his handicap and carry on with a determination, intensity and courage that will not suffer abatement until his dead hands fall from the loom.

It is not at all necessary, however, to go into that matter, since we are here dealing with the question of notice, and on this question I am impelled to agree with the findings of the Full Commission and of the Superior Court, and, therefore, concur in the result reached here.

BARNHILL, J., dissenting: A careful examination of the record discloses that all of the evidence tending to show that the deceased, prior to his death, suffered from asbestosis is hearsay, being largely based on an unsworn unidentified report by the United States Public Health Service. All of the evidence tends to show that the death of the deceased was caused by pneumonia, a germ disease or infection, and that the only effect that asbestosis could have had in contributing to his death lies in the fact that it had a tendency to lower his resistance. There is no evidence that pneumonia was not sufficiently virulent to have caused death irrespective of the existence of asbestosis. Pneumonia being an infectious disease reference might be had to the medical reports relied on in which it is made to appear that he was suffering both from infected tonsils and pyorrhea—conditions which are resistance reducing and provide a fruitful field for the lodgment of pneumonia germs. And the medical testimony tends to show that lobar pneumonia (the cause of the death of the deceased) is more prevalent in strong, apparently healthy, normal individuals than in any other type; that pneumonia patients die not from the condition of the lungs but from the toxemia the presence of bacteria produces; and that the disease is no more prevalent in cases of asbestosis than it is in other patients.

Much could be said as to these aspects of the evidence which make it appear that the presence of asbestosis was incidental and that it could not be said that it was the efficient proximate cause of his death as indicated by the testimony of Dr. Easom, chairman of the Advisory Medical Committee appointed under the Occupational Disease Law and Director of the Industrial Hygiene Division of the Board of Health of the Industrial Commission, as follows: "I think it is very probable that the pneumonia might have been fatal without the asbestosis, he might have died of pneumonia even without the asbestosis; there is no way in the world of proving that this man would have or would not have died

without having the asbestosis . . . it is my opinion that pneumonia is no more prevalent in cases of asbestosis than it is in other patients . . . in my opinion the asbestosis played no significant part in his death . . . most pneumonia patients die from the toxemia from the bacteria that is present. I do not believe that the presence of the asbestosis had any effect one way or the other on the toxemia." Dr. Murphy, a member of the Industrial Commission Advisory Medical Committee, testified to like effect.

Dr. Stewart, who attended the deceased during his illness, frankly stated: "I don't know what asbestosis is." His opinion and the opinions of other doctors who testified were based upon evidence that was wholly incompetent. But as I view the record it is unnecessary to debate the question of proximate cause of death. The claimants have no right to compensation under express terms of the statute.

Ch. 123, Public Laws 1935, amends the Workmen's Compensation Act so as to add sec. 50½, providing for the payment of compensation in certain cases of occupational diseases. As thus amended, sec. 50½ (g) provides that "an employer *shall not be liable* for any compensation for asbestosis . . . unless disablement or death results within three years after the last exposure to such disease, or, in case of death, *unless death follows continuous disability from such disease,* commencing within the period of three years limited herein, and for which compensation has been paid or awarded or timely claim made as hereinafter provided and results within seven years after such last exposure."

Under this section the claimant must prove that the disablement or death resulted within three years after the last exposure to such disease unless it is shown that compensation was paid or awarded or timely claim made, as provided in the act, prior to death. In that event it is sufficient to show that the death resulted within seven years after the last exposure. However, the act expressly provides that there shall be no liability for the payment of compensation in either event unless death follows continuous disablement from such disease commencing within three years after the last exposure. Proof thereof is a condition precedent to recovery, as is the provision for notice.

Disablement or disability as used in this section, as expressly defined in the statute 50½ (g) in respect to cases of asbestosis, means "the event of becoming actually incapacitated because of such occupational disease from performing normal labor in the last occupation in which remuneratively employed."

The deceased continued in his employment until 25 March, 1937, at which time he quit work for the purpose of taking a pleasure trip to Georgia. Before leaving for Georgia he contracted a severe cold followed by pneumonia from which he died 1 April, 1937. He was not

then and had never been disabled from asbestosis as defined in the statute. The Commission found as a fact "that the deceased never knew he had asbestosis." How, then, could his death follow "continuous disability from such disease . . . for which compensation has been paid or awarded or timely claim made"?

The plaintiffs have failed to establish the conditions under which the employer is liable for compensation. The case is plainly not within the terms of the statute.

Whether these restrictions upon the right of recovery in case of death from asbestosis unduly limits the right to compensation is not for us to determine. The Legislature has written the statute in clear and unmistakable language and it is our duty to apply it as written.

The Workmen's Compensation Act (ch. 120, Public Laws 1929, as amended by ch. 123, Public Laws 1935) further provides that no compensation shall be paid for asbestosis "unless written notice of the first distinct manifestation of an occupational disease shall be given to the employer in whose employment the employee was last injuriously exposed to the hazards of such disease or to the Industrial Commission within thirty days after such manifestation, and, *in case of death* unless *also* written notice of such death shall be given by the beneficiary hereunder to the employer or the Industrial Commission within ninety days after occurrence." Sec. 50½ (o). Two separate and distinct notices are required: (1) Notice of the first manifestation of the disease prior to the death of the employee; and (2) written notice of such death within ninety days after death occurs. The provisions of the statute have not been complied with either as to the notice prior to death or to the notice after death.

The Commission found that the claimants made out notice and claim for compensation 19 July, 1937, and filed such notice and claim with the employer and the Industrial Commission 20 July, 1937, which was more than 90 days after death occurred 1 April, 1937. Therefore, the conclusion of the Commission that such notice was served within 90 days, as required in section 50½ (o), is not supported by the record.

In this connection it is well to note that the provisions of sec. 50½ (o) clearly make the provisions of sec. 22, ch. 120, Public Laws 1929, inapplicable, for it is provided that notice is deemed to have been waived: (1) Where the employer or insurance carrier voluntarily makes compensation payments therefor; or (2) within the time above limited, has actual knowledge of the occurrence of the disease or of the death and its cause; or (3) by his or its conduct misleads the injured employee or claimant reasonably to believe that notice and/or claim, has or have been waived. And it does not appear that notice has thus been waived by the defendants.

But if it be conceded, as the majority opinion asserts, that the provisions of sec. 22, ch. 120, Public Laws 1929, are controlling as to notice in the case at bar, then we must bear in mind that it is there provided that "no compensation shall be payable unless such written notice is given within thirty days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby." If the claimants seek to excuse the failure to give notice under the terms of this provision the burden is on them. They did not seek to so show. Even had they done so the Commission has not found that such facts appear to its satisfaction as it is required to do before the want of notice becomes immaterial. *Singleton v. Laundry Co.*, 213 N. C., 32. As the Commission has not found "reasonable excuse" to its satisfaction or that "the employer has not been prejudiced thereby," the failure to give notice is material even under this section.

Furthermore, it is apparent from the record that no effort was made to substantially comply with the provisions of 50½ (r).

A careful reading of the pertinent statute leads me to the conclusion that it clearly appears that the Legislature intended that there should be no compensation paid for death from asbestosis unless the employee, during his lifetime, at least recognized that he was suffering from asbestosis and had made claim for, or the employer had voluntarily made payments of, compensation; and, unless thirty days notice of the existence of asbestosis was given prior to death and notice of death was served within ninety days thereafter, or waived as provided by the statute. If this be correct the claimants are not entitled to compensation.

I am aware of and in full accord with the rule of liberal interpretation when the Workmen's Compensation Act is under consideration. However, this rule when followed to its fullest extent does not require us to write into the statute provisions the Legislature has elected to omit or to disregard positive provisions therein contained.

I am unable to agree with the reasoning in the majority opinion or with that in the concurring opinion to the effect that we are dealing only with the question of notice. As I view it the failure to give the required notice is a secondary feature of the case. The plaintiffs have failed to establish the right to compensation in the first instance, irrespective of notice.

The hearing Commissioner was correct in his conclusion that no compensation should be awarded. We should so hold and reverse the judgment below.

STACY, C. J., and WINBORNE, J., concur in this opinion.

STATE v. F. C. MITCHELL.

(Filed 6 March, 1940.)

1. **Plumbing and Heating Contractors § 2—Statute providing for licensing of plumbing and heating contractors held not to apply to journeymen plumbers.**

A journeyman plumber, duly licensed under the ordinances of a municipality, who furnishes no materials, supplies or fixtures, but merely attaches or replaces fixtures, and does not install plumbing systems or make substantial alterations thereof, is not engaged in carrying on the business of plumbing and heating contracting within the purview of chapter 52, Public Laws of 1931, as amended by chapter 224, Public Laws of 1939, since plumbing is defined in the act in terms of the "plumbing system" and the act refers to plumbing and heating "contractors."

2. **Same—Statute licensing plumbing and heating contractors must be strictly construed.**

Held: Even conceding that the statute providing for licensing of plumbing and heating contractors is ambiguous and is susceptible to a construction which would include journeymen plumbers in its definition of those required to be licensed under its provision, in a prosecution for failing to obtain a license as required by the statute, the Court could not adopt that construction, since the statute must be given that construction which is favorable to defendant and tends least to interfere with personal liberty. The question of the constitutionality of the statute *held* not necessary to be determined on this appeal.

3. **Statutes § 8—**

Criminal statutes must be strictly construed against the State and in favor of the defendant, and if patently ambiguous that construction must be adopted which operates in favor of a party accused under its provisions.

4. **Constitutional Law § 8—**

A statute passed in the exercise of the police power of the State should be strictly construed so as to give it the least interference with personal liberty.

DEVIN, J., concurring.

APPEAL by defendant from *Johnston, Special Judge,* at December Term, 1939, of BUNCOMBE. Reversed.

Criminal prosecution under a warrant in which the defendant is charged with the violation of ch. 52, Public Laws 1931, as amended by ch. 57, Public Laws 1935, as amended by ch. 224, Public Laws 1939, relating to the licensing of plumbing and heating contractors.

The warrant charges that the defendant "did unlawfully and willfully engage in the business of plumbing contracting by installing for a valuable consideration, 2 sinks and one closet in the plumbing system of a building at 191 Chestnut Street, in the city of Asheville, county of

Buncombe, without having been licensed to engage in such business in violation of the statute above cited."

There was a special verdict as follows:

"The jury, after being duly sworn and regularly impaneled to try the issues joined in the above entitled cause and after hearing the evidence presented and the charge of the court, returns into court a special verdict finding the following facts beyond a reasonable doubt:

"That the defendant did on or about August 3, 1939, install 2 sinks and 1 closet in a habitable building, located at 191 Chestnut Street, in the city of Asheville, for Roy Koon and did connect said sinks and closet to the plumbing system of said building.

"That the defendant did receive a valuable consideration from Roy Koon for installing and connecting to the plumbing system said two sinks and one closet, in a habitable building located at 191 Chestnut Street, in the city of Asheville.

"That the defendant, on or about August 3, 1939, was not an employee working under the supervision and jurisdiction of a person, firm or corporation holding a license in accordance with the provisions of chapter 52 of the Public Laws of 1931, as amended.

"That the defendant has not applied for nor procured a license from the State Board of Examiners of Plumbing and Heating Contractors before installing said two sinks and one closet and connecting same to the plumbing system in a building located at 191 Chestnut Street, in the city of Asheville, and at the time of said installation was not licensed by said board. That the city of Asheville is a city having a population of more than 3,500.

"That the defendant at the time of said installations was duly licensed by the governing body of the city of Asheville as a 'journeyman plumber' under the provisions of its ordinances.

"That the defendant does not have or maintain, and did not at the time hereinbefore referred to, have or maintain, any shop, office or fixed place of business, or have, own, sell or offer for sale, any plumbing or heating supplies, material or fixtures whatsoever, except the defendant owned and used at the time of the said installation necessary tools to perform the labor in connection with the said installation.

"That the defendant received a valuable consideration of seventy-five (75) cents per hour for services rendered in connection with said installation of plumbing.

"Upon the foregoing findings of fact, if the court shall be of the opinion that the defendant is guilty, of engaging in the business of plumbing contracting in violation of the provisions of chapter 52 of the Public Laws of 1931, as amended, we, the jury, find him guilty, and if, upon the foregoing findings of facts, the court shall be of the opinion that the defendant is not guilty, we find him not guilty."

The court, being of opinion that upon the facts found in the special verdict, the defendant is guilty of practicing or offering to practice, entering into or carrying on the plumbing and/or heating contracting business, pronounced judgment upon the verdict. The defendant excepted and appealed.

William A. Sullivan for defendant, appellant.
Attorney-General McMullan for the State, appellee.
Brooks, McLendon & Holderness, amicus curiæ.

BARNHILL, J. The defendant presents the following question for determination:

"Is a journeyman plumber, duly licensed under the ordinances of a municipality, who furnishes no materials, supplies, or fixtures, but merely works at his trade as a plumber for an hourly wage, engaged in carrying on the business of plumbing and heating contracting, within the provisions of chapter 52 of the Public Laws of 1931, as amended by chapter 224, Public Laws 1939?"

He likewise challenges the constitutionality of the law under which he stands indicted for that it is contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States and of Art. I, secs. 1, 7, 17 and 31, of the Constitution of North Carolina.

If the answer to the first question presented is "no," the constitutionality of the act becomes immaterial and requires no discussion.

The original act creating the "State Board of Examiners of Plumbing and Heating Contractors," ch. 52, Public Laws 1931, did not undertake to define "plumbing and heating contracting business"; nor did it prescribe the standard of efficiency to be required of an applicant for license by the Board of Examiners. The amendment which is material in consideration of the question presented on this appeal, ch. 224, Public Laws 1939, undertakes to remedy these defects in the original act.

The purpose of the act as declared in the caption is the same: "Relating to the licensing of plumbing and heating contractors." For the purpose of the act "plumbing shall be deemed and held to include the plumbing system of a building consisting of water supply distributing pipes, the fixtures and fixture traps, soil, waste and vent pipes, all with their devices, appurtenances and connections, and all within, adjacent to or connected with the building, however shall not include the repair or installation of water supply pipe from the street to plumbing fixtures not connected with the sewerage or ventilating systems or to the repair or replacement of outside water faucets." Heating "shall be deemed and held to include all heating systems of a building requiring the use of high or low pressure steam, vapor, hot water, warm or conditioned air

and all piping, ducts, connections, or mechanical equipment appurtenant thereto within, adjacent to or connected with the building."

In considering the licensing of an applicant the board is required to give an examination "designed to ascertain the technical and practical knowledge of the applicant concerning the analysis of plans and specifications, estimating costs, construction, fundamentals of design and installation, sanitation, fire hazards, and related subjects." All applicants who, upon such examination, are found by the board "to be qualified to engage in and carry on the business of either plumbing or heating contracting, or both, as defined in this Act, shall be entitled to and shall receive a license to do so."

Section 6 of the amendatory act then provides that: "Any person, firm or corporation who shall engage in or offer to engage in or carry on the business of either plumbing or heating contracting as defined in section six of this Act, without first having been licensed to engage in such business, or businesses, as required by the provisions of this act; . . . shall be guilty of a misdemeanor."

"Plumbing" is defined in terms of the "plumbing system" of a building. The clause "consisting of," etc., immediately following is an adjective phrase which qualifies and defines "plumbing system" and not "plumbing." The adjective phrase merely lists the numerous items and integral parts of such a system. Contrary to the implications of the argument advanced by the State the modifying phrase does not extend the meaning of the words "system" and "systems" but merely clarifies the idea-content of such words by giving an inventory of the units in each case constituting such a "system." By the terms of the act itself the act extends only to those contractors who contract to install or restore entire plumbing systems and heating systems for buildings or to make substantial alterations thereof. This seems to be the meaning and clear intent of the language.

That this was the legislative intent is emphasized by other language in the Act.

The meaning of the term "contractor" is not defined by the Act and, accordingly, we must give to it the normal and ordinary meaning assigned to the word. Although the term "contractor," in a strict sense, may be applied to anyone entering upon a contract, it is commonly reserved to designate one who for a fixed price undertakes to procure the performance of work on a large scale, or the furnishing of goods in large quantities for the public or a company, or individual. (*McCarthy v. Second Parish,* 71 Me., 318, 36 Am. Rep., 320; *Brown v. Trust Co.,* 174 Pa., 443, 34 Atl., 335; *Koppe & Steinichen v. Rylander,* 29 Ga. App., 41, 114 S. E., 81, 83.)

As the performance of work "on a large scale" is one of the essential elements of the meaning of the word "contracts," a definition of the

term tends to show that the act was intended to apply to persons who for a fixed price undertake to provide plumbing and heating systems for entire buildings.

The caption declares the purpose of the act to be the licensing and regulation of plumbing and heating contractors. Plumbing is made to relate to the plumbing system. The examination is designed to ascertain the technical and practical knowledge on the part of one who engages in the business of installing plumbing systems. As there are no provisions for the issuance of a limited license to engage in the plumbing contracting business only (while there is such a provision as to the heating contracting business) the applicant seeking a license to engage in the plumbing business must have technical and practical knowledge both of plumbing systems and of heating systems. The licensed contractors when associated with a non-licensed contractor or when employing assistants, is required to execute contracts, exercise general supervision over the work done and be responsible for compliance with all of the provisions of the act. He is required to possess technical and practical knowledge concerning analysis of plans and specifications, estimating costs, construction, fundamentals of design and installation, sanitation, fire hazards and relating subjects.

There are qualifications, terms and conditions which we would naturally expect to be required of one who is in the contracting business, installing and making substantial alterations in plumbing systems. While, on the other hand, they are stipulations which when applied to an ordinary journeyman plumber who simply replaces a fixture in a plumbing system already installed would seem to be arbitrary and unreasonable. The analysis of plans and specifications, the estimation of costs, the fundamentals of design and installation and the like are scarcely matters essential to the familiar and effective use of the pipe wrench and "plumber's friend." When we summons the overalled plumber to repair a bursted pipe or to replace a defective fixture or to adjust a leaking faucet, we neither demand or expect that he be an authority on engineering, costs accounting, architecture, sanitation or fire prevention.

It is a matter of common knowledge that the plumbing system is "ruffed in" in accord with plans and specifications while the building is being constructed. The water supply distributing pipes and the soil, waste and vent pipes, together with their devices, appurtenances and connections are already provided. The attachment of fixtures is merely incidental and does not and cannot interfere with the general plan of the system. It merely has to be attached to the wall and connected to the water supply pipe and the outlet pipe which are already in a fixed position. The work in connection therewith cannot disarrange or alter the original plan.

So long as the entire unit system was planned and its original installation supervised by an experienced plumbing contractor, in the absence of proof that the later modification or adjustment materially altered or affected the effectiveness or sanitation of the system as a whole, there can be little, if any, justification for invoking the extraordinary force of the police power and its Siamese-twin, the criminal authority of the State, against a skilled practical workman seeking to earn an honest livelihood in the only trade which he has mastered. We may not give to an act of the Legislature a meaning which would be so restrictive of personal liberty unless the language thereof is clear and explicit and it permits of no other reasonable interpretation.

While the trade of plumbing contractor, which actively and directly affects the public health and safety, may, perhaps, invoke the aid of the police power to establish a better regulated and more satisfactorily conducted business, to extend the terms of the act to include those who make incidental repairs and replacements and whose necessary qualifications consist more largely of skill of the hands rather than of technical training of the mind, would cast in serious doubt the constitutionality of the act as an unwarranted use of the police power.

But the State contends that the general definition of plumbing is materially qualified by the use of the following language: "Any person, firm or corporation, who, for a valuable consideration installs, alters or restores or offers to install, alter or restore . . . plumbing . . . as defined in this act, shall be deemed to be engaged in the business of . . . plumbing contracting." It contends that this language brings a journeyman plumber within the meaning of the act and expressly condemns the conduct of the defendant as violative of the statute.

In considering this contention we must bear in mind that plumbing, as defined in the act, is the plumbing system. Accordingly, one who originally installs or substantially alters or restores or replaces a plumbing system comes within the terms of the act. One who makes repairs to a system which amounts to a substantial and material alteration in the original plan or in the plans and specifications under which it was installed or a material alteration of an old installation or the restoration of the same, is covered by its terms. However, the terms of the statute do not extend it to cover every workman who makes a minor repair, every mechanic who makes a slight adjustment or every craftsman who makes a single unit installation in respect to an already installed or already planned system which in no wise changes or disrupts the plans and specifications of the original system.

In the findings of the jury in its special verdict there is no finding or suggestion that the defendant installed, altered or restored a plumbing system.

But let us concede that the language used in defining plumbing is ambiguous and that, as contended by the State, the term not only includes the plumbing system as such but likewise may be interpreted so as to embrace the constituent parts thereof separately and distinctly from the system as a whole. Then we are faced by well recognized and firmly established rules of construction which preclude the adoption of this interpretation.

It is a criminal statute, penal in its nature, and must be strictly construed against the State and in favor of the defendant. *S. v. R. R.*, 168 N. C., 103, 82 S. E., 963; *Nance v. R. R.*, 149 N. C., 366; *S. v. Williams*, 172 N. C., 973, 90 S. E., 905; *S. v. Humphries*, 210 N. C., 406, 186 S. E., 473; *S. v. Heath*, 199 N. C., 135, 153 S. E., 855; *S. v. Whitehurst*, 212 N. C., 300, 193 S. E., 657.

If a statute contains a patent ambiguity and admits of two reasonable and contradictory constructions, that which operates in favor of a party accused under its provisions is to be preferred. *Weirich v. State*, 140 Wis., 98, 22 L. R. A. (N. S.), 1221. Where there is any well-founded doubt as to any act being a public offense it should not be declared such but should rather be construed in favor of the liberty of the citizen. *Harrison v. Vose*, 13 U. S. Law Ed., 179; *Huntsworth v. Tanner*, 15 Pac., 523, Ann. Cases, 1917 D, 676, 25 R. C. L., 1084.

"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." *S. v. Heath, supra; S. v. Kearney*, 8 N. C., 53; *Smithwick v. Williams*, 30 N. C., 268; *Hines v. R. R.*, 95 N. C., 434; *Cox v. R. R.*, 148 N. C., 459.

A statute passed in the exercise of the police power of the State should be strictly construed. *State ex rel. Wooldridge*, 161 N. W., 569, L. R. A., 1917 D, 310; *People v. Marx*, 99 N. Y., 377, 52 Am. Rep., 34, 2 N. E., 29.

Whenever the police power is invoked there is a resulting delimitation of personal liberty. Such legislation is justified only on the theory that the social interest is paramount. *Salus populi est suprema lex.* Therefore, in the interpretation of a statute which is ambiguous in its terms and is subject to two or more reasonable interpretations, the Court must adopt that construction which is favorable to the individual and tends least to interfere with or to circumscribe or delimit personal liberty. *Asbury v. Albemarle*, 162 N. C., 247, 78 S. E., 146; *S. v. Biggs*, 133 N. C., 729; *Price v. Edwards*, 178 N. C., 493, 101 S. E., 33; *Jennette v. Coppersmith*, 176 N. C., 82, 97 S. E., 54. Nowhere in the act is any reference made, either directly or indirectly, to a journeyman plumber

except that employees who work under the supervision and jurisdiction of a licensed contractor are excluded from the provisions of the act requiring a license. Nor are incidental repairs which do not alter a system already installed prohibited by one other than a licensed contractor. We find no language in the amended act which renders *S. v. Ingle,* 214 N. C., 276, 199 S. E., 10, obsolete.

The appellee in its brief states that "the General Assembly of 1939 was hostile to legislation of this kind, as evidenced by their abolishing certain boards set up for certain trades and by limiting the powers previously granted to others." Perhaps this is the reason the Legislature failed to use language which directly or by necessary implication includes journeyman plumbers not employed and working under the supervision of licensed contractors. If it had desired so to do it was a simple undertaking. Slight changes in and additions to the language of the statute would have included them within the terms thereof.

The court below, on the special verdict, adjudged that the defendant is guilty "of practicing or offering to practice, entering into or carrying on the plumbing and/or heating contracting business." Of what crime does he stand convicted? *S. v. Ingle, supra.*

The judgment below is

Reversed.

DEVIN, J., concurring.

ALAMANCE LUMBER COMPANY v. W. W. EDWARDS AND WIFE, OPHELIA EDWARDS.

(Filed 6 March, 1940.)

1. Appeal and Error § 40b—

An order striking out portions of the complaint will not be disturbed on appeal when it does not prejudice plaintiff or embarrass it in the prosecution of its cause.

2. Betterments § 1—

The owner of a lot who, through innocent mistake, constructs a house partly on his lot and partly on the adjacent lot, acquires an equity, which equitable right is assignable but does not run with the land, and the purchaser of his lot at the foreclosure sale of a deed of trust thereon may not enforce the equity against the owner of the adjoining lot.

3. Assignments § 1—

An equity arising to the owner of land by reason of his construction of a house, through innocent mistake, partly on the adjacent land, is assignable.

4. Mortgages § 42—

The purchaser of land at a foreclosure sale acquires title to the land as it is described in the mortgage or deed of trust, and does not acquire an equity arising in favor of the *cestui* by reason of the fact that the *cestui* had constructed a house through innocent mistake partly on adjacent land.

5. Ejectment § 11—Complaint held to state cause of action in ejectment, and demurrer was properly overruled.

The complaint in an action by the purchaser of land at the foreclosure sale which alleges that the *cestui* had built a house on the land which, through innocent mistake, was constructed partly on the adjacent lot, that the owner of the adjacent lot had taken possession of the entire house and collected the rents and profits therefrom, states a cause of action to eject the owner of the adjacent lot from that part of the house admittedly on the land embraced in the deed of trust and purchased by plaintiff, and for an accounting of the rents, and a demurrer thereto is properly overruled.

6. Pleadings § 15—

A demurrer for failure of the complaint to state a cause of action is properly overruled if the complaint in any aspect states facts entitling plaintiff to relief, even though the complaint fails to specifically pray for the particular relief to which the facts alleged entitle plaintiff.

APPEAL by plaintiff and defendants from *Parker, J.*, at May-June Civil Term, 1939, of DURHAM. Affirmed as to both appeals.

The plaintiff brought this action to recover the value of a portion of a house built by mistake on defendants' lot, or, in lieu of such relief, that it be permitted to remove the house from the premises. The defendants moved to strike out certain portions of the complaint; and also demurred to the complaint as not stating a cause of action. The motion to strike was allowed in part and denied in part. From the order striking portions of the complaint, the plaintiff appealed. The demurrer was overruled and defendants appealed.

The plaintiff sets up substantially that the New Hope Realty Company, originally the owner of two adjoining lots of land designated by consecutive numbers, as will presently appear, conveyed one of these lots —No. 22—to Alex Jackson and wife, Mary Jackson, by deed recorded 9 April, 1926; and, thereafter, the said Alex Jackson and wife, under an agreement made with a contractor, Ed Barnes, erected a dwelling house, as they supposed, located on Lot 22. In order to secure the materials for the building of the house, the said Jackson and wife executed a deed of trust on Lot 22 to C. J. Gates, trustee for Ed Barnes, 31 July, 1929, which was properly recorded. The note and deed of trust were transferred to the plaintiff for a valuable consideration, that is to say, the furnishings of the materials for the building of the house, which was known as No. 1406 South Street.

The makers of the note and deed of trust being unable to pay the same in full, a foreclosure proceeding was had, in pursuance of which C. J. Gates, trustee, conveyed the premises to the plaintiff on 20 September, 1930, which deed was duly recorded. Thereupon, the plaintiff in this case went into the possession of the house and has rented it out, kept it in repair, paid taxes on it, and dealt with it altogether as its own property.

The New Hope Realty Company, also owner of adjoining Lot No. 23, a vacant lot, at no time raised any question about any encroachment on Lot 23 of the building erected on Lot 22.

The New Hope Realty Company went into the hands of receivers and its property, including Lot 23, was sold and through *mesne* conveyances came into the hands of the defendants.

Finally, it was discovered that a portion of the house known as 1406 South Street, built by the Jacksons, had been erected and was located partly on Lot 23, belonging to the defendants. It is alleged that those under whom plaintiff claims had used all due diligence, had reasonably supposed that the house was properly erected on Lot 22 and its location partly on Lot 23 was entirely by mistake, but in March, 1939, Edwards having discovered that the house was partly upon his land, it is alleged, "unlawfully and wrongfully took possession of said property, and since 13 March, 1939, the said Edwards has been wrongfully and unlawfully collecting the rents from said property." The plaintiff demanded that defendant Edwards cease collecting the rents from the property and Edwards made a counter-demand that the plaintiff pay to him all the rents which had been collected by plaintiff for the past eight or nine years without having offered to pay any of the costs of repair, insurance, and taxes which the plaintiff had paid on the house for the said period.

The complaint contains a statement of proposals made by plaintiff to Edwards to adjust their differences, and a statement that these proposals had not been accepted.

The prayer of the complaint is (a) for recovery of the value of the premises, (b) if this relief cannot be had, for permission to remove the house from defendants' premises, (c) for the appointment of a receiver, and (d) for costs and such "further relief as the plaintiff may be entitled to have either in law or in equity."

Claude V. Jones and Allen & Madry for plaintiff, appellee-appellant.

S. C. Brawley and S. C. Brawley, Jr., for defendants, appellees-appellants.

PLAINTIFF'S APPEAL.

SEAWELL, J. We see nothing in the order striking out certain portions of the complaint which may be harmful to the plaintiff or embar-

rassing to it in the prosecution of its cause, and the order will not be disturbed. *Patterson v. R. R.*, 214 N. C., 38, 198 S. E., 364; *Pemberton v. Greensboro*, 203 N. C., 514, 515, 172 S. E., 196.

DEFENDANTS' APPEAL.

It is apparent that the defendant Edwards intends to take whatever advantage he may of the windfall that has come to him by reason of the innocent mistake of the original adjoining landowner who, unwittingly, constructed his house partly upon a vacant lot now the property of defendant. Whatever advantage the defendant may have under the austerities of more formal law, plaintiff contends, with some reason, that this attitude is calculated to produce substantial injustice, and argues that it is remediable in equity. We fear that the method of approach to the equitable jurisdiction has not been fortunate.

That there were equities between the original owners of these adjoining lots—the one who built too generously and the one upon whose land the house encroached—must be conceded. Pomeroy Equity Jurisprudence, Vol. 2, sec. 867; *Hardy v. Burroughs* (Mich., 1930), 232 N. W., 200, and cases cited; *Phelps v. Kuntz et al.* (N. J., 1910), 76 Atl., 237; *Crump v. Sanders* (Tex., 1915), 173 S. W., 559; 31 C. J., 318-319; *Gordon v. Fahrenberg & Penn*, 26 La. Ann., 366; *Matson v. Calhoun*, 44 Mo., 368; *Uthoff v. Thompson* (La., 1933), 146 So., 161; *Olin et al. v. Reinecke et al.* (Ill., 1929), 168 N. E., 676. See, also: 31 C. J., p. 312, sec. 9; *Harrington v. Lowrie*, 215 N. C., 706, 2 S. E. (2d), 872, and cases cited. Whether these equities have weathered both time and the vicissitudes of trade and alienation is a question. Such a right is capable of equitable assignment (*Bank v. Jackson*, 214 N. C., 582, 586, 200 S. E., 444; *Trust Co. v. Construction Co.*, 191 N. C., 664, 132 S. E., 804), but we are unable to agree that it runs with the land—that is, that it follows a transfer of the legal title of the land upon which the owner supposed he was building and is assertable against all persons into whose hands may come the land on which the encroachment was made—although there is authority in some jurisdictions suggesting that view.

The plaintiff derives its title to the Jackson lot through foreclosure of a trust deed which, in its form at the time, and, of course, its present form, is a mere legal conveyance of the title—in trust, of course—without expression of any intent between the parties to include in the contract any extraterritorial rights and, in law, must be confined in its effect to the metes and bounds of the description. If it could be now reformed to any advantage to the plaintiff, no equitable basis has been laid for it in the complaint. *Buchanan v. Harrington*, 141 N. C., 39, 53 S. E., 478, and cases cited.

The Jacksons have not been made parties to the suit, and no attempt has been made by the plaintiff to work out its equity through any authority from them, other than that supposed to be contained in the successive transfers of the legal title.

If we looked alone to the assertion of this equity, which is, of course, the paramount relief sought for, we would be compelled to sustain the demurrer in the present state of the pleading.

But the plaintiff alleges that defendants have wrongfully taken from it, the lawful owner, the possession of the whole building, are collecting the rents for it, and not only refuse to account for them, but are demanding of plaintiff a payment to them of the rentals collected for a long period of years, during which plaintiff has paid taxes and kept the premises in repair. In this aspect the complaint is sufficient to support a demand for ejectment of defendants from plaintiff's admitted portion of the house, and an accounting from them of the rents. It is immaterial whether this is included in the prayer, if the allegations in the complaint warrant it. *Knight v. Houghtalling,* 85 N. C., 17; *McNeill v. Hodges,* 105 N. C., 52, 11 S. E., 265; *Lipe v. Trust Co.,* 206 N. C., 24, 173 S. E., 316; *Bolich v. Ins. Co.,* 206 N. C., 144, 173 S. E., 320; *Ins. Co. v. McCraw,* 215 N. C., 105, 1 S. E. (2d), 369; *Sparrow v. Morrell & Co.,* 215 N. C., 452, 2 S. E. (2d), 365.

We are quite aware this might prove a Pyrrhic victory for plaintiff, if it should be unable to assert successfully the equity which it claims; but we are not permitted to strike down a pleading, against the protest of the pleader, when the Court might give some relief on the facts alleged, although not that asked for in the prayer. See authorities, *supra.*

What the plaintiff may do hereafter to "mend its licks," if anything, is not, at present, a concern of the Court.

On both appeals, the judgment is

Affirmed.

CLATE H. TOLLEY v. DAIRYMEN'S CREAMERY, INC.,
and
WILLIAM PLEMMONS v. DAIRYMEN'S CREAMERY, INC.

(Filed 6 March, 1940.)

1. Appeal and Error § 39d—Admission of evidence cannot be held prejudicial when evidence of same import is admitted without objection.

Plaintiffs objected to the admission of the record of the hospital to which one of the plaintiffs was taken after the injury in suit, on the ground that it was not properly identified, and contended that its admission was prejudicial as tending to contradict the testimony of one of the

plaintiffs that he was unconscious after the accident and to corroborate the testimony of one of defendant's witnesses that the plaintiff had made a statement to him on the way to the hospital. Plaintiffs abandoned their objection to the admission of the signed statement, which had been dictated by the physician later during the day on which plaintiff was admitted to the hospital, which statement contained a like import that the plaintiff was conscious. *Held:* The admission of the physician's statement rendered harmless the admission of the hospital record, the difference in the time and authorship of the writings not being sufficient to take the case out of the general rule.

2. Appeal and Error § 38—

The burden is upon the appellant to show not only that error was committed but also that it was prejudicial.

3. Appeal and Error § 39d—

A new trial will not be awarded for error in the admission of evidence which is merely cumulative or of slight probative force and could not have prejudiced the complaining party.

4. Appeal and Error § 39a—

A new trial will not be awarded for harmless or nonprejudicial error.

APPEAL by the plaintiffs from *Warlick, J.*, at January Term, 1940, of BUNCOMBE. No error.

These two actions, consolidated for the purpose of trial, were instituted in the general county court of Buncombe County to recover damages for personal injuries alleged to have been negligently inflicted in an automobile collision. The jury answered the first issue in favor of the plaintiffs, finding that their injuries were caused by the negligence of the defendant, and answered the second issue in favor of the defendant, finding that the plaintiffs by their own negligence contributed to their injuries.

From judgment predicated on the verdict the plaintiffs appealed to the Superior Court, assigning as errors the admission of certain evidence. In the Superior Court the plaintiffs' assignments of error were overruled and judgment entered affirming the judgment of the general county court, from which judgment the plaintiffs appealed to the Supreme Court.

George M. Pritchard and M. A. James for plaintiffs, appellants.
Harkins, Van Winkle & Walton for defendant, appellee.

SCHENCK, J. The exceptive assignment of error relied upon in the brief of the appellants was to the admission in evidence of a certain paper writing purporting to have been a part of the records kept at the Aston Park Hospital in Asheville to which the plaintiffs were taken very soon after the collision between the automobile in which they were riding and the truck operated by the agents of the defendant.

The trial in the general county court centered largely upon the issue as to contributory negligence. The plaintiffs offered evidence tending to prove that the automobile in which they were riding, driven by plaintiff Plemmons and owned by plaintiff Tolley, was being operated in a careful manner on their right-hand side of the highway, and that the defendant's truck was operated in a reckless manner on its left-hand side of the highway and made to collide with their automobile, causing it to get beyond control and to wreck against or under the end of a bridge at the side of the highway.

The defendant offered evidence tending to show that its truck was being operated in a careful manner on its right, and proper, side of the highway, and that the automobile in which the plaintiffs were riding was driven across the center line of the highway, on to its left side thereof, thereby causing the collision.

The defendant offered the testimony of the deputy sheriff, who drove the plaintiff Plemmons from the scene of the wreck to the hospital, to the effect that Plemmons while en route to the hospital said: "The road was foggy there, and the road, he thought the road was clear, and he pulled out and hit the truck, best I remember. I wouldn't say he was unconscious at that time."

The plaintiff Plemmons testified in effect that he was unconscious the whole time he was being transported to the hospital and therefore he did not then make the statement that "he pulled out and hit the truck," or any other statement as to what caused the collision.

The paper writing, the admission of which in evidence is made the basis of the exceptive assignment of error relied upon, was what is known as the "personal history" of the patient and contained the statement: "Patient admitted to hospital after an automobile accident complaining of pain in left leg with inability to use that extremity and bleeding from cut on head."

It is the contention of the plaintiffs that this paper writing was never properly identified by the person who made it, or under whose direction it was made, and was therefore incompetent, and that the statement therein contained tended to corroborate the testimony of the defendant's witness to the effect that the plaintiff Plemmons was conscious and made the statement relative to what caused the collision, and to contradict Plemmons' testimony that he was unconscious, and made no statement as to what caused the collision while en route to the hospital, and that its admission in evidence was therefore prejudicial error.

Conceding but not deciding that the admission in evidence of the paper writing, the "personal history," without proper identification was error, we think, and so hold, that such error was rendered harmless by the other competent evidence in the case. The plaintiffs' own witness,

Dr. Sullivan, testified on cross-examination that he dictated and signed another paper writing known as the "physical examination," which the defendant introduced in evidence, and which contained the statement: "White adult male admitted following an automobile accident complaining of severe pain in left leg." Objection and exception to the admission in evidence of this paper writing, the "physical examination," was abandoned by the appellants. The statements in the two paper writings are practically to the same effect, so far as they relate to the controverted question, namely, was the plaintiff conscious when he was admitted to the hospital?

While it is true that Dr. Sullivan testified the "physical examination" was dictated and signed by him in the afternoon of the day on the early morning of which Plemmons was admitted to the hospital, and the evidence tended to show that the "personal history" was prepared by someone else than Dr. Sullivan upon Plemmons' admission in the early morning and before Dr. Sullivan reached the hospital, this difference in the time of the making and in the authorship of the two statements does not alter the fact that they are practically the same in effect or render the admission of the "personal history" any the less harmless. The circumstances of the making of the respective statements were placed clearly before the jury.

The burden is upon the appellant not only to show error but prejudicial error. *Collins v. Lamb,* 215 N. C., 719. If the admission of the "personal history" of the patient was error because hearsay, no harm came to the plaintiffs by its admission since the same pertinent facts therein contained were subsequently evidenced by the introduction of the "physical examination" of the patient. *Observer Co. v. Remedy Co.,* 169 N. C., 251.

Where evidence is offered by one party for the purpose of corroborating his own witness or contradicting the witness of his adversary, and such evidence is merely cumulative, departure from the strict rules of evidence will not be held for reversible error unless it clearly appears that prejudice to the complaining party has manifestly resulted. A verdict rendered upon competent evidence ought not to be set aside because some evidence, incompetent under the strict rules, of slight probative force, or merely cumulative in its nature, was offered by the successful party and submitted to the jury. The doctrine of harmless or nonprejudicial error is essential to a practical administration of the law by the courts which must necessarily rely upon human agencies to perform their functions. *Bowen v. Worthington,* 191 N. C., 468.

No error.

J. WALDO GRIMES, TRADING AS HOMESTEAD OIL COMPANY, v. THE HOME INSURANCE COMPANY OF NEW YORK.

(Filed 6 March, 1940.)

1. Arbitration and Award §§ 6, 12—

A party to an arbitration agreement has the right, both at common law and by statute, Public Laws of 1927, chapter 94, section 6, Michie's Code, 898 (f), to notice and an opportunity to present evidence as to all matters submitted, and in the absence of notice the award is not binding upon him and does not estop him from instituting action in the Superior Court.

2. Arbitration and Award § 9—

Where a party who is not bound by the award institutes action in the Superior Court, and defendant pleads to the merits, and issue is joined and the jury impaneled, the court is without authority to order resubmission to the arbiters over defendant's objection, and defendant's participation in the second hearing before the arbiters does not constitute a waiver of its exception.

APPEAL by defendant from *Burgwyn, Special Judge,* at November Term, 1939, of EDGECOMBE. Error and remanded.

Plaintiff's truck, while insured by defendant against loss or damage due to collision, was demolished 15 December, 1938, as result of collision with a locomotive engine. In accord with the terms of the policy of insurance, plaintiff and defendant executed an agreement in writing to submit the question of the amount of the damage to named appraisers, with directions to them to select an umpire, the award in writing of any two to determine the amount of damage. Thereafter the two named appraisers submitted an award fixing the total loss and damage at $485.00. It appeared, however, that the attempted appraisal was made without notice to plaintiff and without giving him an opportunity to be heard. The plaintiff refused to accept or be bound by the award, and instituted an action in the Superior Court, and filed complaint setting up the policy and the loss due to collision, and praying that he recover $650.00 therefor. The defendant filed answer admitting liability under the policy but denying the amount of the loss alleged, and pleading estoppel by the award. When the case came on for hearing in the Superior Court, before Thompson, judge presiding at June Term, 1939, after the pleadings were read and the jury impaneled, the court ordered that the matter in controversy be again submitted to the appraisers theretofore appointed by the parties. The defendant excepted to the order of reappraisal, reserving right of appeal to the Supreme Court. Thereafter one of the appraisers, together with the umpire, signed an award fixing the loss at $606.00. To this award defendant noted excep-

tion. At November Term, 1939, Burgwyn, special judge presiding, the award of reappraisement was confirmed, the court finding that defendant had waived its rights by appearing before the appraisers and taking part in the reappraisement. Judgment was entered for plaintiff for the amount last fixed by the appraisers, less the amount deductible under the terms of the policy. Defendant appealed to the Supreme Court, assigning errors in the order of Thompson, J., and in the judgment of Burgwyn, Special Judge.

B. H. Thomas for plaintiff.
Wilkinson & King for defendant.

DEVIN, J. The award made by the appraisers, under the agreement of the parties for the submission of the question of the amount of loss due to collision under the terms of the policy of insurance, was properly held not binding on the plaintiff by reason of the absence of notice and opportunity to be heard. Public Laws 1927, ch. 94, sec. 6; Michie's Code, 898 (f). It is a well recognized rule that the parties to an arbitration proceeding, independent of statute, have a right to be heard and opportunity to present evidence as to all matters submitted. 3 Am. Jur., 929; 6 C. J., sec. 198. "Notice and opportunity to be heard are fundamental." *Waldroup v. Ferguson,* 213 N. C., 198, 195 S. E., 615. Hence the plea of estoppel by the first award could not avail the defendant under the facts of this case. But the case was then in the Superior Court at the suit of the plaintiff. The defendant had pleaded to the merits. The issue was joined, and the jury impaneled. It was error, over the objection of the defendant, to transfer the trial of the issue of fact raised by the pleadings to arbitration or appraisement. C. S., 556.

The fact that defendant, after noting exception to the order of Judge Thompson, participated in the hearing before the appraisers and umpire may not be held to constitute waiver of its exception. As in case of compulsory reference, the defendant preserved its right to trial in the Superior Court and before a jury by excepting in apt time to the order, and again to the award. *Lumber Co. v. Pemberton,* 188 N. C., 532, 125 S. E., 119; *Brown v. Buchanan,* 194 N. C., 675, 140 S. E., 749; *Cotton Mills v. Maslin,* 200 N. C., 328, 156 S. E., 484.

The cause is remanded to the Superior Court of Edgecombe County for jury trial on the issue raised by the pleadings, unless some other method of trial be agreed upon by the parties.

Error and remanded.

FLOYD LAMM ET AL. v. EMMA MAYO ET AL.

(Filed 6 March, 1940.)

1. Wills § 34—

A devise to two of testator's grandchildren for life and after their death to their children, provides a limitation over to a class and upon the death of the grandchildren, the members of the class take *per capita*.

2. Wills § 33c—

Testator devised certain of his lands to each of his living children and devised the share of his deceased daughter to her children for life with the remainder over to their children, if any, and if none then by ulterior limitation to testator's children. *Held:* The ulterior limitation over to testator's children was to take effect only upon total failure of lineal descendants of testator's daughter, and upon the death of one of the grandchildren without issue the land goes to the children of the other deceased grandchild *per capita*.

APPEAL by plaintiffs from *Carr, J.*, in Chambers at Nashville, 7 December, 1939. From WILSON.

Civil action in ejectment or for redemption, accounting and partition.

The court being of opinion, upon the pleadings and admissions of the parties, that the plaintiffs and the defendant, Ellen Hastings, have no interest in the lands described in the complaint, entered judgment accordingly, from which the plaintiffs appeal, assigning error.

Charles M. Griffin, J. M. Broughton, and William H. Yarborough for plaintiffs, appellants.

W. A. Lucas and Finch, Rand & Finch for defendants, appellees.

STACY, C. J. The case turns on the construction of the following clause in the will of Solomon Lamm, who died in 1891:

"5. I give my two grdn children Jemes H Lucas and Seney An Frances Lucas one peace of my land equily a like known as the Evins tract and one hundred & fifty dollars a peace in money ther life times an after their death then to their lawful children if eney and if none then to be equely divided betwen all my children."

The plaintiffs and defendant, Ellen Hastings, are representatives of the children of the testator. They claim one-half of the "Evins tract" under the ulterior limitation in paragraph five of the will as Senia Ann Frances Lucas died on 13 August, 1931, without children or lineal descendants. The defendant, Emma Mayo, claims title to the same property through *mesne* conveyances from James H. Lucas and his children.

The testator first left all of his property to his wife for her lifetime or widowhood. He then provided for a division of the property among his several children "after her rite seases," and to each, in a separate item, he gave his or her part without limitation or qualification. The share of his deceased daughter was given to her two children in item five of the will for "ther life times" with remainder "to their lawful children if eney," and, if none, then over. The trial court held that under the decisions in *Burton v. Cahill,* 192 N. C., 505, 135 S. E., 332, and *Leggett v. Simpson,* 176 N. C., 3, 96 S. E., 638, this remainder to the lawful children of the first takers was intended as a limitation to a class, the representatives of which should take *per capita.* We cannot say there was error in this ruling. The cited cases appear to support it.

It seems consonant with the intent of the testator that the share of his deceased daughter should go to her lineal descendants, and only in case of a total failure of such descendants was her share or any part of it to be divided among the testator's children. The judgment below accords with this intent.

The authorities are in support of the judgment rendered.

Affirmed.

MARCELLA E. COLTRAIN v. GENERAL AMERICAN LIFE INSURANCE COMPANY.

(Filed 6 March, 1940.)

Corporations § 50—

The mere fact that a corporation purchases the entire assets of another corporation is not sufficient to establish responsibility on the purchasing corporation for the liabilities of the selling corporation.

APPEAL by plaintiff from *Hamilton, Special Judge,* at November Term, 1939, of MARTIN.

H. L. Swain for plaintiff, appellant.

Smith, Wharton & Hudgins and E. P. Dameron for defendant, appellee.

PER CURIAM. This is an action by the plaintiff to recover of the defendant General American Life Insurance Company upon a life insurance policy issued by the Missouri State Life Insurance Company. The plaintiff alleged and offered evidence tending to prove that the Missouri State Life Insurance Company issued a policy upon the life of the plain-

tiff's husband in which the plaintiff was named as beneficiary, that plaintiff's husband was killed while the policy was in effect, and that demand had been made upon the defendant for payment of the death benefits stipulated in the policy which had been denied; plaintiff further alleged that "the defendant became owner of all the assets and liabilities of the Missouri State Life Insurance Company, including the assets and liabilities on the above named policy, and is now liable to the same extent as the said Missouri State Life Insurance was before it was taken over by the defendant"; but offered evidence tending to show only that "the defendant became owner of all assets of the Missouri State Life Insurance Company."

At the close of the plaintiff's evidence the court sustained defendant's motion for a judgment as in case of nonsuit, and from judgment accordant therewith the plaintiff appealed, assigning error.

"The fact that one corporation has purchased and taken a conveyance of the property of another corporation does not alone make the vendee liable for the debts of the vendor." *Begnell v. Coach Line,* 198 N. C., 688.

The judgment of the Superior Court is

Affirmed.

H. D. OSBORNE v. SOUTHERN RAILWAY COMPANY, INC., A VIRGINIA CORPORATION.

(Filed 6 March, 1940.)

Limitation of Actions § 11b—

In order to be entitled to institute an action within one year after nonsuit in an action instituted prior to the bar of the statute of limitations, plaintiff must show that the costs in the prior action have been paid or that it was brought *in forma pauperis*, C. S., 415.

APPEAL by plaintiff from *Rousseau, J.,* at October Term, 1939, of BUNCOMBE.

Civil action instituted 6 October, 1937, to recover damages for personal injury allegedly resulting from actionable negligence of defendant.

Plaintiff alleges that he was injured on 14 July, 1934, while as a member of Troop K, 109th Calvary, he was traveling on a train of the defendant en route from Biltmore, North Carolina, to Fort Oglethorpe, Georgia; that he instituted an action against the defendant and others in the Superior Court of Buncombe County, and same was removed to the United States District Court of the Western District of North Carolina, at Asheville, where on 17 August, 1937, a judgment of voluntary

nonsuit was entered; and that the cause of action, allegations and issues in said action were substantially the same in all respects as in the present action, in so far as the same relate to the present defendant.

Defendant pleads the three-year statute of limitations.

The transcript of record here is silent with respect to plaintiff paying the cost on the original action before commencing the present one, as well as to the original action being brought *in forma pauperis.* C. S., 415.

In the present action there was judgment as of nonsuit at the close of evidence for plaintiff. Plaintiff appeals therefrom, and assigns error.

J. W. Pless, Sr., and H. Kenneth Lee for plaintiff, appellant.
W. T. Joyner and Jones, Ward & Jones for defendant, appellee.

PER CURIAM. This appeal presents no new question of law. Even though plaintiff may have instituted the original action within three years from the time of the accrual of his cause of action against defendant, and this action within one year from the date of judgment of nonsuit in original action, the record as constituted on this appeal fails to show facts which would entitle him to maintain this action under the provisions of C. S., 415. *Bradshaw v. Bank,* 172 N. C., 632, 90 S. E., 789; *Rankin v. Oates,* 183 N. C., 517, 112 S. E., 32; *Jackson v. Harvester Co.,* 188 N. C., 275, 124 S. E., 334; *Young v. R. R.,* 189 N. C., 238, 126 S. E., 600; *Southerland v. Crump,* 199 N. C., 111, 153 S. E., 845.

Counsel for plaintiff in oral argument frankly so concede. Hence, it is unnecessary to consider other points discussed in brief filed.

Affirmed.

THE METROPOLITAN BODY COMPANY v. THE CORBITT COMPANY.

(Filed 20 March, 1940.)

1. Bailment § 1: Chattel Mortgages and Conditional Sales § 1a—Contract held conditional sales contract and not bailment.

Plaintiff shipped the truck cabs in suit to its purchaser C.O.D. Upon the purchaser's inability to pay cash therefor, a contract was entered into between plaintiff and the purchaser and its treasurer, under which the treasurer agreed for himself and the purchaser to place the cabs in storage and obtain fire and theft insurance at his own expense for the benefit of plaintiff and to release the cabs to the purchaser as and when he received a stipulated sum per cab and paid said sum or sums to plaintiff, and agreed to pay for all of the cabs within sixty days, and upon his failure to do so, to ship the remaining unpaid for cabs to plaintiff, and

it was stipulated that plaintiff should at all times be considered the owner of the cabs until they were paid for, with further provision that this contract should in no way release the purchaser from its obligation under its contract of purchase unless and until the full purchase price had been paid. *Held:* The contract with the purchaser and its treasurer is a conditional sales contract and not a contract of bailment, since it creates an unqualified obligation to buy and pay the purchase price, with the duty to return the specific articles conditioned upon failure to pay as agreed.

2. Chattel Mortgages and Conditional Sales § 12b—Purchaser in good faith for value obtains title notwithstanding unrecorded conditional sales contract.

The contract between plaintiff and the purchaser, correctly construed, constituted a conditional sales contract for the sale of certain truck cabs. The purchaser, an Ohio corporation, then executed chattel mortgages on certain property, including the truck cabs in suit. The mortgagee acquired possession and obtained a release of all right, title, interest or equity of redemption from the purchaser, and the mortgagee then sold to defendant. *Held:* Under the General Code of Ohio, section 8568, if defendant is a purchaser in good faith and for value, it obtains title unaffected by the unrecorded conditional sales contract, and the conflicting evidence as to whether defendant is a purchaser in good faith and for value should have been submitted to the jury, and an instruction that the contract constituted a bailment and that as a matter of law plaintiff is the owner of the cabs, is error.

APPEALS by plaintiff and defendant from *Thompson, J.,* at October Term, 1939, of VANCE. On defendant's appeal, new trial. Plaintiff's appeal dismissed.

This is a civil action to recover the possession of 35 motor truck seat cabs, together with damages for the wrongful detention thereof. The ancillary writ of claim and delivery was issued. The defendant gave bond and retained possession of said property.

In December, 1937, plaintiff shipped to the Clydedale Motor Truck Company of Clyde, Ohio, by freight, C.O.D., 35 motor truck seat cabs to be used in filling an order for trucks from the Federal Government. Draft with bill of lading attached was drawn by the consignee. As the consignee was unable to pay cash the shipment was stopped in transit and the cabs were subsequently delivered to J. N. Traxler, treasurer of the consignee, under a written contract executed by him and the consignee.

Prior thereto, on 20 October, 1937, the consignee had executed a chattel mortgage to the Great Lakes Acceptance Corporation. This mortgage included an after-acquired property clause which undertook to include all property "which may hereafter be acquired by the grantor to be used in conjunction with the foregoing inventory, in the erecting, building and completing of certain trucks to be delivered under contract with the United States Government." On 14 April, 1938, the consignee

executed a chattel mortgage to the Great Lakes Acceptance Corporation to secure $1,500, payable 15 August, 1938. This chattel mortgage conveyed sundry articles and "10 Cab assemblies refinished for paint, dash drilled for wiring, floor boards and tow boards made, seat box, floor, front dash and bottom painted. 25 Cab assemblies as purchased." There is no other identifying description except a reference to the fact that they are to be used in filling the order of the United States Government. This mortgage is made a lien second to any prior chattel mortgage.

Immediately after the execution of the second chattel mortgage and a few days prior to 20 April, 1938, the mortgagee claims to have taken physical possession of all the inventories included in the two mortgages. On 20 April, 1938, the truck company executed a release to the defendant herein of all its right, title, interest or equity of redemption in the property, the release reciting sale thereof by the Acceptance Corporation. On 21 April, 1938, the Acceptance Corporation executed a bill of sale to the defendant for the property seized, including the 35 cabs. It is therein expressly provided that "this bill of sale shall in no event be construed to pass title to any of the above property or materials which are in excess of the units needed for the erection, construction and completion of thirty-one (31) 4x4 Government motor trucks." It likewise refers to an agreement between the Acceptance Corporation and the defendant dated "April 22, 1938."

Thereafter, plaintiff identified its trucks in the possession of the defendant and instituted this action 14 June, 1938, for the recovery thereof.

Although the bill of sale and release recite that the purchase money was paid by the defendant at the time of the alleged sale the defendant, on 19 July, 1938, by agreement with the Acceptance Corporation, segregated $4,000 of the amount due the Acceptance Corporation and delivered the same to its attorneys to be held for its protection against the outcome of this action.

Issues were submitted to and answered by the jury as follows:

"1. Is the plaintiff the owner and entitled to the possession of the cabs described in the pleadings in this cause? Answer: 'Yes.'

"2. What was the value of said cabs at the time of the institution of this suit? Answer: '$50.00 each.'"

Judgment was entered on the verdict and both the plaintiff and the defendant excepted and appealed.

A. A. Bunn, Jasper B. Hicks, and J. H. Bridgers for plaintiff.

J. P. & J. H. Zollicoffer for defendant.

DEFENDANT'S APPEAL.

BARNHILL, J. The court below, on the first issue, charged the jury as follows:

"Some question has arisen about title to those cabs, and I have held, gentlemen, as a matter of law, that the Corbitt Company by that purchase did not acquire a good title to the property, and the first issue or question which will be submitted to you reads as follows: (quotes issue).

"I instruct you, gentlemen of the jury, that if you believe all of the evidence, and find the facts to be as the evidence tends to show, you will answer that issue Yes."

"The paper writing sued on is what the law calls a bailment, that is where a party places his property in care of another for a special purpose, retaining title to the same, and the caretaker is not liable as a purchaser, such party is called a bailee. Such bailee has no power except as contained in the document . . .

"Therefore, I have charged you if you believe the evidence and find the facts to be as the evidence tends to show, you will answer that issue Yes."

Later on the same issue he further charged:

"I decided as a matter of law that by the purchase of the property he did not get a good title, and if I am wrong about that the Supreme Court up at Raleigh will reverse me and send it back here for a new trial. So take the case now, gentlemen, and answer this second issue, remembering that the burden of proof as to the value of the cabs is upon the plaintiff in the case."

The ownership of the property was the principal fact at issue. The statement of the court below that it had decided this fact as a matter of law, in effect, took the case from the jury on the issue of ownership and at least constituted such an expression of opinion by the court as would necessitate a new trial unless the record discloses that as a matter of law the plaintiff is, in fact, the owner of the property in controversy.

The 35 cabs, which are the subject matter of this suit, were delivered by the plaintiff to J. N. Traxler under a written contract signed by him and the Motor Truck Company.

It is the contention of the plaintiff that the delivery of the cabs to J. N. Traxler constituted a bailment, and that any disposition of the cabs thereafter which was not authorized by the plaintiff, conveyed no title to the property. If its premise is correct its conclusion is sound.

However, upon a careful examination of the contract upon which plaintiff relies we are of the opinion that it constitutes a conditional sale contract and not a bailment.

When it appeared that the purchaser was unable to pay cash for the shipment plaintiff entered into an agreement with the Clydedale Motor

Truck Company and J. N. Traxler under the terms of which the cabs were delivered and one-half of the purchase price, to wit, $3,500, was paid. Traxler entered into this agreement "for himself and for the Clydedale Motor Truck Company" of which he was treasurer. He agreed that he would place the cabs in storage at his expense "for the benefit of the Metropolitan Body Company, who shall at all times be considered the owners of said shipment until paid for as hereinafter stated." He further agreed to obtain fire and theft insurance at his own expense with the plaintiff as beneficiary and to release to the Clydedale Motor Truck Company the cabs as and when he received $100 per cab and the said sum or sums were remitted to the plaintiff. He likewise agreed "for himself and as Treasurer of said Clydedale Motor Truck Company," to pay for the cabs on or before sixty days after the signing of the agreement and that upon his failure so to do he would cause the remaining unpaid-for cabs to be shipped to the plaintiff. It was further stipulated that "this agreement in no way releases the Clydedale Motor Truck Company from its obligation under its contract of purchase, unless and until the full sum has been fully paid for.

"It is further agreed that for all cabs unpaid for, the title to the same shall remain in" the plaintiff.

This contract is signed by the Clydedale Motor Truck Company and by J. N. Traxler.

Under the terms of the agreement the alleged bailees bound themselves as purchasers, the plaintiff retaining title until the purchase price was paid. Traxler and the sales company not only paid one-half of the purchase price but likewise agreed to be and become bound for the payment of the balance. Neither was under obligation to return the property except upon a default in the obligation to pay the purchase price.

The agreement is an unequivocal contract to buy and to pay the purchase price. The alleged bailees are under the unqualified obligation to purchase. The duty to return the specific articles is conditioned upon their failure to pay. Title to the property changed upon the delivery and Traxler and the truck company became debtors. See *Haak v. Linderman,* 64 Pa. St., 4991, Am. Rep., 612, 3 R. C. L., 77; *Wetherell v. O'Brien,* 140 Ill., 146, 29 N. E., 904, 33 A. S. R., 221; *B. F. Sturtevant Co. v. Cumberland, Dugan & Co.,* 106 Md., 587, 68 Atl., 351, 14 Ann. Cas., 675; *Sattler v. Hallock,* 160 N. Y., 291, 54 N. E., 667, 73 A. S. R., 686, and note, 46 L. R. A., 679; *Bretz v. Diehl,* 117 Pa. St., 589, 11 Atl., 893, 2 A. S. R., 706, and note; *Smith v. Niles,* 20 Vt., 315, 49 Am. Dec., 782, 3 R. C. L., 73.

Under the law of Ohio, General Code of Ohio, sec. 8568, this agreement is void as to all subsequent purchasers and mortgagees in good

faith and for value unless recorded, and it is admitted that the agreement is not of record as required by this statute.

It follows that the plaintiff is not the owner of the cabs as against the defendant if the defendant is, as it alleges, a purchaser in good faith for value. The quoted portion of the charge must be held for error.

There are facts and circumstances *pro* and *con* appearing in the record bearing on the question as to whether the defendant is a purchaser in good faith and for value. As there must be a new trial it would serve no good purpose, and might prove prejudicial to one or the other of the litigants, to discuss in detail the evidence thereon. Suffice it to say that this question should be submitted to and determined by a jury upon a proper issue.

In its answer the defendant alleges that J. N. Traxler held possession of the cabs in controversy as agent for the plaintiff. Whether, under this allegation, the defendant now may assert that the instrument under which plaintiff claims title is an unrecorded conditional sale contract is not presented on the record for determination.

PLAINTIFF'S APPEAL.

As the errors pointed out on defendant's appeal require a new trial the questions presented by plaintiff's appeal become immaterial. Consideration thereof is not essential.

On defendant's appeal,

New trial.

Plaintiff's appeal

Dismissed.

C. D. KENNY COMPANY, A CORPORATION; MORGAN BROS., INC.; PEARCE-YOUNG-ANGEL COMPANY, A CORPORATION; C. R. DEUEL, TRADING AS DEUEL NEWS COMPANY; A. C. KELLY, TRADING AS KELLY FRUIT COMPANY; J. D. EARLE, TRADING AS EARLE-CHESTERFIELD MILL COMPANY; CLARK-FOWLER CIGAR COMPANY, A CORPORATION, AND STATESVILLE FLOUR MILLS COMPANY, A CORPORATION, PLAINTIFFS, APPELLEES, V. TOWN OF BREVARD, A MUNICIPAL CORPORATION, DEFENDANT, APPELLANT.

(Filed 20 March, 1940.)

1. Municipal Corporations § 42: Taxation § 2a—

A municipal corporation is empowered to tax trades or professions carried on or enjoyed within the city, unless otherwise provided by law, Constitution of North Carolina, Article V, sec. 3; C. S., 2677, but its classification of trades and professions for taxation must be based upon reasonable distinctions and all persons similarly situated must be treated alike.

2. Municipal Corporations § 42—

The powers of a municipality relating to taxation are strictly construed.

3. Same—

Municipalities are prohibited by section 61, chapter 407, Public Laws of 1937, from levying a license or privilege tax for use of its streets by motor trucks.

4. Same—

A municipality may not levy a tax on a business or trade which is not carried on within its limits.

5. Same—Municipal license tax held void as being discriminatory and as imposing tax on business not carried on within its limits.

Plaintiffs, wholesale merchants, sent salesmen into defendant municipality to solicit orders for future delivery of merchandise for approval or acceptance by plaintiffs, respectively, and upon acceptance the plaintiff to whom the order was directed delivered the goods by his truck. There was no solicitation or acceptance of orders from the trucks and no collections were made therefrom, except in case of C.O.D. deliveries. Plaintiffs instituted this action to restrain the municipality from enforcing as to them its ordinance imposing a privilege tax upon "wholesale dealers or merchants not otherwise taxed, using streets for delivery, per truck, $15.00." *Held:* The ordinance is void as to plaintiffs on the ground of discrimination, since it levies a tax on merchants using the streets for delivery by truck while exempting merchants using other means of transportation or delivery than by truck or other means of ingress than its streets, and on the ground that it imposes a tax on trades and businesses not carried on within defendant city, since under the facts agreed plaintiffs were not doing business in defendant city. *Hilton v. Harris*, 207 N. C., 465, and *S. v. Bridgers*, 211 N. C., 235, cited and distinguished in that the taxes upheld in those cases were imposed by municipalities on businesses carried on within the limits of the municipality levying the tax.

6. Municipal Corporations § 40—

The municipal ordinance imposing a license tax on plaintiffs being invalid, the enforcement of the ordinance was properly restrained at their suit.

APPEAL by defendant from *Warlick, J.*, at December Term, 1939, of TRANSYLVANIA. Affirmed.

Plaintiffs instituted action against the town of Brevard to restrain the enforcement as to them of an ordinance imposing a privilege tax upon "wholesale dealers or merchants, not otherwise taxed, using streets for delivery, per truck, $15.00," on the ground of invalidity of the ordinance. The case was heard upon agreed statement of facts, the pertinent portions of which are as follows: The plaintiffs are wholesale merchants in Buncombe County, North Carolina, each with a regular place of business in that county and maintaining no place of business in Brevard.

"From time to time, usually about once a week, and at no times more than twice a week a traveling salesman of each of said plaintiffs visits

the town of Brevard in an automobile, in some instances the automobile being owned by the plaintiff, and in some instances being owned by the traveling salesman, at which time the said traveling salesman solicits and receives orders for merchandise from a merchant or merchants in Brevard, subject to the approval and acceptance of said order at its place of business at Asheville, North Carolina, by the plaintiff to whom the order is directed; that all of said orders are for future delivery. If and when such an order is so accepted, the goods so ordered are delivered to the customer in Brevard in a truck operated by the plaintiff whose goods are ordered. Such truck is operated by a truck driver employed by said plaintiff. No one in, or connected with said truck, either solicits or takes orders for merchandise, nor makes any collection except in case of C.O.D. shipment. The only goods which are carried in said truck are goods for which orders have been previously received and accepted by the plaintiffs at their place of business in Asheville. No goods are carried for sale by said truck, nor any sale made from said truck. All of the accounts, except C.O.D. accounts, are handled as follows:

"Generally purchasers mail checks to the plaintiff to whom the debt is owing at its place of business at Asheville, but occasionally purchasers make payments to the traveling salesman of said plaintiff upon some subsequent visit of said traveling salesman to Brevard. Various merchants in the town of Brevard also go to Asheville and purchase wholesale merchandise from each of the plaintiffs at their place of business in Asheville and the said purchasers carry said merchandise back to Brevard."

The town of Brevard was chartered by ch. 113, Private Laws 1903. The ordinance imposing privilege tax levy was adopted, effective 1 July, 1939.

The court below held the ordinance imposing the privilege tax quoted was invalid, and enjoined its enforcement. Defendant appealed.

Williams & Cocke for plaintiffs.
Ralph H. Ramsey, Jr., for defendant.

DEVIN, J. The power of the General Assembly to tax trades, professions and franchises (Const., Art. V, sec. 3) was by ch. 62 of the Code, sec. 3800 (now C. S., 2677), delegated to municipal corporations, and they were empowered to "lay a tax on all trades, professions and franchises carried on or enjoyed within the city, unless otherwise provided by law." *S. v. Worth,* 116 N. C., 1007, 21 S. E., 204; *Rosenbaum v. New Bern,* 118 N. C., 83, 24 S. E., 1; *Guano Co. v. Tarboro,* 126 N. C., 68, 35 S. E., 231; *Cotton Mills v. Waxhaw,* 130 N. C., 293, 41 S. E., 488; *Drug Co. v. Lenoir,* 160 N. C., 571, 76 S. E., 480; *S. v. Bridgers,* 211 N. C., 235, 189 S. E., 869.

The power of the town by proper ordinance to levy a tax on wholesale dealers or merchants doing business in the town is not controverted, but it is contended by plaintiffs that the tax ordinance herein attacked is so qualified as to destroy its uniformity, and that it attempts to impose a privilege tax on merchants in another county on business transactions beyond the limits of the town and in excess of its powers, and that the ordinance by its terms attempts to impose a tax on the plaintiffs for the use of the streets of the town.

It may be regarded as an established principle that in the exercise of taxing powers by a municipal corporation the requirement of uniformity must be observed, and that the classification of different subjects of taxation shall have some rational basis for the distinction, and that all persons similarly circumstanced shall be treated alike. *Roach v. Durham,* 204 N. C., 587, 169 S. E., 140; *Provision Co. v. Maxwell,* 199 N. C., 661, 155 S. E., 557; *Tea Co. v. Doughton,* 196 N. C., 145, 144 S. E., 701; *Greene v. R. R.,* 244 U. S., 501, 99 A. L. R., 711.

To lay a tax on merchants using streets for delivery by truck would exempt from tax obligation all merchants who use other means of transportation and delivery than by trucks, or other means of ingress than over streets. In *Bellingrath v. Town of Georgiana,* 23 Ala. App., 111, where an ordinance, which undertook to levy a license tax upon the business of persons making wholesale deliveries by trucks for soft drink manufacturers and bottlers, was held void as making an unwarranted discrimination, the Court said: "Construing the ordinance strictly against the town, as we must do, if the deliveries are made by train, wagon, buggy, touring car, or otherwise, or for other persons than manufacturers or bottlers, the ordinance does not apply and no license is required. License taxes must bear equally and uniformly upon all persons engaged in the same class of business or occupation or exercising the same privileges." The powers of municipalities relating to taxation are strictly construed. *Latta v. Williams,* 87 N. C., 126; *Plymouth v. Cooper,* 135 N. C., 1, 47 S. E., 120.

The ordinance of the town of Brevard purporting to lay a tax on wholesale merchants using streets for delivery by truck cannot be upheld as a license or privilege tax for the use of the streets by motor trucks, as that is prohibited by section 61, ch. 407, Public Laws 1937. The language imports something more than a mere description of the person or business taxed. It confines the classification to merchants using streets for delivery by truck. That classification is too narrowly restrictive without apparent showing of reasonable basis therefor. It does not appear from the record that there are any wholesale merchants in Brevard, a town which by the census of 1930 had a population of 2,339. But even if there are, the powers given the town by statute and by its

charter do not authorize a tax on a business or trade not carried on within the limits of the town. The facts here agreed exclude the conclusion that the plaintiffs were doing business in Brevard under the rule stated in *Plott v. Michael,* 214 N. C., 665, 200 S. E., 429. Brevard has no extra territorial power to tax the trade or commerce of merchants in Asheville. *S. v. Ninestein,* 132 N. C., 1039, 43 S. E., 936; *Duffin v. Taylor,* 113 Fla., 621, 153 So., 298; *Fruit Co. v. Dalton,* 184 Ga., 277, 191 S. E., 130; *Oil Co. v. Pitts,* 178 Ga., 339, 173 S. E., 384.

Defendant relies on the decisions of this Court in *Hilton v. Harris,* 207 N. C., 465, 177 S. E., 411, and *S. v. Bridgers,* 211 N. C., 235, 189 S. E., 869, as authority for the imposition of this tax on the plaintiffs. But the holding in those cases must be understood in the light of the facts upon which those decisions were based. In the *Hilton case, supra,* the ruling was based on the finding that the plaintiff in that case, a Charlotte baker, was doing business in Concord. The Court said: "We think plaintiff's trade (bakery) is carried on or enjoyed within the city of Concord." And again, "The factual situation is that clearly plaintiffs are plying their trade and doing business by delivering and soliciting the sale of bread in the city of Concord." In *S. v. Bridgers, supra,* where the facts were almost identical with those in the *Hilton case, supra,* the decision was based on that case. It was established in the *Bridgers case, supra,* that the method of business of the Raleigh bakery in the city of Rocky Mount was to operate a truck from its plant in Raleigh to the city of Rocky Mount daily, carrying bakery products and delivering same to grocery stores and cafes in Rocky Mount. Its salesmen sold and made deliveries from its trucks operating over the streets of the city of Rocky Mount, and collected therefor at the time of delivery, and also solicited from customers orders to be delivered at some later date.

The facts here materially differ from those in the cases cited by defendant, and hence those cases may not be held as controlling the decision in this case. The erection of trade barriers between cities and towns by the power of taxation may not be extended beyond constitutional and statutory limits.

We conclude that the tax ordinance imposing a tax on "wholesale dealers or merchants not otherwise taxed, using streets for delivery, per truck, $15.00," must be held invalid and that the plaintiffs may not be required to pay this tax. The enforcement of the ordinance, at the suit of the plaintiffs, was properly restrained.

Judgment affirmed.

STATE v. H. LEE SHELNUTT.

(Filed 20 March, 1940.)

Forgery § 6—Evidence held insufficient to prove that defendant had forged any one of the checks specified in the indictments.

Defendant was prosecuted on indictments, consolidated for trial, charging him with forging nine checks. The State introduced testimony of a confession made by defendant to the effect that he had forged numerous checks, but failed to identify any of them as a check described in the indictments, and introduced recordak copies of checks having instances of pairs of checks in similar amounts, one of each of which the State contended was forged by defendant, without evidence that the signatures of any particular one of them was forged. *Held:* The evidence is insufficient to prove that defendant had forged any one of the checks specified in the indictments, and defendant's motion to nonsuit should have been granted.

APPEAL by defendant from *Warlick, J.*, at August Term, 1939, of POLK. Reversed.

The defendant was indicted, in separate bills, for forging and uttering nine checks, drawn on various banks, and purporting to be signed by J. N. Jackson. The indictments were consolidated and tried together.

The evidence, pertinent to the decision of the Court, tended to show that the defendant was employed by Jackson & Jackson, Inc., dealers in cotton goods, in the capacity of secretary, but without authority to sign checks. He did, however, have general charge of the accounts, attended to the mails, drew checks for various purposes, including pay roll checks, to be signed by J. N. Jackson, president of the company, and presented checks at local banks and received cash therefor.

The evidence is contradictory as to the instigation of an audit, the State's evidence tending to show that J. N. Jackson brought it about on account of evidence of a shortage attributable to Shelnutt, the defendant's evidence tending to show that the latter asked for it because the books were "in a mess." When the auditor arrived, as his testimony tended to show, he called on defendant to explain discrepancies in the accounts and the absence of vouchers and supporting data. He testifies that defendant confessed to him that he (defendant) had obtained a large amount of money, some $20,000, from the corporation wrongfully. Pressed to explain this more particularly, witness said defendant admitted it had been obtained on forged checks, by using the name of J. N. Jackson, Sr., and admitted that he was an expert at that sort of thing, and illustrated to the witness his ability to imitate the signature of Jackson, so that witness was unable to judge which signature was genu-

ine and which false. There was other testimony to this confession. Defendant admitted, according to this witness, the practice of making out similar pay roll checks, one to be genuine, one to be forged, the genuine of which he would present to one bank, the spurious ones to another, and receive the money on both. The evidence tended to show that he took the forged checks out of the enclosure containing the bank statements. If not destroyed, they were not available in evidence at the trial.

Recordak or photostatic copies, made in the course of business by the banks, of the nine checks described in the consolidated indictment, were introduced in evidence, but no one to whom they were exhibited would express the opinion that the signatures were not genuine.

The State relied upon the alleged confession of defendant that he had committed forgeries of this kind in withdrawing approximately $20,000 of the corporation's money, and upon such evidence as the circumstances afforded, including items in approximately similar amounts constituting discrepancies in the account, and appearing in photostatic copies of the checks.

In the testimony of the auditor the following appears with reference to such items: "Several times I took items that there were no checks appearing for and asked him, and each time I asked him he said: 'That is one of those items.' He said that the check was gone . . . that he had destroyed them." This witness further testified as to the purported confession: "He said in drawing these checks for the pay roll and for himself that he drew a check on one bank, and would ask Mr. J. N. Jackson to sign that; that he would cash that check either in the Bank of Landrum or Tryon; then in a day or two, or the same day, or earlier, he would write another check for a like amount and cash it at the other bank, and that he would sign J. N. Jackson's name to that check, which was for a like amount, either $137.50, $275.00 or $115.00, or $137.50, less social security, or $352.00 less social security, combining both together. He said that if he got the check Mr. Jackson signed cashed at Landrum, then he would get the check he signed Jackson's name to cashed at Tryon."

At the conclusion of the State's evidence, and at the conclusion of all the evidence, the defendant made a motion for judgment of nonsuit, which was overruled, and defendant excepted. There was a verdict of guilty, and, from a sentence to State Prison for a term of three years, defendant appealed.

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

Hamrick & Hamrick and Massenburg, McCown & Arledge for defendant, appellant.

SEAWELL, J. We have not attempted to set out the evidence in detail, or to call attention to other parts of the State's evidence which might offer a speculative suggestion of defendant's guilt. He was tried for forging and uttering the specific checks described in the indictment, and the fact, if true, that he had forged a multitude of them in wrongfully converting his employer's funds does not identify the nine checks with which the investigation was concerned as being so forged and uttered, but only induced a speculative, not a probative persuasion that they were forged. *Sampson v. Jackson Bros.*, 203 N. C., 413, 166 S. E., 181; *Ivey v. Cotton Oil Co.*, 199 N. C., 452, 154 S. E., 740; *S. v. Vinson*, 63 N. C., 335. Persons are not retired from society because they are criminals or because they have committed crimes one or many, but only upon conviction of the specific crime of which they are charged.

It is not necessary to go into the refinements of law relating to the necessity of proving the *"corpus delicti,"* and whether it may be established by a confession alone. The State, having charged the defendant with forging these specific checks, and the defendant never having made any specific reference to them in any confession, or made any statement from which they might be segregated or identified, his admissions are not available for the necessary purpose of identification. If we consider the checks described in the indictment as present through recordak or photostatic copies, the efforts of the State to produce proof that the signatures to them were forged were unsuccessful.

The evidence, considered in its most favorable light to the State, will not sustain conviction.

The motion for nonsuit should have been allowed, and the judgment overruling the motion is

Reversed.

GEORGE A. PENNY v. NEILL McK. SALMON, A. L. OLDHAM AND W. P. BYRD, CONSTITUTING THE BOARD OF ELECTIONS FOR HARNETT COUNTY, NORTH CAROLINA.

(Filed 20 March, 1940.)

1. Constitutional Law § 4d: Counties § 1: Registers of Deeds § 1—

The constitutional provision for the election of registers of deeds for a term of two years, Art. VII, sec. 1, is subject to modification by statute, Art. VII, sec. 14, and therefore the Legislature has the power to make the office appointive rather than elective, to extend the term, or to abolish it altogether, and even to dispossess the incumbent, since public office is not a property right.

2. Same: Statutes § 7—Statute extending term of office of incumbent register of deeds held not an ex post facto statute.

The provision of chapter 494, Public-Local Laws of 1939, extending the term of office of the Register of Deeds of Harnett County who was elected for a two-year term and was inducted into office on the first Monday in December prior to the passage of the act, is a valid exercise of legislative power and amounts to an appointment of the incumbent by the Legislature for the remainder of the four-year term prescribed by the act, and therefore is not an *ex post facto* act, and the Board of Elections of the county properly refused to place plaintiff's name on the ballot as a candidate for the office at the expiration of the two-year term.

APPEAL by plaintiff from *Williams, J.*, 22 February, 1940, at Chambers, Raleigh, N. C. From HARNETT. Affirmed.

J. R. Young for plaintiff, appellant.
Neill McK. Salmon for defendants, appellees.

SEAWELL, J. This is a civil action brought by the plaintiff against defendants (constituting the Board of Elections of Harnett County), to obtain a writ of *mandamus* compelling them to permit the plaintiff to file notice of his candidacy for the office of register of deeds for Harnett County in the primary election to be held 25 May, 1940, and to put his name on ballots to be voted at said election. Plaintiff sets up that in apt time he had offered to file with the defendant Board of Elections the notice and pledge as required by law as a candidate for the office of register of deeds for Harnett County in the Democratic primary election to be held on 25 May, 1940, and therewith tendered the filing fees required of candidates for this office; that it was the duty, and is now the duty, of the defendant Board of Elections to accept said fee and place plaintiff's name upon the ballots to be voted in the said primary; that the defendants declined to accept the fee and have declared their intention and purpose not to place plaintiff's name upon the ballots to be voted in said election; and, in fact, held a meeting at which, upon appropriate resolutions, they formally declined to accept the fee or recognize the plaintiff as a candidate, upon the ground that the present register of deeds for Harnett County had been duly elected to office at the general election held in Harnett County on the first Tuesday of November, 1938, was inducted into the said office on the first Monday in December, 1938, and that thereafter the General Assembly of North Carolina enacted chapter 494, Public-Local and Private Laws of 1939, extending the term of the incumbent of the office of register of deeds of Harnett County for a term which will not expire until the first Monday of December, 1942. The defendants duly notified the plaintiff of their said action.

The plaintiff makes the contention that chapter 494, Public-Local and Private Laws of 1939, purporting to extend the term of office of the present register of deeds of Harnett County, is unconstitutional and void, and that in spite thereof the plaintiff is entitled to file his notice of candidacy to said office and to have his name placed upon proper ballots, so that the electors may have an opportunity of voting for him.

The defendants demurred to the complaint as not stating a cause of action and aver the constitutionality of the statute.

The trial judge sustained the demurrer, declared the statute to be constitutional, dismissed the action, and taxed the plaintiff with the costs. From this judgment plaintiff appealed, assigning error.

Article VII of the State Constitution provides a set-up for the organization of municipal corporations, which may be permanent or temporary according to whether the Legislature elects to let it alone or provide otherwise. See section 14. In section 1, provision was made for the election of a register of deeds for a term of two years. It was realized that more elasticity should be given in the organization and operation of these municipal corporations, perhaps for the reason that they were calculated to bring government closer to the people and might have to deal with local conditions, making desirable a different set-up, or might even be made responsive to the local desire for facilities which political progress proved to be superior to those at the time made available by the Constitution. *Wells v. Housing Authority,* 213 N. C., 744, 197 S. E., 693. Therefore, section 14 of Article VII provides: "The General Assembly shall have full power by statute to modify, change, or abrogate any and all of the provisions of this article, and substitute others in their place, except sections seven, nine, and thirteen." The excepted sections are not involved in this appeal.

The Legislature, therefore, has power to deal with the office of register of deeds as it sees fit, to make it appointive rather than elective, to extend the term, or to abolish it altogether. *Audit Co. v. McKensie,* 147 N. C., 461, 61 S. E., 283; *Harriss v. Wright,* 121 N. C., 173, 179, 28 S. E., 269; *Jones v. Comrs.,* 137 N. C., 579, 50 S. E., 291; *Crocker v. Moore,* 140 N. C., 429, 53 S. E., 229; *Brown v. Comrs.,* 100 N. C., 92, 5 S. E., 178.

Pertinent to the manner in which the Legislature may deal with the office, we may quote from 97 A. L. R., p. 1441: "Where the office is purely statutory the Legislature may either shorten or lengthen the term and make the act apply to those in office at the time when the act becomes effective."

It is clear that if the Legislature may make the office appointive there is no constitutional prohibition against the Legislature making the appointment, and it may do so in one act and confer the office upon the

incumbent. See Connor and Cheshire on the Constitution, p. 129; *Fortune v. Comrs.*, 140 N. C., 322, 53 S. E., 75.

Under no aspect of its operation is the statute under review retrospective. Even had the incumbent been dispossessed by the action, he may have been disappointed but not legally aggrieved. *Mial v. Ellington,* 134 N. C., 131, 46 S. E., 961. The right to office is no longer a property right, and there can be no vested right therein which would prevent the Legislature from dealing with it as public policy requires.

Much less has the plaintiff any cause of complaint, since certainly the public has no vested right in the election of any officer except as that mode of selection may be guaranteed by the Constitution, under provisions which are unalterable by legislative action. The right of plaintiff to stand for election to an office is a political privilege and not inalienable, and certainly when a different method of selection has been provided, consistent with the Constitution, the fact that his aspiration has been thwarted by a nondiscriminatory change of the law gives him no cause of action.

This opinion is in accordance with *Freeman v. Board of Elections, ante,* 63, with regard to its immediate effect upon the term of the office and is not retrospective in disregarding any implications which might arise from the fact that the election of the present incumbent was for a term of specific length.

The judgment is

Affirmed.

STATE OF NORTH CAROLINA EX REL. MRS. KATE DUNN, ADMINISTRATRIX OF THE ESTATE OF LEONARD DUNN, DECEASED, v. L. L. SWANSON, SHERIFF OF VANCE COUNTY, EDWARD ELLIS, JAILER OF VANCE COUNTY, AND NATIONAL SURETY CORPORATION.

(Filed 20 March, 1940.)

Principal and Surety § 5a: Sheriffs § 6b—

Under the provisions of C. S., 354, the sheriff and the surety on his official bond are liable for the wrongful death of a prisoner resulting from the negligence of the jailer in locking the prisoner, in a weakened condition, in a cell with a person whom the sheriff and the jailer knew to be violently insane, and who assaulted the prisoner during the night, inflicting the fatal injury.

APPEAL by defendants from *Thompson, J.*, at October Term, 1939, of VANCE. Affirmed.

D. P. McDuffie, Yarborough & Yarborough, and Allsbrook & Benton for plaintiff, appellee.

J. P. & J. H. Zollicoffer for defendant, National Surety Corporation, appellant.

SEAWELL, J. The plaintiff, Mrs. Kate Dunn, administratrix of the estate of Leonard Dunn, brought this action to recover for the injury and death of her husband, which she alleges was brought about by the negligent acts of the defendants Ellis, jailer, and Swanson, sheriff of Vance County, and for which she claims the National Surety Corporation is liable on the sheriff's bonds.

The plaintiff complains that some time in June, 1939, her intestate was in a weak, sick, and helpless condition; that the defendant Ellis, jailer, acting in his official capacity and under color of his office and for his superior, Swanson, sheriff, received the intestate from certain police officers in the city of Henderson, and while he was in such helpless condition incarcerated him in the common jail of the county and carelessly and negligently cast him into a cell with a violently insane man, one Pusey Thorne, locked the door to the cell, and abandoned him. The plaintiff further sets out that both Ellis and Swanson were aware of the fact that Pusey Thorne was violently insane and was at the time confined to prevent him doing injury to others; that during the night plaintiff's intestate, while in a helpless condition, was violently and murderously assaulted by the said insane person, and terribly beaten from head to foot with a table leg torn from a table which had been left in the cell by Swanson and Ellis; that the intestate lay in his cell "in his own blood, without care or attention, since the time when he was assaulted and beaten," and that in consequence of the assault he died that morning, without having recovered consciousness.

The plaintiff further sets up that the defendant National Surety Corporation was a surety on the bond of the sheriff and, therefore, with the sheriff, is liable on the said surety bond to answer in damages for the injury or death of intestate.

To this complaint the defendants demurred. The demurrer was overruled and defendants appealed. The defendant National Surety Corporation is prosecuting its appeal in this Court.

This case is controlled by C. S., 354; *Warren v. Boyd,* 120 N. C., 57, 26 S. E., 700; *Kivett v. Young,* 106 N. C., 567, 10 S. E., 1019; and *Price v. Honeycutt,* 216 N. C., 270, 4 S. E. (2d), 611.

It is true that there is a factual difference between the case at bar and *Price v. Honeycutt, supra.* In the latter case the conduct for which the sheriff was called to account was a willful assault; in the case at bar the conduct of the jailer, imputed to the sheriff, is charged to be merely negligent. But the difference is not fruitful in raising a distinction in legal effect. The statute as interpreted by the decisions, *Kivett v. Young,*

supra; Warren v. Boyd, supra, covers negligence by the officer as well as willful acts. *Kivett v. Young, supra,* applied the statute in the case of negligence, and the statute itself, in so many words, provides for the prosecution of a cause of action based on negligence. *Daniel v. Grizzard,* 117 N. C., 106, 23 S. E., 93.

In *Davis v. Moore,* 215 N. C., 449, 2 S. E. (2d), 366, the Court merely followed the more recent precedent of *Sutton v. Williams,* 199 N. C., 546, 155 S. E., 160, which case itself was based upon earlier authorities decided before C. S., 354, as amended, became a law (1883). A re-examination of the authorities convinced the Court that while the result reached in *Sutton v. Williams, supra,* was correct—since in that case there was no reasonable connection between the injury sustained by the plaintiff and the misconduct attributed to the sheriff—the Court was not justified in ignoring the plain terms of the statute as it had been correctly interpreted and applied in *Kivett v. Young, supra,* and other cases decided after its passage, all, of course, subsequent to *Crumpler v. Governor,* 12 N. C., 52, and other decisions of a similar nature rendered prior to the statute. It is only fair to say that in *Davis v. Moore, supra,* neither the correcting statute nor the cases interpreting it were called to the attention of the Court.

The courts have frequently acted upon the principle that a public statute relating to the subject must be considered as in contemplation of the parties in making a contract, and when it relates to the liability of the parties to the public it becomes an enforceable part of the contract made for their benefit. See cases cited in *Price v. Honeycutt, supra.*

Under this law, conduct for which the defendants might otherwise have been only personally liable would render both them and their surety liable on the official bond. Only by color of his office could the jailer or sheriff have imprisoned the intestate in the county jail and in the cell where he received the injury resulting in his death.

The judgment overruling the demurrer is

Affirmed.

G. W. HARRIS, B. A. SCOTT ET AL. v. BOARD OF EDUCATION OF VANCE COUNTY AND E. M. ROLLINS, COUNTY SUPERINTENDENT OF SCHOOLS OF VANCE COUNTY.

(Filed 20 March, 1940.)

Pleadings § 23: Motions § 2—Parties are fixed with notice of all motions made in pending causes during term.

After decision of the Supreme Court sustaining a demurrer to the complaint, but not dismissing the action, plaintiff moved during term to be allowed to file amended complaint. Defendant objected thereto on the

ground that it was entitled to three days written notice of the motion, C. S., 515, 914. *Held:* The objection is untenable, since parties are fixed with notice of all motions or orders made in pending causes during term, and the statutory provisions are not applicable in such instances.

APPEAL by defendants from *Thompson, J.*, at October Term, 1939, of VANCE.

This is an action for *mandamus* to compel the defendant County Board of Education to approve the election by the district school committee of the plaintiff B. A. Scott as principal of the Dabney High School. Demurrer filed by the defendants and overruled by the Superior Court was, upon appeal, sustained by the Supreme Court.

Although the demurrer was sustained, it is said in the opinion (*Harris v. Board of Education,* 216 N. C., 147) that: "He (plaintiff Scott) 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. . . . 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."

The aforesaid opinion was filed in the Superior Court of Vance County on 3 October, 1939. Calendar was made for the next ensuing regular term of the Superior Court, which convened 9 October, 1939, and this action was duly placed on the motion docket (Rule 23, Rules of Practice in the Superior Court, 213 N. C., 836). On Monday morning, 9 October, 1939, in open court, in the presence of counsel for defendants, the plaintiffs gave notice that it was their purpose to move in accordance with the opinion of the Supreme Court for leave to file additional or amended pleadings. On Friday, 13 October, 1939, plaintiffs' motion to file additional or amended complaint, after argument by counsel for plaintiffs and defendants, was allowed, and an order accordant therewith entered. From this order the defendants gave to counsel for plaintiffs notice of appeal on 21 October, 1939. "There were no other notices given by the said plaintiffs of said motion except as herein above stated, and said motions (notices) were not in writing."

Gholson & Gholson and Yarborough & Yarborough for plaintiffs, appellees.

A. A. Bunn and J. H. Bridgers for defendants, appellants.

SCHENCK, J. It is the contention of the defendants that the provision of C. S., 515, that "within ten days after the receipt of the certificate from the Supreme Court, if there is an appeal, if the demurrer is sustained the plaintiff may move, upon three days notice, for leave to amend the complaint," made it necessary for the plaintiffs to give three days written notice (C. S., 914) of their intention to lodge their motion to file additional or amended complaint.

With the contention of the defendants we cannot concur. The permissive right given the plaintiffs by the statute does not deprive them of the right to lodge any motion at term time in a cause pending before the court.

Parties to actions are fixed with notice of all motions or orders made during the term of court in causes pending therein. *Jones v. Jones,* 173 N. C., 279; *Wooten v. Drug Co.,* 169 N. C., 64; *Hardware Co. v. Banking Co.,* 169 N. C., 744; *Coor v. Smith,* 107 N. C., 430; *Hemphill v. Moore,* 104 N. C., 378.

The holding that the provision of the statute (C. S., 515) that upon the demurrer being sustained the plaintiffs may move upon three days notice to amend does not deprive them of their right to lodge their motion to amend at term without such notice is sustained by the cases above cited. In the *Jones case, supra,* notwithstanding the statute provided "that no order allowing alimony *pendente lite* shall be made unless the husband had five days notice thereof," it was held that the provision applied only when the motion is heard out of term, and that the parties are fixed with notice of all motions and orders made during the term of court in causes pending therein. In the *Hemphill case, supra,* notwithstanding the statute, Code, 340 (now C. S., 849), prescribed that "an injunction should not be allowed after the defendant shall have answered, unless upon notice or upon order to show cause," it was held that where a motion for injunction was made, after answer had been filed, in the course of an action in term time, it was proper to entertain the motion.

The order of the Superior Court is

Affirmed.

DR. W. A. SAMS, INDIVIDUALLY, AND DR. W. A. SAMS, A CITIZEN AND TAXPAYER OF MADISON COUNTY, N. C., FOR AND ON BEHALF OF HIMSELF AND ALL OTHER TAXPAYERS OF MADISON COUNTY, N. C., WHO DESIRE TO BECOME PARTIES TO THIS ACTION, v. THE BOARD OF COUNTY COMMISSIONERS OF MADISON COUNTY, N. C., A BODY POLITIC AND CORPORATE, WM. V. FARMER, CHAIRMAN; SHAD FRANKLIN AND LEVI BUCKNER, MEMBERS, CONSTITUTING THE BOARD OF COUNTY COMMISSIONERS OF MADISON COUNTY, AND WM. V. FARMER, SHAD FRANKLIN, AND LEVI BUCKNER, INDIVIDUALLY.

(Filed 20 March, 1940.)

1. Statutes § 2—

Chapter 322, Public-Local Laws of 1931, which undertakes to create and name the members of a county board of health for Madison County alone, which board is charged with the duty to inspect county institutions and see that they are kept in a sanitary condition, and to select a physician to vaccinate against disease, is a local act relating to health and sanitation prohibited by Art. II, sec. 29, of the State Constitution.

2. Public Offices § 5b—

The acts of the Madison County Board of Health created by ch. 322, Public-Local Laws of 1931, cannot be upheld on the ground that, notwithstanding the act is void, its members were *de facto* officers, since a *de jure* Board of Health for the county had been properly constituted under C. S., 7064.

3. Counties § 8b—Madison County Board of Health, created by ch. 322, Public-Local Laws of 1931, held without power to appoint county physician.

Plaintiff, who was appointed county physician by the county board of health of Madison County, created by ch. 322, Public-Local Laws of 1931, instituted this action to recover his salary as such officer. *Held:* The act creating said board is void as being in contravention of Art. II, sec. 29, of the State Constitution and as being contrary to the general laws relating to county boards of health, C. S., 7064, 7067, nor can the acts of the members of the board be upheld on the ground that they were *de facto* officers, since a *de jure* county board of health was then in existence, and plaintiff's cause of action based upon the act of 1931 cannot be maintained.

APPEAL by defendant from *Rousseau, J.*, at September Term, 1939, of MADISON. Reversed.

Smathers & Meekins for plaintiff, appellee.
Roberts & Baley for defendant, appellant.

DEVIN, J. The plaintiff instituted his action against the board of county commissioners of Madison County to enforce the payment to him of the salary of county physician and quarantine officer, to which office

he alleged he had been elected by the county board of health of Madison County as that board was constituted under the provisions of ch. 322, Public-Local Laws 1931.

The defendant board denied liability chiefly on the ground that the local act of the General Assembly creating a county board of health for Madison County, under which plaintiff claims, violated the provisions of Art. II, sec. 29, of the Constitution of North Carolina, and was therefore void.

Since the plaintiff's action is based on this act of the Legislature his right to maintain his suit depends upon the validity of the act. *Reed v. Madison County,* 213 N. C., 145, 195 S. E., 620; *Borden v. Goldsboro,* 173 N. C., 661, 92 S. E., 694. The determination of the question presented by this appeal was foreshadowed by what was said in *Freeman v. Comrs. of Madison County, ante,* 209.

Art. II, sec. 29, of the Constitution, prohibits the General Assembly from passing "any local, private or special act . . . relating to health, sanitation and the abatement of nuisances." It is expressly ordained that any local or special act passed in violation of this section shall be void, power being given the General Assembly to pass general laws regulating the matters therein set out.

The act, ch. 322, Public-Local Laws 1931, under which plaintiff claims, undertakes to create for Madison County, alone, a county board of health and to name its members. The principal duty of this board is to elect a county physician and quarantine officer, for whom is prescribed the duty of inspecting the county institutions and seeing "that each is kept in a sanitary condition." This board is also authorized by the act to select a physician to vaccinate against disease.

It is apparent that the act is local and that it relates to health and sanitation, and thus comes within the prohibition of the quoted section of the Constitution. This is in accord with the decision of this Court in *Armstrong v. Comrs. of Gaston County,* 185 N. C., 405, 117 S. E., 388, where a local act authorizing the erection of a hospital for the treatment of tuberculosis was held void under Art. II, sec. 29, as being a local act pertaining to health and sanitation. *S. v. Warren,* 211 N. C., 75, 189 S. E., 108; *R. R. v. Lenoir County,* 200 N. C., 494 (497), 157 S. E., 610; *S. v. Kelly,* 186 N. C., 365 (375), 119 S. E., 750; *In re Harris,* 183 N. C., 633, 112 S. E., 425. To the same effect is the ruling in *Sanitary District v. Prudden,* 195 N. C., 722, 143 S. E., 530, where a special act creating a sanitary district for the construction and maintenance of a water and sewer system in Henderson County was held to violate this constitutional provision. Furthermore, the act is in conflict with the State-wide policy as contemplated by the Constitution and established by general laws regulating the composition of county boards

of health throughout the State and the election of county physicians. C. S., 7064, 7067; *S. v. Dixon,* 215 N. C., 161 (166), 1 S. E. (2d), 521.

The local act attempting to create a county board of health for Madison County must be held void by reason of its conflict with the constitutional restrictions upon the power of the General Assembly imposed by Art. II, sec. 29, and the persons named as members of the county board of health by this act were thus without power to perform any duty prescribed thereby. *Freeman v. Comrs. of Madison County, supra.* Nor could validity be given to their acts as *de facto* officers, for the reason that it is found as a fact that the *de jure* board of health of Madison County, constituted in accordance with the provisions of the general statute (C. S., 7064), and acting as such, had in April, 1937, elected another person as county physician and quarantine officer for the county, who performed services and was recognized by the board of county commissioners as such. *Baker v. Hobgood,* 126 N. C., 149, 35 S. E., 253.

We conclude that the plaintiff's action founded upon the Public-Local Act of 1931 cannot be maintained, and that the judgment of the court below in his favor must be

Reversed.

F. D. KOONE AND SHERDIE RHODES v. CAROLINA MOUNTAIN POWER CORPORATION AND DUKE POWER COMPANY.

(Filed 20 March, 1940.)

Waters and Water Courses § 7—Evidence of negligent operation of hydro-electric dam by defendant held sufficient for jury.

Evidence sustaining plaintiff's allegations to the effect that defendant power company permitted water from several days rain to gradually accumulate back of its dam until the dam was endangered, and then suddenly opened the floodgates of the dam, resulting in the overflow of plaintiff's lands to his damage, *is held* sufficient to be submitted to the jury in plaintiff's action to recover for the negligent operation of the dam, and the granting of defendant's motion to nonsuit is error.

APPEAL by plaintiffs from *Ervin, Special Judge,* at September Term, 1939, of RUTHERFORD. Reversed.

This is an action for actionable negligence brought by plaintiffs against defendants. The plaintiffs allege damage to their land and crops by defendants negligently flooding certain lands of theirs.

Plaintiffs allege, in part: "That during the month of October, 1936, the locality in which plaintiffs' land and defendants' dam (Lake Lure

Dam) is located was visited by several days of rain, such as a man of ordinary care and prudence could reasonably expect and anticipate in said locality; that said rains caused the waters flowing in the natural channel of said Broad River to become considerably swollen; that during this rainy season defendants, for their own benefit and profit, negligently and unlawfully allowed the water from said rains to gradually accumulate in their pond or reservoir above said dam until the waters therein had risen to the crest of and was flowing over a portion of said dam so that said dam was about to be suddenly swept away. That on the ..... day of October, 1936, the defendants, after negligently and unlawfully allowing said waters to accumulate in said pond or reservoir, as hereinbefore alleged, and in order to protect said dam and power house, did wrongfully, negligently and unlawfully, and in utter disregard of the rights of these plaintiffs and other riparian owners below said dam, and in a negligent manner, open the floodgates of said dam, thereby releasing great volumes of water from their said large lake, adding said great volumes of water to the already swollen condition of the stream below said dam; that the said water, so released, rapidly accelerated the flow of said stream below said dam; and added such large volumes of water thereto as to cause the stream to overflow plaintiffs' land with water and mud and other debris carried therein and greatly damaged said land and destroyed the crops thereon; that the releasing of said water, as hereinbefore alleged, so augmented the flow of the stream as to cause said stream to rush over plaintiffs' lands with such force and velocity as to cover said land and said crops with mud, silt and sands, greatly damaging a portion thereof and absolutely destroying a portion thereof. . . . Such damages were proximately caused by the negligence and wrongful and unlawful conduct of the defendants, as hereinbefore alleged."

All allegations of plaintiffs as to the negligence of defendants were denied by defendants, and the answering defendants further allege that "Any damages sustained at the times referred to in the complaint were caused by the heavy and excessive rains and flood conditions which then occurred in the vicinity of said lands."

From a judgment of nonsuit plaintiffs excepted, assigned error, and appealed to the Supreme Court.

McRorie & McRorie, Edward A. Morgan, Paul J. Story, Oscar J. Mooneyham, C. O. Ridings, and Jordan & Horner for plaintiffs.

Edwards & Edwards, Hamrick & Hamrick, C. W. Tillett, W. S. O'B. Robinson, and J. H. Marion for defendants.

CLARKSON, J. At the close of plaintiffs' evidence the defendants made a motion in the court below for judgment of nonsuit. C. S., 567. The

court below sustained the motion and in this we think there was error. We think the evidence and the reasonable inference to be drawn therefrom sustained the allegations of the complaint and were sufficient to be submitted to a jury. We do not set forth the evidence as the matter is to be heard again. The facts in like cases, and the law arising thereon, have been fully set out in the following cases: *Lumber Co. v. Power Co.*, 206 N. C., 515; *Dunlap v. Power Co.*, 212 N. C., 814; *Bruton v. Light Co., ante*, 1. In the *Bruton case, supra*, the facts were not sufficient to be submitted to a jury and a nonsuit was sustained. In the present action the evidence is sufficient to be submitted to a jury.

The judgment of the court below is

Reversed.

STATE v. ZEB PAGE.

(Filed 20 March, 1940.)

Criminal Law § 80—Appeal dismissed for failure of defendant to prosecute same.

Defendant was convicted of a capital felony and was allowed to appeal *in forma pauperis*. Upon certificate of the clerk that nothing has been done towards perfecting the appeal and that the time for filing it has expired, and his statement in the certificate that he is informed by counsel that they do not intend to prosecute the appeal, the appeal is dismissed upon motion of the Attorney-General, there being no apparent error on the face of the record proper. 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 December Term, 1939, Johnston Superior Court, the defendant herein, Zeb Page, 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 verdicts.

From the judgment thus entered, the defendant gave notice of appeal and was allowed to prosecute same *in forma pauperis*. The clerk certifies that nothing has been done towards perfecting the appeal and that the time for filing it has expired. He further states in his certificate that he is informed by counsel they do not intend to prosecute the 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*, 216 N. C., 543.

Judgment affirmed. Appeal dismissed.

LYN BOND, J. V. COBB, W. G. CLARK, W. C. HARGROVE, CHAIRMEN OF THE BOARD OF COMMISSIONERS OF EDGECOMBE COUNTY, THAD HUSSEY, C. A. JOHNSON, R. B. JOSEY, J. T. LAWRENCE, B. C. MAYO, PEMBROKE NASH, AND R. B. PETERS, JR., MAYOR OF THE TOWN OF TARBORO, TRUSTEES UNDER DEED FROM EDGECOMBE HOSPITAL AND BENEVOLENT ASSOCIATION, INC., OPERATING AS EDGECOMBE GENERAL HOSPITAL, PETITIONERS, v. TOWN OF TARBORO, ON BEHALF OF ITSELF AND ALL ITS CITIZENS, INCLUDING THE SICK AND INDIGENT AND OTHERS REQUIRING MEDICAL OR SURGICAL AID, ET AL., DEFENDANTS.

(Filed 20 March, 1940.)

1. Trusts § 6b—Courts of equity may authorize trustees of charitable trust to mortgage property when necessary to preserve the trust.

Courts of equity have the power to authorize the trustees of a charitable trust to mortgage the trust property when, by reason of changed conditions, such action is necessary to effectuate the purpose of the trust and preserve the trust property, and prevent depreciation which would eventually render the property useless and thus result in the loss of the benevolent undertaking.

2. Same—Facts of this case held to sustain judgment authorizing trustees to mortgage property of charitable trust.

The facts found by the court were to the effect that plaintiffs are the trustees of a charitable trust whose objective is the maintenance and operation of a hospital for the benefit of the indigent sick of the locality, that one of the buildings, which was originally an old residence converted into a hospital at the inception of the trust, had become so antiquated that renovation into a modern, adequate hospital was impractical, that it had become a fire hazard and that if the trustees were not authorized to place a lien on all of the property of the trust to obtain money to make improvements in the construction of a new and modern hospital building, the old building would become useless and that if it were not replaced the object of the trust could not be adequately carried out, and that neither the deed which created the original trust nor any of the *mesne* conveyances contained any restrictions upon the successive trustees against alienation or encumbrancing the trust property, and that the revenue from the proposed new building would probably be sufficient to carry the proposed loan. *Held:* The findings are sufficient to sustain the judgment of the court authorizing the trustees to execute the proposed mortgage in order to preserve the trust.

WINBORNE, J., dissenting.

STACY, C. J., and BARNHILL, J., concur in dissent.

APPEAL by defendants from *Burgwyn, Special Judge,* at September Term, 1939, of EDGECOMBE. Affirmed.

This is a proceeding brought by the trustees of a charitable trust, who operate a hospital in Tarboro, N. C., under the name and style of Edgecombe General Hospital, to secure court authority to borrow from the Jefferson Standard Life Insurance Company the sum of $40,000, on

certain terms, to execute a note or notes therefor, and to secure the payment of the note or notes by the execution and delivery of a mortgage or deed of trust on the hospital property. The purpose of the loan is to make certain additions and improvements to the present plant, particularly by the construction of a new building on the site now occupied by what is designated as the Nurses' Home, and also by the erection of a new building to be used as a Nurses' Home. The details of the plan are set forth in the findings of fact of the court below. The present hospital was first established in 1901 and has been operated continuously since that time by various trustees, individual and corporate. In 1928, the Edgecombe Hospital and Benevolent Association, Inc., conveyed the property to the present trustees, by deed dated 6 June, 1938, recorded in Book 288, page 300, Edgecombe County registry, which conveyed the property to the present trustees, as "trustees for the use and benefit of the citizens of the town of Tarboro, of the county of Edgecombe, and of the adjacent counties." Except for the conveying clause, description of the property and the attestation, the deed contained only the following, which is found in the *habendum* clause: "To have and to hold the aforesaid real and personal property, together with all the privileges and appurtenances thereunto belonging or in anywise appertaining unto the said parties of the second part, their successors and assigns, for the purpose of owning, equipping, managing, maintaining and supporting a hospital for the care and treatment of the sick and the indigent or any others requiring medical or surgical aid, the dispensing of charity, distribution of funds for charitable and benevolent purposes and for such other and further acts as may be necessary to carry out the purposes aforesaid."

The plaintiffs set forth, and it was found by the court, that the present plant, especially the building designated as the Nurses' Home (which contains other departments as well as room for the nurses) is not safe for use, constitutes a fire hazard, and is not in condition to be so repaired as to render it reasonably adapted for further use. The plaintiffs have secured from the Jefferson Standard Life Insurance Company a commitment to make a loan of $40,000, to be secured by mortgage or deed of trust, and the plaintiffs propose to rebuild the plant as fully set forth. On the findings of fact the court below adjudged and decreed that the plaintiffs (trustees) be authorized to secure the proposed loan and execute necessary note or notes and a mortgage or deed of trust on the property. To this judgment the defendants excepted, assigned error and appealed to the Supreme Court. This exception and assignment of error and other necessary facts will be set forth in the opinion.

Gilliam & Bond for plaintiffs.
C. H. Leggett for defendants.

CLARKSON, J. The questions involved in this controversy are: (1) Has the court, in the exercise of its equity jurisdiction, the power to authorize the trustees of a charitable trust to mortgage the trust property? (2) If so, do the facts in the case justify the exercise of that power? Under the facts and circumstances of this case, we think both the questions must be answered in the affirmative.

The findings of facts by the court below are set out in full in the record and we think are plenary to support the judgment. It is found that "Neither the deed which created the original trust nor any of the *mesne* conveyances contain any restrictions upon the power of the grantee or grantees therein, to alienate or encumber the trust property."

This proceeding was brought for the purpose of obtaining court authority to borrow an amount not exceeding $40,000 from the Jefferson Standard Life Insurance Company and to execute a note or notes therefor, together with a mortgage or deed of trust on the property described in the petition. The total investment at this time of the Edgecombe General Hospital amounts to $60,000. In the findings of facts is the following: "The present plant of said institution consists of (1) the original brick building in which the hospital began operations in the year 1901, it being then a residence building of more than fifteen years of age; this building houses the home for nurses, the dining room, the kitchen, the deep-therapy X-ray department, and the heating plant; (2) a brick building connected with the above building which was constructed in the year 1916, at a cost of about $15,000, with funds raised by voluntary donations; this building contains thirteen private hospital rooms, four wards, two operating rooms, X-ray room, offices, etc.; (3) a brick building in the rear of the Nurses' Home, constructed in the year 1920, at a cost of about $15,000, with funds also raised by voluntary donations; this building contains rooms for colored people and is connected with both of the above-mentioned buildings. The building referred to above as the Nurses' Home, being old and dilapidated, is dangerous and unsafe, some of the outside walls are cracked from bottom to top in several places, the interior woodwork has rotted in many places, the electric wiring, the plumbing and heating pipes, connections and fixtures are worn out, and there exists a serious fire hazard on account of such conditions. This structure is unsafe and unfit for use in its present condition and on account of its age and plan of construction it is impracticable and economically inadvisable to remodel it for use as a part of a modern and well appointed hospital; and without this building or one erected in its place the petitioners will be unable to discharge the duties imposed upon them in a proper, reasonable and adequate manner. Because of the imperative need of replacing the aforesaid portion of the trust property and the further need of improving generally so as to

maintain it as an up-to-date hospital for the practice of modern medicine and surgery and equipped to provide and furnish the kind and measure of service contemplated by the trust have worked out and submitted to the court a plan of improvement and enlargement hereinafter set out in detail, which the court finds to be based upon sound economic considerations and one designed to accomplish the end in view and also to widen and enlarge the scope and field of petitioners' operations; as a part of this plan the petitioners on 9 July, 1938, acquired title to a parcel of land adjoining the parcel of land above referred to and on which the present hospital buildings are located, which was conveyed to the petitioners by deed in Book 366, page 368, Edgecombe County registry."

The details of the improvement and enlargement are set forth and the annual rental is found to be sufficient to operate the hospital and carry the loan. The entire buildings and furniture, fixtures and equipment to cost approximately $40,000.

The court below further found: "That the consummation of the above loan will be to the great, lasting and material advantage of all parties concerned, including the 'sick and indigent, or all others requiring medical or surgical aid' in Edgecombe and adjacent counties; and that on the other hand, if authority to consummate said loan is withheld and petitioners are prevented from carrying out the proposed plan of improvement and enlargement the benefits accruing from the original trust property and subsequent donations will be presently materially limited and in the course of time entirely lost. The court further finds that in all reasonable probability the additional income to be derived from rental of office space and new private rooms will enable petitioners to meet the payments of interest and principal of the proposed loan and thereby eventually relieve the trust property of the proposed encumbrance."

In other words, the present buildings will decay and the human undertaking be lost to Edgecombe County and the surrounding section if the trustees are not given the power to place a lien on the property, the money to be spent in improvements. Of course, mortgaging is a hazardous venture, but few homes, industrial plants, railroads, or going concerns, are erected without resorting to a mortgage or deed of trust. Building and Loan Associations, mortgage corporations, insurance companies and other like concerns, as well as State and Federal agencies, are functioning for the purpose of loaning by way of mortgage and deed of trust. If we feared to plant seed-corn or wheat, what would the harvest be? In this case the object is to take better care of the sick, indigent and afflicted. Lord Bacon, in his celebrated Essay, "Of Goodness and Goodness of Nature," says: "Goodness answers to the theological virtue charity, and admits no excess but error: the desire of power in excess caused the angels to fall; the desire of knowledge in

excess caused man to fall; but *in charity there is no excess;* neither can angel or man come into danger by it."

The trustees are unanimous in their request, the defendants in the answer admit, or do not deny, the plaintiffs' allegations. Further in the answer it is said: "The trustees have no right in law or equity to create debts against the property, and particularly have no such right to subject the trust property to liens. . . . That these defendants, while not questioning the good faith and purpose of the petitioners, deem it their duty on behalf of themselves and all other citizens of Edgecombe County, including the sick and indigent and others requiring medical or surgical aid, to present to the court the reasonable positions and contentions of all beneficiaries of the trust, namely, (1) that the court is without jurisdiction to grant the prayer of the petition; and (2) assuming the jurisdiction of the court in the premises, the authority requested in the petition should not be granted."

The deed to plaintiffs, trustees, in the *habendum clause*—last words—says, "For such other and further acts as may be necessary to carry out the purposes aforesaid." The trustees, who are primarily interested in preserving the trust, say that what they want done is necessary to carry out the charitable purposes of the trust. Where there is a charitable trust and the need is imperative to save that which will be lost, as under the facts and circumstances of this case, we can see no reason why a court of equity could not or should not grant the request.

In *Holton v. Elliott,* 193 N. C., 708 (710), we find: "The power is not infrequently exercised where conditions change and circumstances arise which make the alienation of the property, in whole or in part, necessary or beneficial to the administration of charity. The principle is very clearly upheld in *Church v. Ange,* 161 N. C., 315, in which it is said: 'The language, the property "shall not be disposed of, sold or used in any other way or for other purpose than the one designated in this clause of my will," manifests an intention to effectuate the trust, and to permit a sale if the purpose declared, of providing a rectory, can be thereby promoted; but if this power to sell and reinvest in other land, suitable for a rectory, is not contemplated by the will, it is not forbidden, and under the statute, Revisal, sec. 2673 (N. C. Code, 1935 [Michie], sec. 3571), the plaintiffs can sell. If, however, this was doubtful, the sale in this case has the sanction of the Court, the courts of equity have long exercised the jurisdiction to sell property devised for charitable uses, where, on account of changed conditions, the charity would fail or its usefulness would be materially impaired without a sale. *Lockland v. Walker,* 52 N. W. (Mo.), 427; *Brown v. Baptist Society,* 9 R. I., 184; *Stanly v. Colt,* 72 U. S., 119; *Jones v. Habersham,* 107 U. S., 183. In the last case, the Court said of an express provision against alienation:

"It will not prevent a court of chancery from permitting, in case of necessity arising from unforeseen change of circumstances, the sale of the land and the application of the proceeds to the purpose of the trust. Tudor on Charitable Trusts (2 Ed.), 298; *Stanly v. Colt,* 5 Wall., 119, 169." ' "

In Bogart on Trusts and Trustees, Vol. 4, p. 2238, part sec. 757, is the following: "The courts are particularly interested in preserving the trust assets so that the primary object of the trust can be accomplished, and to that end have in some cases implied the power to mortgage to avoid the sacrifice of trust property," citing authorities.

In Scott on Trusts (1939), Vol. 2, p. 839, part sec. 167, it is stated: "In cases of emergency in order to prevent a sacrifice of the trust property the court may permit the trustee to mortgage or pledge the property, even though he may be forbidden by the terms of the trust to do so."

In American Law of Charities (Zollmann), speaking to the subject, we find, sec. 580, p. 405: "Under a gift to trustees for a hospital, the trustees have been authorized by the court to give a mortgage on the property in order to raise the money necessary for its best interest."

To the same effect, to improve the property in order more fully to carry out the purposes of the trust—*Scott v. Mussafer,* 134 So., 857, 223 Ala., 153; *Christian v. Worsham,* 78 Va., 100; *Frith v. Cameron,* L. R., 12 Eq., 169. The right is given a court of equity to permit the trustee to mortgage the trust estate.

In *Curtiss v. Brown,* 29 Ill., 201 (230), it is written: "Exigencies often arise not contemplated by the party creating the trust, and which, had they been anticipated, would undoubtedly have been provided for, where the aid of the court of chancery must be invoked to grant relief imperatively required; and in such cases the court must, as far as may be, occupy the place of the party creating the trust, and do with the fund what he would have dictated had he anticipated the emergency. . . . From very necessity a power must exist somewhere in the community to grant relief in such cases of absolute necessity, and under our system of jurisprudence, that power is vested in the court of chancery."

In *Reynolds v. Reynolds,* 208 N. C., 578 (631), speaking to the subject, it is said: "Frequently, on changed conditions, equity steps in and gives relief."

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

Affirmed.

WINBORNE, J., dissenting: I am unable to follow through with the majority opinion. In the first place, the trustees of a charitable trust have only such powers as are conferred upon them expressly or impliedly by the terms of the trust, or, in some instances, by statute. They cannot

properly mortgage trust property unless a power to mortgage is so conferred. Scott on Trusts, Vol. 3, sec. 380; *Shannonhouse v. Wolfe,* 191 N. C., 769, 133 S. E., 93.

In the *Shannonhouse case, supra,* where trustees of a charitable trust, who were invested with neither express nor implied power to mortgage same, had given a mortgage thereon to secure money borrowed and expended in improving such property, this Court declared the mortgage void.

In that case, after stating principles deducible from the authorities as to when a sale may be made of property impressed with a trust for charitable uses, *Brogden, J.,* speaking for the Court, said: "'We think it is well settled that a court of equity, if it has jurisdiction in a given cause, cannot be deemed lacking in power to order the sale of real estate which is the subject of a trust, on the ground, alone, that the limitations of the instrument creating the trust expressly deny the power of alienation. It is true, the exercise of that power can only be justified by some exigency which makes the action of the court, in a sense, indispensable to the preservation of the interests of the parties in the subject matter of the trust, or, possibly, in case of some other necessity of the most urgent character.' *Trust Co. v. Nicholson,* 162 N. C., 257; *St. James v. Bagley,* 138 N. C., 384; *Church v. Bragaw,* 144 N. C., 126; *Church v. Ange,* 161 N. C., 314; *College v. Riddle,* 165 N. C., 211; *Middleton v. Rigsbee,* 179 N. C., 440. However, the mere naked power of sale implied in the word 'disposal,' or, for that matter, language of like import, does not necessarily imply or delegate power to mortgage. 'A sale of property presumably brings its full value. A mortgage of property presumably brings but a part of its value, and yet may result, by foreclosure, in the loss of the rest.' *O'Brien v. Flint,* 74 Conn., 502."

In Scott on Trusts, Vol. 2, p. 1037, in treatment on the subject of administration of trusts in general, speaking of the power to mortgage, the author said: "Whether the trustee has a power to mortgage trust property depends primarily upon the manifestation of intention of the settlor. We have seen that the same rule governs the existence of a power of sale. Nevertheless, in the absence of controlling language in the trust instrument it is easier to infer that the settlor intended to confer a power of sale than that he intended to confer a power to mortgage. It is more likely that the settlor intended to permit the trustee to sell trust property and hold the proceeds in trust or apply them to the purposes of the trust than to permit him to subject the property to a mortgage which might result in the sacrifice of the property. In the case of a sale, if the sale is made at an adequate price, the estate loses nothing, and there is merely a shifting of the trust property from one form to another. In the case of a mortgage the estate may receive the

amount advanced, but that amount will ordinarily be much less than the value of the property mortgaged, and the trustee thereafter may be unable to redeem the mortgage and runs the risk that the property will be sold at an unfavorable time and for less than its value. The making of the mortgage subjects the trust to a risk which may be beyond the control of the trustee. The extent of the risk, of course, depends upon all the circumstances.

"At any rate, the placing of a mortgage upon the property, although it may be prudent enough as a business risk, ordinarily involves a risk, which ought not to be assumed in the administration of a trust, since the administration of a trust requires cautious and conservative management."

In the present case the power to mortgage is not given, expressly or impliedly, to the trustees. The extent of the power granted in the trust as originally set up in 1901 is that "if any change should be necessary to better effectuate the purpose, with power in said board of trustees, in their discretion to adopt the same." But in a later deed in the chain of title under which plaintiffs claim, after two other buildings had been erected on the trust lot with money derived from voluntary contributions, it is provided: "In case it shall hereafter at any time or for any reason become impracticable to maintain and operate such institution, then the party of the second part to have, hold and use said real and personal property for such other purposes and objects of a charitable or benevolent character as said party of the second part, by its board of trustees, may determine." Thus, an anticipation that in the course of time it might become impracticable to maintain and operate the hospital, is clearly indicated. This negatives any intention to authorize a mortgage.

On the other hand, the only statutory authority, in this State, empowering trustees to mortgage charitable trust property, relates to trustees of religious bodies. C. S., 3571.

Furthermore, where trustees of a charitable trust are not given the power, expressly or impliedly, by the terms of the trust, or by statute, whether a court of equity has the power to authorize such trustee to borrow money to preserve the trust and secure the same by a mortgage on the property has not been decided in this jurisdiction.

In *Wright v. McGee,* 206 N. C., 52, 173 S. E., 31, while this Court disposed of the appeal upon other grounds, *Connor, J.,* expressed the trend of thought on the subject in this manner: "We have been unable to find any case in which a court with equity jurisdiction has exercised such power. The power to authorize the sale of property impressed with a trust for charity, and the investment of the proceeds of the sale in other property to be held under the same, or like trust, does not

necessarily include the power to authorize a mortgage or deed of trust on the property, which may result in the loss of the property upon the foreclosure of the mortgage or deed of trust." See, also, *Raleigh v. Trustees,* 206 N. C., 485, 174 S. E., 278.

In this connection the majority opinion in this case cites no such decision.

But, be that as it may, decision on the question is not necessary to determination of this appeal.

Secondly, if it be conceded that the courts in the exercise of equity jurisdiction have the power to interpose and grant the power, where none is given, to trustees to mortgage property impressed with a charitable trust as security for borrowed money used or to be used in improvement of the trust estate, the facts in the present case do not justify the exercise of such power.

A more complete statement of the factual situation is necessary for clear understanding and proper consideration of the terms of the charitable trust and of the condition of the trust property with regard to the proposed improvement of the property and the enlargement of "the scope of the field of the operations" by means of borrowed money secured by mortgage on the entire estate, both real and personal.

These facts appear: Prior to 17 December, 1901, the purchase and equipment of the Pittman Hospital were made with funds contributed, as follows: By Miss Minerva Pittman as a memorial to Dr. W. J. Pittman, $2,000; by Robert M. and Sarah E. Bruce as a memorial to John T. Bruce, $5,117; by the Auxiliary Board of Health of Edgecombe County, $2,460; by Ladies' Hospital Aid Society of Tarboro, $1,000; by physicians (vaccination allowance), $500; by various voluntary contributions, about $500, agreement with respect to which is registered in Edgecombe County registry in Book 107, page 279, but which is not incorporated in the record on this appeal. The contributors agreed that the hospital be conveyed to a board of trustees composed of certain practicing physicians coming within descriptive qualifications set forth in the Articles of Incorporation, Constitution and By-Laws of the Auxiliary Board of Health of Edgecombe County with power to fill vacancies as therein declared. Pursuant thereto the Pamlico Insurance & Banking Company, by deed dated 17 December, 1901, in which the contributors joined in consideration of the matters therein set forth and $3,000 paid from funds contributed by the Bruces, conveyed to said board of trustees, naming them, the lots on St. Andrews Street in the town of Tarboro on which the Pittman Hospital was then situated. The deed contains the following provision: "And the Auxiliary Board of Health of Edgecombe County, a corporation, . . . Robert M. and Sarah E. Bruce, by their attorney, Geo. Howard, and Miss Minerva Pittman do hereby

affirm the modifications made by this deed of the 'agreement' aforesaid and waive all right to claim the return of any part of their contributions, their purpose being and they hereby declare their trust, that the said Board of Trustees use the property conveyed to them, in the interest of humanity to alleviate its suffering doing all reasonable charity work, by operating a hospital in perpetuity, and if any change should be necessary to better effectuate the purpose, with power in said Board of said Trustees, in their discretion to adopt the same."

Later the then board of trustees believing that control and management of said hospital and its affairs by a corporation would more certainly and quickly develop same, unanimously determined and resolved in meeting assembled, that the property control and management of said hospital should pass to a corporation "for the better effectuating and perpetuating its purposes." Pursuant thereto, and in pursuance of resolution duly made, the board of trustees procured a corporate charter for the Pittman Hospital Association, Incorporated, with "full power to hold all the property of said hospital and manage its affairs." Thereupon, on 4 May, 1903, the trustees then constituting said board conveyed to said corporation all the property conveyed to them as aforesaid, as well as "all other property of any kind and description held" by them, "to have and to hold . . . unto it and its successors in fee; to the end that said association manage and use the property conveyed to it in the interest of humanity, to alleviate its suffering, doing all reasonable charity work, and to develop and perpetuate said hospital."

At a meeting of the Pittman Hospital Association, held on 26 March, 1910, a resolution was passed "authorizing and directing the President and Secretary to rent or lease said hospital for a term of years, or if deemed advisable, desirable or considered that it would better effectuate the purposes of the Association, to deed in fee said hospital and all its appurtenances to the proper person; and . . . in accordance with said resolutions and after due and mature consideration . . . it was deemed advisable and so ordered that a deed in fee simple should be made to Dr. J. M. Baker, Trustee of the Bruce Fund." Pursuant thereto, on 6 April, 1910, a deed was executed by the Pittman Hospital Association to Julian M. Baker, trustee of the Bruce Fund, his heirs and assigns, conveying the hospital property "to have and to hold . . . together with all the privileges and appurtenances thereunto belonging, or in anywise appertaining unto him, . . . in fee simple forever."

By deed in fee dated 29 July, 1915, all of the property so conveyed to him, was conveyed by J. M. Baker, trustee of the Bruce Fund, to the Edgecombe Benevolent Association, Inc., which had theretofore been organized for the purpose of purchasing and operating same. The consideration therefor was the issuance and delivery to the grantor, J. M.

Baker, trustee of the Bruce Fund, of stock in said Edgecombe Benevolent Association of the par value of $12,500.

While the title to the said property was held by the Edgecombe Benevolent Association two brick buildings were constructed in connection with the original brick building, and added to the hospital plant. The first of these two was built in the year 1916, and the second in 1920, each at cost of $15,000 with funds raised by voluntary donations.

Afterwards, on 17 December, 1927, the Edgecombe Benevolent Association, Incorporated, executed a deed to the Edgecombe Hospital and Benevolent Association, Incorporated, its successors and assigns, conveying the Pittman Hospital property and all furniture, fixtures, equipment and apparatus then located in and used in the operation of said hospital, except certain property not owned by it: "To have and to hold . . . together with all privileges and appurtenances thereunto belonging or in any wise appertaining, unto the party of the second part, its successors and assigns, in accordance with and under the limitations and provisions of the Articles of Incorporation of party of second part, that is to say, said party of the second part to have, hold and use said real estate and personal property for and in the operation of an institution for the care and treatment of sick and injured persons, and in case it shall hereafter at any time or for any reason become impracticable to maintain and operate such institution, then said party of the second part to have, hold and use said real and personal property for such other purposes and objects of a charitable or benevolent character as said party of the second part, by its Board of Trustees, may determine."

The Edgecombe Hospital and Benevolent Association, Incorporated, in deed dated 6 June, 1928, after asserting the provisions set forth in the *habendum* to the deed to it dated 17 December, 1927, and further reciting that: "The board of trustees or directors of the said Edgecombe Hospital and Benevolent Association, Incorporated, found it impracticable to maintain and operate said institution for the purposes aforesaid, and by duly authorized motions have consented, empowered and authorized its officers to convey by proper deed all of said real and personal property conveyed to it by the above mentioned deed to the hereinafter mentioned trustees," conveyed the said property to the plaintiffs in this action, their successors and assigns, "for the use and benefit of the citizens of the town of Tarboro, of the county of Edgecombe, and of the adjacent counties," "to have and to hold the aforesaid real and personal property together with all privileges and appurtenances thereunto belonging or in anywise appertaining unto the parties of the second part, their successors and assigns, for the purpose of owning, equipping, managing, maintaining and supporting a hospital for the care and treatment of the sick and the indigent or any others requiring medical or surgical aid, the

dispensing of charity, distribution of funds for charitable and benevolent purposes and for such other and further acts as may be necessary to carry out the purposes aforesaid."

As thus founded, dedicated, acquired and held, the trust estate, a charitable trust, originally known as the Pittman Hospital, now the Edgecombe General Hospital, as the record shows, is "as of today a hospital of fifty beds, having the approval of the American Hospital Association." It represents, as is alleged by plaintiffs and found as a fact by the court, an investment of $60,000.

Petitioners allege that the expense of maintenance and upkeep of the hospital has been met almost entirely from the patronage of pay patients, the Duke Endowment, the county of Edgecombe and the town of Tarboro, and that in spite of loyal support of most of the physicians, the public generally, and aid from other sources, they are unable to accumulate funds for these needed improvements.

What then do the petitioners propose to do? It is alleged that they "have conceived a plan . . . which, as they believe, is based upon sound economic consideration and will accomplish the end in view and prove advantageous to the beneficiaries in the trust, *as well as widen and enlarge the scope of the field of the operations.*" As a part of this plan petitioners have acquired title to a lot on St. Patrick's Street, adjoining the original lot, by deed from W. W. Greene and others upon terms of trust in almost identical words to those used in the deed from the Edgecombe Hospital and Benevolent Association to plaintiffs.

It is further planned: (1) To replace the original brick building by the erection of a two-story brick building which will provide sixteen private rooms, offices for the hospital staff and space for the other purposes for which the said original building is now being used; (2) to erect on the recently acquired lot on St. Patrick Street a two-story brick building of 16 rooms to be used as a nurses' home. The proposed plan, including the cost of necessary furniture, fixtures and equipment, is approximately $40,000, all of which is to be borrowed, on terms "payable in 20 years, interest at 6 per cent, payable semiannually, with a 5 per cent semiannual curtailment of the principal." The loan is to be secured (1) by a first mortgage on all of the real estate, that is, the original lot and the recently acquired lot, and the improvements thereon; (2) by a "first chattel lien on the furniture, fixtures and equipment located on this property"; and (3) subject to the lender "being furnished with a satisfactory ten-year lease at $150 per month for the office space occupied by the doctors."

An agreement for a lease at such monthly rental has been entered into between plaintiffs and "physicians and surgeons constituting the staff of the hospital."

Plaintiffs further "believe and allege that the consummation of the above loan will be to the great, lasting and material advantage of all parties concerned, including the 'sick and indigent, or all others requiring medical or surgical aid' in Edgecombe and adjacent counties; that, if said loan is consummated and the hospital modernized, enlarged and improved, as hereinbefore set forth, the class of persons known and designated as 'sick and indigent, or all others requiring medical or surgical aid' will receive more benefit from the trust; that the income of the institution will be greatly increased; that the Duke Endowment, which donated the sum of $3,861 for the year 1938, will continue to make similar donations, or increased donation in proportion to the increased facilities, and that the county of Edgecombe and the town of Tarboro will continue to make donations as in the past, and in addition your petitioners will receive an annual rental of $1,800 for the office space to be provided, as well as the added income of approximately $12,000 from the additional private rooms." . . . Plaintiffs "believe and allege," and the "court finds that in all reasonable *probability* the additional income to be derived from rental of office space and new private rooms will enable petitioners to meet the payments of interest and principal of the proposed loan and thereby eventually relieve the trust property of the proposed encumbrance."

Though the trust estate is "for the use and benefit of the citizens of Tarboro, of the county of Edgecombe and of the adjacent counties," the record is silent as to hospital facilities in adjacent counties, which may affect patronage of the hospital here involved.

Analyzing the situation: (1) The present plant meets the approval of the American Hospital Association. What the requirements are for such approval, the record does not disclose. It must mean something, and it may be assumed that there are standard requirements. If so, does not the fact of approval tend to negative such exigency or urgent necessity as calls for the intervention of a court of equity to supply the trustees with power to mortgage the trust estate to prevent it being destroyed or lost?

(2) Is the condition of the original building in the trust estate such exigency or urgent necessity as appeals to a court of equity for authority to encumber the estate to get funds with which to erect a building on other land held by the trustees under an independent source of title, though under similar terms?

(3) Do the terms of the proposed loan and the probability of income from amortizing it offer such assurance as justifies a court of equity interposing to vest the trustees with the power to mortgage? A careful consideration raises grave doubt. A "5 per cent semiannual curtailment of principal" amounts to $4,000 per year. By adding to this interest

on the loan, more than $6,000 will have to be raised the first year, and the whole in 10 years. But if the curtailment is to be only five per cent annually, that is, $2,000, more than $4,000 will be required the first year. In either event only the amount of interest to mature each year will be reduced proportionate to the prior curtailment of the principal.

On the other hand, the only sure annual income is $1,800, the rental of the offices to the doctors. That the increased contribution expected from the Duke Endowment relates to charitable beds is a matter of common knowledge. Though there will be sixteen additional private rooms, charitable beds are not contemplated. What the increased income will be will depend upon patronage, which is necessarily a matter of speculation. If, however, the additional space is to be devoted to the charitable purposes of the trust, there is no sound basis for anticipating the alleged contemplated revenue. If such additional income results the trustees will have engaged in a commercial venture foreign to the express conditions attached to the use of the property and the charities to which it must be devoted under the stipulations in the several deeds.

The facts and circumstances here presented, it seems to me, reveal a proposal which is inconsistent and inharmonious with the kind of cautious and conservative management required in the administration of a charitable trust. The trust estate ought not to be so jeopardized. A court of equity should not sanction it.

STACY, C. J., and BARNHILL, J., concur in dissent.

MINNIE BURCHFIELD STALLCUP, WIDOW, v. CAROLINA WOOD TURNING COMPANY, EMPLOYER, AND AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, CARRIER.

(Filed 20 March, 1940.)

1. Master and Servant § 55d—

Findings of fact of the Industrial Commission are conclusive on the courts when supported by any competent evidence.

2. Master and Servant § 40f—Facts held not to show as matter of law that accident arose in course of employment and denial of compensation must be sustained.

The findings of fact of the Industrial Commission, supported by the evidence, were to the effect that deceased employee was a night watchman, that his duties were to make periodic inspection and to attend the furnaces and get up steam, that on the night in question he procured his son to help him, that he instructed his son to do certain of his duties in the

boiler room, that he placed a small box and plank on a walkway eight or nine feet high, with one end of the plank resting on the box, and lay down on the plank, that his son called him in time to make a periodic inspection some thirty minutes later, and that in getting up from his recumbent position, while his son was engaged in the performance of the employee's active duties in the boiler room, the employee fell from the walkway and was fatally injured. *Held:* The facts do not compel the conclusion, as a matter of law, that at the time of injury the employee had not deviated from, or abandoned his employment, and therefore the award of the Industrial Commission denying compensation must be upheld.

SEAWELL, J., dissenting.

CLARKSON and SCHENCK, JJ., concur in dissent.

APPEAL by plaintiff from *Pless, Jr., J.,* at October Term, 1939, of SWAIN. Affirmed.

Claim for compensation under the Workmen's Compensation Act, prosecuted by plaintiff, widow of Seth L. Stallcup, deceased employee of the defendant Carolina Wood Turning Company.

It was admitted that the deceased husband of the plaintiff, Seth L. Stallcup, was an employee of the defendant Carolina Wood Turning Company; that the said defendant is bound by the provisions of the Workmen's Compensation Act and that the said employee received injuries on the early morning of 31 August, 1938, from which he died. The only question at issue before the Commission was as to whether the deceased employee met his death from an accident arising out of and in the course of his employment.

The deceased was employed as a night watchman at the defendant's plant and was charged with the general duties of a night watchman and was required to attend to the furnaces, the dry kilns, etc. His hours were from 11 o'clock p.m. to 7 o'clock a.m. He had been ordered not to allow anyone on the premises during the nighttime except certain employees who had definite designated duties. Contrary to these instructions deceased had been permitting his son to assist him in the discharge of his duties, and a few minutes prior to 4 o'clock on the morning of 31 August, 1938, he went to his home, awoke his son and directed him to come to defendant employer's plant and assist him. The son arrived at the plant about the time deceased was completing his 4 o'clock round of inspection. Deceased instructed his son to proceed to perform certain duties in connection with preparing to make the fire in the furnace and stated that he, the deceased, was going to lie down and rest and cool off. Deceased then procured a box approximately 12 to 18 inches in height and about 12 inches broad, and also a plank, which plank was about 12 inches wide and 10 or 12 feet long, which he carried to a walkway which was about 50 to 70 feet long and which was built from the main plant to the boiler room and which was about 3 feet wide and approximately

8 or 9 feet in height above the ground. He placed the box on the walkway, then placed one end of the plank on the box and put a raincoat thereon and then lay down on the bed or resting place thus improvised. This was about 25 minutes after 4 o'clock. Shortly before 5 o'clock his son called or aroused him and spoke to him concerning the 5 o'clock round of inspection. Deceased said he wished to make his round himself and directed his son to prepare to make a fire in the furnace; that he, the employee, would make the round and come back and help. A few minutes thereafter the son, having heard a noise, went out and found the employee lying on the ground where he had in some way fallen from the walkway. He was seriously injured and died in a few minutes as a result thereof.

The Commission found, in part, "that the deceased at the time of his death and for a period of 20 to 30 minutes prior thereto, had completely abandoned and deviated from his employment; that the acts which he performed during this period had nothing whatever to do with his employment and that the same were not to the interest nor to promote the interest of his employer, but, on the contrary, were for the personal pleasure, convenience and comfort of the deceased employee; that the creation of the box, plank and raincoat bed by the employee, consisted of an additional and dangerous hazard which had no connection whatever with the deceased's employment and that specifically the deceased Seth L. Stallcup did not meet his death from an injury resulting from an accident arising out of and in the course of his employment."

Upon these and other findings made by the Commission it entered its order denying compensation. Upon the appeal of plaintiff the court below affirmed the judgment of the Commission and the plaintiff excepted and appealed.

B. C. Jones, T. D. Bryson, Jr., and E. C. Bryson for plaintiff, appellant.

Smathers & Meekins for defendants, appellees.

BARNHILL, J. The findings of fact, the conclusions of law and the opinion of the Commission in this cause are commendably full, clear and concise. The facts found are supported by the evidence and warrant the conclusion that the plaintiff is not entitled to compensation under the Workmen's Compensation Act. Ch. 120, Public Laws 1929. The facts thus found, being supported by evidence, are conclusive. *Lockey v. Cohen, Goldman & Co.*, 213 N. C., 356, 196 S. E., 342; *Johnson v. Lumber Co.*, 216 N. C., 123; *Baxter v. Arthur Co.*, 216 N. C., 276; *Tindall v. Furniture Co.*, 216 N. C., 306; *Clark v. Sheffield*, 216 N. C., 375; *McNeill v. Construction Co.*, 216 N. C., 744.

The parties have filed comprehensive briefs in which they discuss (citing many authorities) whether the conduct of deceased constituted a departure from and an abandonment of his employment and whether the creation of an unnecessary hazard bars recovery. The facts found by the Commission make it unnecessary for us to discuss these questions.

The accident did not occur during a rest period between the times the deceased was required to make his rounds of inspection. It happened at a time when it was his duty to be engaged actively in the boiler room cleaning out grates and increasing the head of steam in the boilers and about 10 minutes before he was to start his next round of inspection. He had delegated these duties to his son, who was then engaged in the performance thereof, and had retired to a temporary and precarious resting place of his own construction and of his own choosing. These facts, which are established by uncontradicted evidence offered by claimants and the defendants, and which are found, in substance, by the Commission do not require the conclusion, as a matter of law, that the conduct of the deceased does not constitute a deviation from or an abandonment of his employment.

The judgment below is

Affirmed.

SEAWELL, J., dissenting: The function of the Court is the interpretation and application of law—but not merely written law. Beyond this, there is a great body of principles established by public policy which we regard as binding. They are reflected in the decisions of the courts—of this Court as well as others—and, outside of constitutional amendment and statutory enactment, they offer the only known means of keeping law adjusted to enlightened progress. Without violating these principles the courts cannot establish arbitrary requirements between employment and labor contrary to recognized custom and usage which enter into the terms of the contract and so invite a return to conditions from which society has painfully lifted itself through the conflict and turmoil of the years.

In my opinion, the decision of the Industrial Commission denying compensation for the death of the watchman, Stallcup, is a serious departure from those principles, in adopting an arbitrary conception of the duties of the watchman, contrary to recognized standards, and in declining to recognize the rules of liberal construction which it was their duty to observe in the administration of the act. The result is to place upon common labor in this field, to the advantage of the employer and the insurance carrier, a burden which the law did not intend it to carry. Moreover, the main fact found by the Commission that the deceased was asleep at the time of the accident, or was arising from sleep, is not

supported by any evidence whatsoever, and I think a fair interpretation of the order of the Commission admits it. I am not willing it should pass this Court with a mere formulary approval. The facts demand scrutiny.

All authorities agree that the provisions of workmen's compensation acts must be liberally and broadly construed in favor of the employee. "It is, of course, the settled rule everywhere." *Ex parte Coleman,* 211 Ala., 248, 100 S. E., 114, 115. *Williams v. Thompson,* 200 N. C., 463, 157 S. E., 430; *West v. Fertilizer Co.,* 201 N. C., 556, 160 S. E., 765; *Johnson v. Hosiery Co.,* 199 N. C., 38, 153 S. E., 591; *Reeves v. Parker-Graham-Sexton, Inc.,* 199 N. C., 236, 154 S. E., 66; *Cole v. Minick,* 123 Neb., 871, 244 N. W., 785, 787. This is not only because they are remedial statutes, but because of their history great concessions of common law rights have been made, and because they are for the benefit of "the laboring class." *Southern Surety Co. of New York v. Scheels,* 49 S. W. (2d), 937; *Henley v. Oklahoma Union Railway Co.,* 81 Okla., 224, 197 P., 488, 490, 18 A. L. R., 127; *Stacy v. State Ind. Accid. Com.,* 26 P. (2d), 1092, 1094; *Cleveland Railway Co. v. Kingdom,* 23 Ohio App., 95, 154 N. E., 168. "The act in question arbitrarily restricts the rights of employees affected by it." *Ætna Life Ins. Co. v. Rodrigues* (Tex. Civ. App.), 255 S. W., 446, 447. "With the utmost liberality," says *Ind. Com. v. Sodec,* 55 Ohio App., 177, 177 N. E., 292, 293. Also in *Eastern Texas Elec. Co. v. Woods* (Tex. Civ. App.), 230 S. W., 498, 503; *McQueenie v. Sutphen & Hyer,* 153 N. Y. S., 554. "Every intendment of the statute" is the wording in *Great American Indemnity Co. v. Essary* (Tex. Civ. App.), 57 S. W. (2d), 891, 892. "It is the universal holding of the Court." *Smith v. Marshal Ice Co.,* 204 Iowa, 1348, 217 N. W., 264, 265. This is not merely because it is a remedial law, but because of the complete wash-out of common law rights and remedies in favor of the employees which it brings about. *In re Bowers,* 65 Ind. App., 828, 116 N. E., 842, 843. It has been frequently held that all doubts as to the right to compensation should be resolved in favor of employees or their dependents. *National Cast Iron Pipe Co. v. Higgenbottom,* 216 Ala., 129, 112 S., 734. "All presumptions indulged will be in favor of those for whose protection the statutory compensation was fixed and who, by the terms of the act, are deprived of the ordinary remedies open to others whose rights are invaded." *Wick v. Gunn,* 66 Okla., 316, 169 P., 1087, 4 A. L. R., 107. *Liberality of interpretation thus required extends to the nature and cause of the accident and injury, and whether or not it is within the orbit of employment.* Specifically, the provision "arising out of and in the course of employment" must be liberally construed. *Stacy Bros. Gas Construction Co. v. Massey,* 92 Ind. App., 348, 175 N. E., 664. "The words 'by accident arising out of and in the course of employment,' as used in workmen's compensation

acts, should be given a liberal construction in order that the humane purpose of their enactment may be realized." *Empire Health & Accid. Insurance Co. v. Purcell,* 76 Ind. App., 551, 132 N. E., 664, 665; *Holland St. Louis Sugar Co. v. Shraluka,* 64 Ind. App., 545, 116 N. E., 330. It might be well to remember this word "humane."

Contrary to accepted precedent and the theory upon which all workmen's compensation laws are based, the Commission achieved at the very first a point of view of rigidity and strictness. "His duties" (night watchman at defendant's plant) "are very similar to those of a sentry or night guard on a military reservation." This is not the use of an unfortunate expression. It is the expression of an unfortunate attitude. The militaristic conception is faithfully followed at every vital turn in the case.

I do not wish anything that I may say in the treatment of this case to be construed as reflecting on our Industrial Commission, which I regard as outstanding in this country, not only as to personnel but as to the fine contribution it has made to this difficult branch of administrational law by constructive decision. This, as I know, was not achieved without faithful study and a well informed and conscientious application of the Workmen's Compensation Act to the cases decided by that body. In that respect, the uniform correctness of decision, although in the history of the administration here very intricate matters had to be handled, has left the courts little to do. It is not amiss to say that the broad research made by members of this body into subjects connected with the administration of this and similar laws is nationally recognized. I only wish to point out that in my judgment a departure has been made in this instance from that liberality of construction which is enjoined both upon them and us, and a strictness applied in this case which is unusual in the decisions of that body, and which I think is in conflict with the rules, which should guide us in the interpretation of the law.

The evidentiary facts are undisputed and clear in their import and, therefore, the finding that the deceased employee did not come by his injury and death through an accident arising out of and in the course of his employment is a question of law. *Baron v. National Metal Spinning & Stamping Co.,* 182 N. Y., 284, 169 Supp., 337; *Ind. Com. v. Big Six Coal Co.,* 72 Colo., 377, 211 P., 361; *Noskey v. Farmers Union Coop. Assn.,* 109 Neb., 489, 191 N. W., 486. Conclusions of fact are inferences which must not be based upon speculation but upon relevancy of the probative fact. Whether there is such relevancy the Court will determine.

There is no evidence to support the findings or conclusions of fact upon which this conclusion of law was predicated. To be more specific, there is no evidence in the record upon which the Industrial Commission could base the conclusion that the deceased watchman had made any

deviation from his employment and was outside of its orbit when his injury was sustained.

The undisputed facts are as follows: Stallcup was a watchman at the plant of the defendant company, the duties of which position continued from eleven o'clock in the evening until seven o'clock in the morning. He had other intermittent duties to perform in connection with this continuous employment as a watchman. It was his duty to start fires in the boilers to get up steam in time to start the engines in the morning, and to keep the fires going in the drying plant. As watchman he was required to make periodic rounds and punch clocks in various positions on the premises to serve as evidence of his inspection. With the exception of these periodic rounds his activities were not scheduled as to time. Between his rounds there were periods of comparative inactivity, during which he was not required to be at one place more than another—a time during which his duties might be summed up as those of waiting and watching. What position he should take at such times—whether standing, sitting, or recumbent—was largely of his own choosing.

On the morning of his death he secured the services of his son to fire the boiler for him and, between his rounds of inspection, laid a plank upon a box on a walkway near the boiler room, placed his raincoat upon it, and lay down to rest. A short time thereafter his son came to the door, called him and reminded him that it was approaching time for the five o'clock round. The father responded by giving the young man instructions as to the firing of the furnace. Shortly thereafter this witness heard a fall, and going out found his father had fallen upon the concrete about eight feet below the walkway and seemed badly hurt, calling for a doctor. Young Stallcup went after his mother, called the doctor, and when the doctor arrived it was found that the elder Stallcup was dead. The autopsy showed that the left lung had been injured and that he had bled internally.

Upon this evidence the Full Commission found that the deceased employee was asleep, or that he was in a dazed condition following sleep, when the accident occurred; that for his own ease and comfort he had taken up a position which made it impossible for him to perform the duties of a watchman; that he had delegated the duties of his position to his son, and had thus abandoned them; that he had increased the hazards of his employment and, therefore, was without its pale.

I take these findings somewhat in their order.

There is no evidence in the record that Stallcup was asleep at any time, nor is there any evidence that he was in a dazed condition following sleep at the time the accident occurred.

How far the Industrial Commission may be indulged in refusing to believe credible testimony is still to be worked out, but its arbitrary dis-

regard of positive testimony and the substitution therefor of mere speculation is within the power of review and correction by this Court.

There is no real evidence anywhere in this case that Stallcup was asleep on duty or asleep at all, although the able counsel for the defense pressed this phase of the case with commendable vigor and zeal, both in the development of the case before the Commission and in his argument here. The testimony of young Stallcup on this point, while confused at points, does not, in probative value, amount to evidence but, indeed, is to the contrary. The Commission, rightfully I think, took that view of it.

The Industrial Commission itself took this view of the matter by finding (R., p. 36) that "there is no testimony that the deceased was asleep." Yet, out of the thinnest of thin air, the Commission permitted hypothetical questions to be propounded to witnesses, based on the assumption that the deceased was asleep, and to testify as to conditions of mental confusion following a sudden awakening. (The diminution of the blood supply in the brain, caused by suddenly changing from a recumbent position to an erect position, as a matter of common knowledge frequently causes dizziness, without preceding sleep. The evidence refutes the finding that there was a dazed condition, but if it had been the case it was as easily attributed to this innocent cause as it was to sleep.

What else is there in the evidence suggestive of sleep after this testimony was properly disregarded by the Industrial Commission? Nothing more than that the deceased had been for some time in a reclining position, and that he fell. These facts have no probative relevancy to sleep, and any finding based upon them is pure speculation. *Farfour v. Fahad,* 214 N. C., 281, 199 S. E., 521.

The deceased was upon the premises. There was nothing in the nature of his employment that required him to be at any particular place at any particular time except as he made his rounds. In order, therefore, to remove him constructively from the orbit of his employment he must have been asleep, for in no other way could he negatived the attention and alertness of faculties which was, at the moment, all that could be required of him.

But concede for purposes of this analysis that the deceased had been asleep, and that this caused a deviation from his employment. As soon as he awoke he was upon the premises, at the very point physically, and morally, where the deviation had occurred, and he was *eo instanti* within the ambit of his employment, and in the very act of performing one of his more active duties, that of making the five o'clock round. Schneider, Vol. 1, 2nd Ed., p. 1182; *Conyer v. Canadian Northern Railroad Co.,* 12 N. C. C. A., 898.

There is no evidence in the record that any previous condition of sleep or inattention at this time clouded his faculties. There is this

abstract statement by an expert witness that confusion might follow sleep. There is a speculation on the part of the Industrial Commission that this confusion then attended the watchman. They were not content with the positive testimony of young Stallcup that such was not the case. They were not content with the evidence that the watchman had given specific and intelligent directions with regard to starting the fire, denoting his full consciousness and awareness. The "circumstances," they conclude, show that he was asleep. There are no circumstances pointed out, and there are none other than I have stated, and if they have any relation at all to that condition it is, at most, speculation. The utmost sinning that can be imputed to the deceased is that he rested between rounds.

The Commission has undertaken to take judicial notice of the duties of a watchman, and the Court, inadvertently I think, has approved that principle, although it has been rejected by other tribunals. But, if the Industrial Commission may do so, so may this Court. But whether we go by the record or by a common knowledge of the employment as a watchman, the Industrial Commission has taken a view of the incidents of this employment entirely inconsistent with that held by textwriters and courts whose conclusions we have been accustomed to respect. They measure the demands of the employer no less than they do the liberties of the employee. They are far from regarding the employee as a slave whose humanities may be refused recognition, or a robot who has none. These uniformly recognize the human limitations which are involved in service, and from them we may epitomize the respect which must be paid by employer and employee to their mutual rights. "No break in the employment is caused by the mere fact that the workman is administering to his personal comfort or necessities as by warming himself or seeking shelter, or by leaving his work to relieve nature, or to procure drinks, refreshments, food, or fresh air, or to rest in the shade." Honnold, Vol. 1, p. 382; *Koch v. Oakland Brewing and Malting Co.*, 1 Cal. I. A. C. Dec., 373; *Jackson v. General Steam Fishing Co., Ltd.*, 2 B. W. C. C., 56, H. L. Ct. of Sess.; *Clem v. Chalmers Motor Car Co.*, Op. Mich. Indus. Accid. Bd., Bul. No. 3, p. 40.

A principle which the Commission seems wholly to have ignored is that in employment of this kind, where the more strenuous duties are intermittent, there is a period of comparative relaxation, if not leisure, in which attention to the personal comfort of the employee does not take him out of the orbit of his employment. Thus, in *Iron Co. v. Ind. Comm.*, 160 Wis., 633, 152 N. W., 416, an employee who insuch an interval of inactivity went into a car to warm himself by heat from the briquettes which it was his duty to unload and in consequence thereof was killed through a collision with another car upon the track, the injury was compensable and the Court said: "The man's duties involved periods

of leisure during which apparently he was expected to kill time as best he might, with no specific direction as to what he should do or where he should wait; the night was cold, and he put off dumping the car until he could warm himself from its heated contents; to say that in so doing he had left the master's employment, was pursuing his own private purposes, and doing something foreign to the work he was employed to do is illogical to a degree."

A night watchman had gone to a shanty to cook food and it fell and injured him. He had no business in the shanty or to make fire there at night. The injury was held to have been sustained in the course of his employment. *Morris v. Lambeth Borough Council,* 8 W. C. C., 1, C. A.

To further support the view that a night watchman injured while resting between his rounds is entitled to workmen's compensation, we may note the following: Injury in fight in wash-room while preparing to eat lunch (*Vordy v. Joseph Horne Co.,* 96 Pa. Super. Ct., 550); injury to eye during scuffle of other employees during lunch hour or during working period (*Vignaul v. Howze,* 150 So., 88, La. App., 1933); injury due to falling out of chair while reading at lunch time (*Sears, Roebuck & Co. v. Finney,* 169 Tenn., 547, 89 S. W. 2nd, 749; prostration from heat while sitting in sun during rest period (*Holmes' Case,* 267 Mass., 307, 166 N. E., 827); injury due to combing hair preparing to leave work (*Terlecki v. Strauss,* 85 N. J. L., 454, 89 Atl., 1023); death due to blasting of stumps by logging foreman during lunch hour (*Lumber Co. v. Industrial Commission,* 168 Wis., 230, 169 N. W., 561); going to answer telephone (personal call), *Holland St. Louis Sugar Co. v. Shraluka, supra;* returning to work upstairs after setting bottle of tea in basement (9 note, p. 933, *Etherton v. Johnstown Knitting Mills Co.,* 184 App. Div., 820, 172 N. Y. S., 724, 17 N. C. C. A., 961).

I have already expressed myself as to the effect the position which the deceased had taken up might have on the question of deviation from employment. As I have before stated, there is nothing in the record, and I know nothing regarding the duties of his employment, that would require him to be in any particular place during the time of his less active duties. A reasonable alertness to those duties is not inconsistent with his conduct in this respect, as disclosed by the record.

The deceased did not abandon his duties or deviate from his employment by delegating only a portion of his intermittent duties, that is, of firing the boiler, to his son. *Employers' Liability Assurance Corp. Ltd. of London, England, v. Ind. Acc. Com. of California,* 179 Cal., 432, 177 P., 171. This is especially true, since his duties as a watchman were continuous, to be performed notwithstanding any other duty, and this duty he did not delegate.

The main opinion says the accident "happened at a time when it was

his duty to be engaged actively in the boiler room cleaning out grates and increasing the head of steam in the boilers." The record evidence does not support this. There is no evidence whatever in the record that it was his duty to attend to the boilers at that particular time. On the contrary, firing the boiler was superadded to his duty as watchman, did not produce a discontinuity in his duties as watchman, and it was only necessary to fire the boiler in time to have steam up for the beginning of operations, then hours away.

The Industrial Commission did not make a frank acceptation of the facts of the case above cited, *Employers' Liability Assurance Corp. Ltd., of London, England, v. Ind. Acc. Com. of California.* Its pertinency cannot be evaded. The employee in that case was driving and steering the truck as well as manipulating the levers controlling the sprinkler. He surrendered the important duty of driving and steering and control of the truck to a stranger, while he attended to the less responsible duty of manipulating the levers; yet the Court held that his injury was compensable, upon the ground that he had not wholly abandoned the duties of his employment. "He was not outside the course of his employment merely because he allowed a stranger to perform a part of his task while he was engaged in the remainder of it." If we adopt that reasonable view, we are, thus, returned to a consideration, not whether he had abandoned his duty with respect to firing the boiler, but whether he had completely deviated from his employment as a watchman, a matter I have already discussed.

The simple device of elevating one end of the plank, upon which the deceased lay, by placing it upon a box, is called by the Commission a "death trap," and is held to have so added to the peril of the employment as to constitute a departure therefrom. If we were trying a case of negligence, it might be considered some evidence, but negligence, except as it may be regarded as an accident, is foreign to the theory of workmen's compensation laws. They are specially designed to be rid of that complicated field of jurisprudence and to reach justice with less refinement and more certainty. 71 C. J., p. 247. The underlying theory is that of insurance. *Maryland Casualty Co. v. Industrial Commission,* 198 Wis., 202, 223 N. W., 444, 445.

Most workmen's compensation acts specifically provide that the negligence of the employee shall not bar his recovery. The question as to whether a known act adds such a peril to employment as to bar compensation is one of law upon the facts. The Court cannot consistently hold that this simple act of the deceased is of such a character as to defeat compensation without going deep into the field of negligence and deciding the case consciously or unconsciously upon that principle. How remote the facts in the case at bar are from sustaining that principle may be best understood by illustrations from compensation cases:

It is said in Honnold on Workmen's Compensation, page 389: "A peril which arises from the negligent or reckless manner in which he does the work which he is employed to do may well, and in most cases rightly, be held to be a risk incidental to the employment." Acts not in willful disregard of notice or known danger, but merely negligent, are not sufficient to defeat compensation.

In *Pepper v. Sayer,* 7 B. W. C. C., 616, C. A., where a farm bailiff, who needed something from a cowshed which was locked and did not want to go home for the key, imprudently got up on the window sill in an effort to reach what he wanted, slipped, and was killed in the fall, it was held to be an accident arising out of and in the course of his employment and compensable.

In *Durham v. Brown Bros. & Co., Ltd.,* 1 F., 278, Ct. of Sess., where a workman seeking to find out the cause of a leak from a tank, climbed up to it by an obviously dangerous way, instead of by a perfectly safe way which was provided, and in consequence thereof was killed by some machinery which was close, the injury and death were said to be compensable.

In *Bullworthy v. Glanfield,* 7 B. W. C. C., 191, C. A., where a window cleaner tried to get from a window which he had just finished to the next by crawling along a narrow ledge, instead of going back into the room, and was injured, the injury was held to be caused by an accident arising out of and in the course of employment and was compensable.

The causes leading to the adoption of workmen's compensation acts are well known and well understood. 71 C. J., 242, *et seq.* In this State, at least, the chief of such causes was the fact that exposure to personal injury suits had become ruinous to industry. Such statutes, commendable as they are when properly administered, are in derogation of common law rights, and involve commitments, compromises, and concessions in which recoveries are drastically limited. Through them certainty and security are intended to be provided both to the employer and to the employee; most of all it is intended that the ends of justice may be reached by simple administrational processes short of the uncertainty and technicalities of negligence law. In return for these concessions, broader principles of liability were applied to employers, so that industry might take care of its own wreckage. When, because of the renaissance of these abandoned technicalities in the practice of administrational boards, it becomes apparent that these objectives can no longer be reached, the end of the experiment is in sight.

The judgment in this case ought to have been reversed.

CLARKSON and SCHENCK, JJ., concur in dissent.

J. M. EDGERTON v. R. D. JOHNSON.

(Filed 20 March, 1940.)

1. Appeal and Error § 6e—

Where a witness' answer is not responsive to the question or where he testifies to facts not necessary to answer the question, it is incumbent upon the adverse party to move to strike out the answer.

2. Appeal and Error § 39d—

An exception to the admission of evidence becomes immaterial when the excepting party himself introduces evidence of the same import.

3. Sales § 29—Where article is totally worthless for purpose for which it is sold, purchaser may recover price paid irrespective of warranties.

Plaintiff instituted this action to recover the balance due on the purchase price of a tractor sold to defendant, and took possession of the tractor in claim and delivery. Defendant admitted that plaintiff was the owner and entitled to possession of the tractor and filed counterclaim to recover the part of the purchase price paid, and introduced evidence that plaintiff knew the tractor was to be used by defendant in logging operations and that the tractor was totally worthless for this purpose. Plaintiff relied upon the written conditions of the contract that retention of possession or continued use should constitute an acceptance and satisfaction of warranty, and defendant contended and testified to facts tending to show that this provision was waived. *Held:* The conflicting evidence as to whether the tractor was worthless for the purpose sold was properly submitted to the jury and the verdict in favor of defendant on his counterclaim is upheld, the principle that the written contract between the parties as to warranties and representations cannot be varied by oral testimony not being applicable.

APPEAL by plaintiff from *Bone, J.*, at October Term, 1939, of WAYNE. No error.

This is a civil action brought in the county court of Wayne County for the recovery of certain personal property, in which action the defendant filed a counterclaim for damages for breach of warranty. From a judgment in favor of the plaintiff in the county court the defendant appealed to the Superior Court. From a verdict and judgment in the Superior Court in favor of the defendant on the counterclaim for $385.00 and interest from 5 July, 1939, the plaintiff excepted and assigned error and appealed to the Supreme Court.

The plaintiff sold to defendant a McCormick-Deering tractor. The contract is as follows: "Order for Goods. To J. M. Edgerton, Goldsboro, N. C. I hereby order of you the following goods: No. 1. Size and Description: F/20 tractor with 5" spade lugs—Price $1085.00. Finance $25.64—total $1110.64. By 2 mules $200.00—$910.64, by

Cash payment $185.00—total $725.64. I am retaining a copy of this order which, together with the warranty and agreement on the back hereof, is understood to be our entire contract. (signed) R. D. Johnson, 7/5/37."

"Accepted 7/5/37 By (signed) J. M. Edgerton."

Warranty and Agreement (appearing on back of order): "The purchaser agrees to give each machine a fair trial as soon as possible after receiving and within two days after the first use. If it then fails to work properly and prompt notice is given, the Seller will send a man within a reasonable time to put it in order, the Purchaser agreeing to render friendly assistance. If it still fails to work properly and the Purchaser promptly returns it to the Seller at the place where delivered, the Seller will refund the amount paid, which shall constitute a settlement in full. Retention of possession or continued use shall constitute an acceptance and satisfaction of warranty and further assistance rendered the Purchaser shall not be considered a waiver of this provision. The Purchaser agrees to pay the expense of remedying any trouble due to improper handling. No agent of the Seller has authority to alter, add to or waive the above warranties, which are agreed to be the only warranties, given in lieu of all implied warranties."

Defendant gave a promissory note for $725.64 and a chattel mortgage on the tractor. The papers are dated 5 July, 1937. By the terms of the papers payments were due each month at the rate of $60.47 a month. Plaintiff took out claim and delivery on 23 March, 1938. Defendant made none of the payments provided for in the note and agreement. Plaintiff sued for the balance due on the sale—$725.64—and took out claim and delivery for the tractor under the chattel mortgage. Defendant gave no replevin bond.

Defendant, in answer denied the material allegations of plaintiff's complaint and says: "Further answering said paragraph the defendant alleges that the plaintiff warranted and guaranteed that the said tractor was suitable and efficient for the purpose of hauling logs and timber in connection with the logging operations in which the defendant was engaged; that said tractor was not at any time fit or suitable for the purpose of handling and hauling logs and timber and therefore was a complete and total failure of consideration and breach of warranty on the part of the plaintiff resulting in great loss and damage to the defendant. . . . That the said tractor is of no value to him for the purpose for which it was guaranteed, but the plaintiff having alleged the value to be $725.64, then the defendant could not in any event be indebted to the plaintiff in any sum."

Defendant in his further answer, by way of cross action and counterclaim, says, in part: "(a) That the plaintiff solicited the defendant to

purchase a certain McCormick-Deering tractor guaranteeing and warranting the said tractor to be in all respects suitable for hauling logs and timber from the woods to the defendant's sawmill, stating to the defendant that if said tractor was not in all respects suitable and satisfactory for the defendant's purpose that he would refund to the defendant the cash payment and would cancel the note which the defendant executed; that said representations and guarantees were made at the time of and simultaneously with the payment of a part of the purchase price and the execution of the note described in the complaint for the balance thereof. (b) That the said tractor was not at any time suitable and satisfactory for the purpose for which the defendant was induced to buy the same and the defendant made repeated complaint to the plaintiff as to the trouble that he was having with said tractor and the difficulty in operating the same; that the plaintiff caused a mechanic to attempt to adjust said tractor and as a result of the defective condition of the same the said tractor caused the death of the defendant's son, who was one of his employees engaged in said logging operations. (c) By reason of the defective condition of said tractor the plaintiff is entitled to recover of the defendant the sum of $385.00 paid on the purchase price and have the note sued on in the complaint canceled and surrendered."

Demand was made by defendant against plaintiff for judgment for $385.00 and interest from 5 July, 1937. Plaintiff in reply denied that he owed defendant anything.

The issue submitted to the jury and their answer thereto were as follows: "What amount, if any, is the defendant entitled to recover of the plaintiff on his counterclaim? Ans.: '$385.00, with interest from July 5, 1937.'" The court rendered judgment on the verdict. The plaintiff made numerous exceptions and assignments of error and appealed to the Supreme Court. The material ones and necessary facts will be set forth in the opinion.

Royall, Gosney & Smith for plaintiff.
Abell & Shepard for defendant.

CLARKSON, J. At the close of plaintiff's evidence and at the close of all the evidence, the plaintiff made motions in the court below for judgment as in case of nonsuit. C. S., 567. The court below refused the motions and in this we can see no error.

In the record is the following: "The plaintiff announced in open court that the only thing he was seeking to recover was the cost of the action and the defendant admitted in open court that the plaintiff was the owner and entitled to the possession of the tractor described in the complaint."

"The issue tendered by plaintiff was: 'Is plaintiff the owner and entitled to possession of the tractor described in the complaint?' The court declined to submit the issue tendered by the plaintiff because of defendant's admission in open court that the plaintiff was the owner and entitled to the immediate possession of the tractor." The court below submitted the issue set out in the record, which was answered in favor of defendant.

The plaintiff contends that the written contract between the parties as to warranties and representations cannot be varied by oral testimony. This principle is not applicable on the present record. Plaintiff introduced the written "warranty and agreement" and in his testimony stated on cross-examination: "I sold him the tractor for use in logging operations and understood he was going to use it in logging."

In *Willis v. New Bern,* 191 N. C., 507 (514), is the following: "The rule is that if evidence offered by one party is objected to by the adverse party and thereafter the objecting party elicits the same evidence, the benefit of the objection is lost, and further, if on cross-examination evidence is developed without objection, the adverse party can offer evidence in reply relating to the same questions, even though such evidence in reply might have been incompetent in the first instance." *Bryant v. Reedy,* 214 N. C., 748 (754).

It seems that this answer was more than necessary to the question asked plaintiff and there should have been a motion to strike.

In *Keller v. Furniture Co.,* 199 N. C., 413 (416), is the following: "If a witness gives an answer which is not responsive to a question, the proper course is a motion to strike out the answer or to instruct the jury to disregard it. *Hodges v. Wilson,* 165 N. C., 323; *Godfrey v. Power Co.,* 190 N. C., 24 (31)."

The plaintiff introduced similar evidence showing he knew the tractor was to be used in logging and was sold for that purpose.

Max Stapps, a witness for plaintiff, testified, in part: "I put a tractor hitch on the tractor. It is something to hitch a long cart to, not a trailer. Mr. Johnson gave me the order to do that. . . . They wanted the trailer hitch exactly level with the back seat in order to make a right straight pull with the log cart. That tractor hitch is made for hitching a long cart tongue."

R. G. Batson, witness for plaintiff, testified, in part: "Q. Have you observed the use of this type of tractor in logging operations? Ans.: Yes, sir, I have demonstrated to several. . . . I am familiar with the method or use of these tractors in connection with pulling logs. We use this tractor for hauling logs. . . . The logs are under the tongue of the cart and the logs that hang under this tongue are about a foot of the ground and keep the tractor from turning over as long as they are

hitched in the tongue. . . . I took this tractor down there. I explained to the people at Mr. Johnson's place the operation of it. I don't think Mr. Johnson was there. That was on Saturday when I carried the tractor down. . . . I operated the tractor. It didn't do so good on pulling the log because we had it down a hill. We didn't have a cart where the hitch was put on to pull, we were just snaking logs. . . . I took it and made a couple of loads with it down to the woods and it operated all right, in other words, it didn't rear up. I asked them if that was the load they usually carried and they said, 'Yes.' I put the tongue in. I told them not to put nothing on top of there but that tongue to the log wagon. With the tongue in there when I was there it operated all right. There was plenty of power."

All of the above evidence of plaintiff indicates that the tractor was sold to be used in logging. It is well settled that an objection to evidence is immaterial where the same evidence is later admitted without objection. In this case the plaintiff introduced evidence that the tractor was to be used in logging. The case was tried on the theory that the tractor was for use in logging.

It was contended by plaintiff that in the contract was the following: "Retention of possession or continued use shall constitute an acceptance and satisfaction of warranty." Defendant contended that this provision was waived and testified: "Q. When was the conversation with Mr. Edgerton in which he told you what to do with the tractor? Ans.: The next week I and my daughter came here and drove to his place of business and talked with him about it and he told me what to do. Q. Did you comply with his instructions? Ans.: Yes, sir. Mr. Edgerton never made any request or demand upon me for any payment on this tractor. . . . Q. What, if anything, occurred between you and Mr. Edgerton with reference to a refund of all your money? Ans.: I told him I wanted him to take the tractor back and give me my money. He said where would he put it. I told him anywhere and he said roll it up in the yard until the Insurance Company settles their part. He never refunded my money."

We think this evidence sufficient to be submitted to the jury on the question that there was no breach of warranty, on this aspect. The defendant testified, in part: "Q. Did you state to Mr. Edgerton the purpose for which the tractor was being purchased? Ans.: I told him I was purchasing it for use in the lumber and logging business. I bought the tractor for $1,085.00, paying $385.00 cash. . . . Q. After the tractor was left there with you state whether or not you gave the tractor a trial and within two days? Ans.: We started hauling that morning and messed with it all day until about 3:00 or 3:30. It wouldn't pull, would rear up and draw-bar would drag the ground. I

went to Dixon's to a little store and called Mr. Edgerton, that was Monday, and on Tuesday he sent the mechanic about 4:00 or 5:00 o'clock; they went to the woods, got a load of logs—it wouldn't pull with them, reared up and the draw-bar dragged the ground." There was evidence on the part of defendant that he gave the tractor a fair trial.

There was evidence, *pro* and *con,* whether the tractor "failed to work properly," all of this was left to the jury under proper instruction. The amount due ($385.00) was fully sustained by the evidence.

After reading with care the record and briefs of the able counsel, we can see no prejudicial error of the court below in the admission and exclusion of testimony during the trial or in the charge of the court below. The court below gave the law applicable to the facts clearly and accurately. The controversy was one mostly of fact, which was decided in favor of defendant. In the judgment of the court below, we find no prejudicial or reversible error.

No error.

MRS. MAE BRIDGERS SCOTT v. R. G. HARRISON.

(Filed 20 March, 1940.)

1. Appeal and Error § 49—Held: Opinion reversing judgment overruling demurrer merely indicated plaintiff might move to amend under C. S., 515.

In reversing the judgment of the lower court overruling defendant's demurrer, the opinion of the Supreme Court stated that plaintiff will be given a reasonable time to amend her complaint, if she so desires. There was no motion by plaintiff in the Supreme Court to be allowed to amend. *Held:* The statement, certainly when read in connection with the preceding sentence of the opinion, merely indicated to plaintiff that the procedure to amend under the provisions of C. S., 515, was still open to her, and the opinion of the Supreme Court does not entitle her to file amended complaint as a matter of right without notice to defendant.

2. Pleadings § 23—

When the Supreme Court reverses the judgment of the lower court overruling defendant's demurrer, plaintiff upon three days notice to defendant may move in the Superior Court within ten days after the opinion of the Supreme Court is received by the clerk, to be allowed to amend. C. S., 515.

CLARKSON, J., dissents.

SEAWELL and SCHENCK, JJ., concur in dissent.

APPEAL by defendant from *Thompson, J.,* at October Term, 1939, of VANCE.

Civil action to recover damage for alleged slander.

Upon former appeal, 215 N. C., 427, 2 S. E. (2d), 1, this Court reversed the judgment of the Superior Court of Vance County in overruling defendant's demurrer to complaint of plaintiff for that it failed to state facts sufficient to constitute a cause of action.

The record on present appeal states these facts: The opinion, certified by the clerk of Supreme Court, was received by the clerk of Superior Court of said county on 2 May, 1939. On that day plaintiff, without notice to defendant, and without leave of the court to file same, lodged in the office of the clerk of Superior Court of said county "a paper writing described as an amended complaint." Defendant, after notice dated 15 May, 1939, appeared specially to move, and on 26 May, 1939, moved to strike said "paper writing" from the files of the court for that, in the main, plaintiff has failed to move, after notice, for order permitting the filing of an amended complaint. The clerk, in the exercise of his discretion, transferred the motion to the civil issue docket to be heard by the judge at term. The motion was heard at the October Term, 1939. Defendant also moved to dismiss the action as provided by law. Both motions were denied. Thereupon, the court, in judgment entered, after reciting that "it appearing from the Supreme Court decision rendered herein that: 'Plaintiff will be given reasonable time to amend her complaint, if she so desires'; and it further appearing that amended complaint was filed on May 2, 1939, the day that the opinion was certified to the clerk of the Superior Court of Vance County, North Carolina, . . . decreed that the motion to dismiss be and the same is hereby denied, and defendant is hereby given thirty (30) days to file answer."

Defendant appeals to Supreme Court, and assigns error.

J. P. & J. H. Zollicoffer for plaintiff, appellee.

A. A. Bunn, Jasper B. Hicks, and J. H. Bridgers for defendant, appellant.

WINBORNE, J. From the facts set forth on this appeal, motions of defendant to strike from the record the proposed amended complaint of 2 May, 1939, and to dismiss the actions should have been granted.

When on the former appeal the judgment of the Superior Court overruling demurrer to complaint was reversed, the provisions of the statute, C. S., 515, as amended, were open to plaintiff to move to be allowed to amend her complaint. *Williams v. Williams,* 190 N. C., 478, 130 S. E., 113; *Morris v. Cleve,* 197 N. C., 253, 148 S. E., 253; *McKeel v. Latham,* 202 N. C., 318, 162 S. E., 747; *White v. Charlotte,* 207 N. C., 721, 178 S. E., 219; *Oliver v. Hood, Comr.,* 209 N. C., 291, 183 S. E., 657; *Bank v. Gahagan,* 210 N. C., 464, 187 S. E., 580.

Under C. S., 515, as amended the plaintiff, upon notice of three days and within ten days after the opinion of the Supreme Court was received by the clerk of the Superior Court, could have made motion to amend. If the motion be not granted, judgment shall be entered dismissing the action. C. S., 515.

Plaintiff failed to proceed under said statute. On the other hand, she elected to act upon the conclusion that the statement in the former opinion with regard to plaintiff being given reasonable time to amend her complaint is a self-executing order. Indeed, in rendering the judgment below it appears that the court was actuated by the same impression. However, a reading of the sentence quoted from that opinion in connection with that which immediately precedes, the meaning is not in doubt. When so read, it is clear that the opinion merely indicated to plaintiff that the way was still open to her to amend her complaint, if she should so desire. Moreover, recurring to record on former appeal it appears that plaintiff made no motion in this Court to be allowed to amend. That question was not then under consideration.

For a decision on this appeal, it is unnecessary to consider other questions of law raised by the appellant.

The judgment below is

Reversed.

CLARKSON, J., dissenting: The concluding statement of the opinion in the former appeal was, *"Plaintiff will be given reasonable time to amend her complaint, if she so desires. The judgment overruling the demurrer is reversed."* In my opinion, both the plaintiff and the judge below were correct in interpreting this as an order of this Court permitting plaintiff to amend. The words are plain, clear and positive. Nor are they, in my opinion, altered in meaning by the sentence preceding the quoted statement, as that sentence merely distinguished the case under consideration from an earlier case. As the sentence quoted above was pertinent and germane to the disposition of the case it was well within the scope of the former appeal (*Riley & Co. v. Sears & Co.*, 156 N. C., 267), and became a part of the "law of the case." As such it was binding on the lower court and is now binding on this Court. *Stanback v. Haywood,* 213 N. C., 535; *George v. R. R.,* 210 N. C., 58; *McGraw v. R. R.,* 209 N. C., 432; *Groome v. Statesville,* 208 N. C., 815; *Betts v. Jones,* 208 N. C., 410; and numerous interim cases back to and including *James v. Withers,* 126 N. C., 715. All matters determined on the first appeal are *res judicata* on subsequent trials, and appeals here. *Warden v. McKinnon,* 99 N. C., 251; *Pretzfelder v. Ins. Co.,* 123 N. C., 164; *Harrington v. Rawls,* 136 N. C., 65. Where the trial court proceeds in substantial conformity with an opinion of this Court in a cause,

the action of the court below in so doing cannot be questioned on a second appeal here. *Bradsher v. Cheek,* 112 N. C., 838. A judgment of a trial court founded on the intimation and direction of this Court in a prior appeal will not be disturbed. *Kramer v. R. R.,* 128 N. C., 269. This is true even where it is found on the second appeal that the prior opinion was incorrect (*Bank v. Furniture Co.,* 120 N. C., 475), or erroneous (*Hospital Assn. v. R. R.,* 157 N. C., 460), and that the earlier appeal was premature (*Yates v. Ins. Co.,* 176 N. C., 401).

Not only am I convinced that we are precluded, by numerous authorities from disturbing what has been done in accordance with the prior opinion, but I am likewise convinced that this Court had plenary power to grant to plaintiff an opportunity to amend. C. S., 547, provides, "The judge or court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding. . . ." Nor is this Court dependent solely upon the statute for this power. As was pointed out in *Bank v. Sherman,* 101 U. S., 403, 25 L. Ed., 866, the allowance of amendments is incidental to the exercise of all judicial power, and is indispensable to the ends of justice. With his usual precision and clarity, the late Dr. McIntosh stated the rule as follows: "The courts have inherent power, independent of statute, to amend pleadings, and they may exercise this power in their discretion, unless prohibited by some statute, or vested rights would be disturbed, or the rights of the parties would be injuriously affected." N. C. Practice and Procedure, p. 512. This Court having exercised this discretion and there having been no challenge of the power, by petition to rehear or otherwise, the order permitting the amendment was binding upon the lower court and upon this Court in subsequent proceedings in this cause.

C. S., 515, on which the defendant relies in this case, cannot be held to affect the inherent jurisdiction of this Court over cases that are properly here on appeal, nor prevent the Court from making any such orders as may appertain to justice, or prescribing or directing what may be done therein after the case goes back. It does not even partially suspend the power of this Court with respect to the allowance of amendments or directing that amendments be allowed; otherwise, the jurisdiction of the Court, and the rules and orders it makes, would be made subject to statutory control.

That the Court had power to permit the amendment to the pleading, and to make an order in that respect which must be obeyed by the court below, I think cannot be successfully controverted. The order here provided for a reasonable time to file an amendment, and it was clearly the intention of the court to permit it. What that reasonable time might be was left to the discretion of the court below, but the order of this

Court is unaffected by the fact that it did not set a definite time. The statute can only be considered as controlling where the Supreme Court has not exercised its constitutional and inherent power in the matter. Constitution of North Carolina, Article IV, sec. 8.

SCHENCK and SEAWELL, JJ., concur in dissent.

JOHN J. CALCAGNO v. A. L. OVERBY AND A. H. WILLIAMS.

(Filed 20 March, 1940.)

1. Venue § 3—

A defendant's motion to extend the time for him to file answer, allowed by consent, is an acceptance of the jurisdiction of the court and waives such defendant's right to move for change of venue as a matter of right.

2. Same—

A motion for change of venue as a matter of right, made after expiration of time for filing answer, is properly denied on the ground that the motion was not made in apt time. C. S., 470.

APPEAL by defendants from *Thompson, J.*, at October Term, 1939, of VANCE. Affirmed.

Action for damages for personal injury due to the negligence of defendants in the operation of a motor truck. Motion by defendants for removal of the cause to Harnett County as proper place of trial. Motion denied and defendants appealed.

Gholson & Gholson for plaintiff, appellee.
Kerr & Kerr for defendants, appellants.

PER CURIAM. The motion for removal as a matter of right was denied by the court below on the ground that the motion was not made in apt time. It appeared that summons was served, and complaint filed 5 July, 1939. On August 4, 1939, the following order was entered by the clerk of the Superior Court: "Upon motion of defendant A. L. Overby, and by consent, it is ordered and adjudged that the defendant A. L. Overby shall have to and through August 23, 1939, to file answer in this action." On 11 August, 1939, motions for removal were made by defendants Overby and Williams.

It is apparent that the motions to remove as a matter of right came too late. Defendant Overby's motion and agreement to extend the time to file answer was an acceptance of the jurisdiction and waived the right

to remove on that ground. *Garrett v. Bear,* 144 N. C., 23, 56 S. E., 479; McIntosh Prac. & Proc., 280. Defendant Williams' motion was made after the time for answering had expired. C. S., 470; *Lumber Co. v. Arnold,* 179 N. C., 269, 102 S. E., 409.

Judgment affirmed.

STATE v. CHARLIE HOPKINS.

(Filed 20 March, 1940.)

1. Criminal Law § 80—Appeal dismissed for failure of defendant to file brief and required copies of record and case on appeal.

Where defendant files in the office of the Clerk of the Supreme Court a certified copy of the record proper and defendant's case on appeal, which had been served on the solicitor, but fails to file nine typewritten copies of the record and case on appeal and fails to file a brief, the motion of the Attorney-General to docket and dismiss will be allowed, Rules of Practice in the Supreme Court, Nos. 22 and 28, but when defendant has been convicted of a capital felony the motion to docket and dismiss will be allowed only after an inspection of the record proper and defendant's case on appeal shows no apparent error.

2. Criminal Law § 71—

The affidavit and order for appeal *in forma pauperis held* not in strict accord with the statute. *S. v. Smith,* 152 N. C., 842.

MOTION by State to docket and dismiss appeal.

Attorney-General McMullan for the State.

PER CURIAM. At the November Term, 1939, Rutherford Superior Court, it being the term for the trial of criminal causes, the defendant was tried upon an indictment charging him with the capital felony of murder of one Roy Watkins. There was a verdict of guilty of murder in the first degree. Judgment was thereupon duly entered that the 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. Young,* 216 N. C., 626. From the judgment thus entered the defendant gave notice of appeal to the Supreme Court and 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.

On 12 February, 1940, the defendant filed in the office of the clerk of this Court a certified copy of the record proper and of the defendant's case on appeal, which case or appeal was served on the solicitor 4 Janu-

ary, 1940. The defendant has failed, however, to file nine typewritten copies of the record and case on appeal as required by Rule 22, and has likewise failed to file a brief as required by Rule 28.

The Attorney-General, for the State, in due time, filed a written motion to docket and dismiss the appeal under Rules 22 and 28.

We have carefully examined the record proper and the defendant's case on appeal attached thereto. There is no apparent error on the face of the record and the assignments of error in the case on appeal are without substantial merit. Therefore, the motion of the Attorney-General to docket and dismiss the appeal under Rules 22 and 28 must be allowed. *S. v. Taylor,* 194 N. C., 738, 140 S. E., 728; *S. v. Massey,* 199 N. C., 601, 155 S. E., 255; *S. v. Goldston,* 201 N. C., 89, 158 S. E., 926.

The affidavit and order for appeal *in forma pauperis* is not in strict accord with the statute. *S. v. Smith,* 152 N. C., 842, 67 S. E., 965.

Judgment affirmed. Appeal dismissed.

LENA HINES, EMMA ALLIGOOD, W. M. CARTER AND WIFE, ADDIE CARTER, HATTON HINES, HORACE HINES, ELSIE SEIWELL AND HUSBAND, PETER SEIWELL, MILDRED HENDERSON AND HUSBAND, MACK HENDERSON, MATTHEW HINES, LEONARD HINES, WILMER HINES, ROBERT HINES, MITCHELL T. HINES, JAMES McDONALD HINES, THE LAST THREE BEING MINORS BY THEIR NEXT FRIEND, LENA HINES, v. FANNIE MAE HINES, WIDOW OF P. R. HINES, AND GEORGE STANCILL HINES, A MINOR, HEIR AT LAW OF P. R. HINES, BY HIS GUARDIAN AD LITEM, FANNIE MAE HINES.

(Filed 27 March, 1940.)

1. Deeds § 13a—

The provision of C. S., 991, that a conveyance will be construed to be in fee whether the word "heir" is used or not, applies by the express language of the statute only when the deed fails to disclose a clear intention to convey an estate of less dignity.

2. Same—Instrument held to disclose plain intention not to convey fee.

The instrument in question stipulated that the grantor did "give, grant, bargain, sell and convey, lease and let" to the grantee the described premises for the purpose of using same as a home until the grantor should see fit to sell or repossess the land, and that as rents the grantee should pay one-half the taxes and insurance on the property, that the grantee should be a tenant at will, and twice provided that the grantee should give up and deliver possession upon 30 days notice. *Held:* The instrument

clearly indicates an intention to convey an estate of less dignity than a fee and C. S., 991, is not applicable, and the instrument is a lease, and upon the death of the grantee, lessee, his heirs take no interest in the land thereunder.

APPEAL by defendants from *Frizzelle, J.*, at October Term, 1939, of PITT. Affirmed.

The plaintiffs' complaint alleged, in part: "That at the time of the death of Mrs. Lizzie Tunstall, in the town of Murry, Greene County, North Carolina, on or about the ..... day of August, 1937, the said Lizzie Tunstall was seized and possessed of a one-half undivided interest in that certain real property lying and being situated in or near the town of Ayden, Pitt County, North Carolina, and being the house and lot and about three acres of vacant lands adjacent thereto, being the same house and lot and vacant lands now occupied by one of the petitioners, Lena Hines, and that upon the death of the said Mrs. Lizzie Tunstall, the plaintiff petitioners and the defendants became the owners in fee simple and tenants in common of said one-half undivided interest in said real property, and the plaintiffs and the defendants are the only persons or parties interested in the said one-half undivided interest in said property as heirs at law of the late Mrs. Lizzie Tunstall. That the interest of the plaintiffs and the defendants in the said one-half undivided interest in said real property is as follows: . . . (setting same forth) . . . George Stancill, the infant defendant, as heir at law of the late P. R. Hines, owns 15/90 of said undivided interest, subject to the dower interest of his mother, the defendant, Fannie Mae Hines, widow of P. R. Hines. The real property hereinbefore described is too small to be susceptible of actual division, and the petitioners desire to hold their interest therein in severalty in the proceeds of the sale of said property, due to the fact that the interests of the tenants in common are too small to be allotted to them in land. . . . Wherefore, your petitioners pray that an order be made by the court that the said one-half undivided interest of the real property hereinbefore described be sold at public sale before the courthouse door in Greenville, to the highest bidder for cash, to the end that the tenants in common may hold their interests in the proceeds thereof in severalty."

The defendants denied the material allegations of the complaint and, answering further the complaint, say: "That P. R. Hines was the owner in fee simple of a one-half undivided interest in the tract of land described in the petition, by reason of a deed executed by Lizzie Hines to P. R. Hines and recorded in Book V-14, page 203, of the Pitt County Registry, and, therefore, the defendant George Stancill Hines, as heir at law of P. R. Hines, is now the owner of said one-half undivided interest in said tract of land, subject to the dower right of the defendant

Fannie Mae Hines, widow of P. R. Hines. That the defendants do not want a division nor a sale of the said tract of land or their interest in the same, but if a sale is to be had, then the whole tract of land should be sold and the proceeds of the sale divided between the plaintiff Lena Hines and the defendants. . . . Wherefore, the defendants pray: First: That they be adjudged the owners of a one-half interest in the tract of land described in the petition, and that the petition be denied. Second: That if a sale be ordered, that it be for the entire or whole tract of land for division."

The court below found certain facts and rendered judgment, in part, as follows: "Upon the pleadings filed, the deed in question, and the facts above found, the court is of the opinion, and holds, adjudges and decrees that the defendants take no interest whatever or no estate whatever in the land set out and described in the petition filed in this cause under or by reason of the paper writing, deed, executed by Lizzie Hines to P. R. Hines and recorded in Book V-14, page 202, of the Pitt County registry, and set up and referred to in the answer of the defendants; but that the defendant George Stancill Hines, sole heir at law of the late P. R. Hines, owns fifteen-ninetieths of one-half undivided interest in the lands described in the petition, subject to the dower interest of his mother, Fannie Mae Bowen, widow of P. R. Hines, and that other parties own interests as set out in the petition. It is further ordered, adjudged and decreed that the lands set out and described in the petition filed in this cause be sold for the purpose of making division among the parties in interest therein in the proceeds thereof," and that certain commissioners be appointed to make sale, etc.

The defendants Fannie Mae Hines and George Stancill Hines, through his guardian *ad litem,* Fannie Mae Hines, excepted to the foregoing judgment, assigned error and appealed to the Supreme Court.

Harding & Lee for plaintiffs.
Julius Brown for defendants.

CLARKSON, J. The only question for our determination is: What interest or estate P. R. Hines took under the paper writing (termed deed) from Lizzie Hines to P. R. Hines, dated 19 March, 1924, and duly recorded in Pitt County, N. C. We think that the judgment of the court below is correct and that P. R. Hines took no interest or estate in the land in controversy, under the said paper writing.

To sustain the position that P. R. Hines had a one-half interest in the land, defendants cite C. S., 991, which is as follows: "When real estate is conveyed to any person, the same shall be held and construed to be a conveyance in fee, whether the word 'heir' is used or not, unless

such conveyance in plain and express words shows, or it is plainly intended by the conveyance or some part thereof, that the grantor meant to convey an estate of less dignity." N. C. Code, 1935 (Michie), sec. 991.

We extract from the paper writing: (1) "Witnesseth: That for and in consideration of natural (love) and affection, and other good and valuable considerations and for the sum of one dollar in hand paid me by P. R. Hines, I do hereby give, grant, bargain, sell and convey, *lease* and let to P. R. Hines, the following described property to P. R. Hines, *for the purpose of using the same as a home or until I shall see fit to sell the same or shall want the possession of said* property at any time—(describing land in controversy). (2) To have and to hold the said one-half of said real estate, including one-half of the house room on said place in the dwelling and out houses and especially my rooms in said dwelling to him the said P. R. Hines' only use and behoof, *as a home in said land until I see fit to sell my said interest in the said property or until I shall see fit to repossess said land, and as rents* for said property until I shall see fit to sell or repossess the same, *P. R. Hines agrees to pay one-half of the taxes and insurance on said property,* and in case I shall see fit to sell the said property or to repossess the same, *P. R. Hines agrees to give up and deliver the possession of the same to the said Lizzie Hines upon thirty days' notice* and agrees to keep the same in good repair and *return* the same in as good condition as of the date of this agreement, wear and tear and accident to the same excepted; and it is further agreed that P. R. Hines shall take possession of my said interest in said property after the 20th day of March, 1924, and *from then until I shall wish to repossess or sell the same;* and it is further agreed that the said P. R. Hines shall be a *tenant of said land at my will* and that I shall retain full right to dispossess and take said property at any time I shall desire to take possession of the same, and *P. R. Hines agrees to give up and deliver possession of the same upon thirty days' notice as above stated* without let or hindrance of any kind whatsoever and he is hereby put into possession of the same to enjoy the quiet possession of same on and after the day above specified. Witness my hand and seal, this 19th day of March, 1924. (Miss) Lizzie Hines (Seal)." (Italics ours.)

It will be noted that the first part of section 991, *supra,* is qualified by the following: "Unless such conveyance in plain and express words show or it is plainly intended by the conveyance or some part thereof that the grantor meant to convey an estate of less dignity." The paper writing clearly indicates that it was a lease. "P. R. Hines shall be a tenant of said land at my will," etc. Twice in the paper writing it is

set forth that P. R. Hines "agrees to give up and deliver possession of the same . . . upon thirty days' notice." We think the construction put on the paper writing by the court below correct, and the judgment is

Affirmed.

JOHN WHITE v. R. P. HOLDING, R. M. PLEASANT, C. L. DENNING, J. H. AUSTIN AND J. B. WOOTEN, COUNTY COMMISSIONERS OF JOHNSTON COUNTY.

(Filed 27 March, 1940.)

1. Mandamus § 1—

Mandamus confers no new authority, but lies only to compel the performance of a duty imposed by law on the person sought to be coerced at the instance of a party having a clear legal right to demand its performance.

2. Appeal and Error § 40f—

In reviewing a judgment sustaining a demurrer, the facts alleged in the complaint will be taken as true for the purpose of determining the sufficiency of the complaint, and whether the plaintiff can establish them by proof is not presented.

3. Animals § 3: Mandamus § 2a—

Where a person having a legal right to recover under C. S., 1681, makes satisfactory proof to the county commissioners of injury inflicted by a dog, it is the legal duty of the commissioners to appoint freeholders to ascertain the amount of damage done, and *mandamus* will lie to compel them to perform this duty.

4. Mandamus § 3—

A person having a separate and peculiar right to the performance of a legal duty by an officer or board, so that he is the party beneficially interested, may maintain suit for *mandamus* to compel the performance of the legal duty.

5. Parent and Child § 8—Father's right of action for negligent injury to child.

A father is under duty to care for and maintain his child and, if the child should die during minority, to pay the funeral expenses, and as between himself and its mother, nothing else appearing, is entitled to the services and earnings of his child during minority, and therefore the father has a right of action against a person negligently injuring his child to recover for loss of services of the child and pecuniary damages sustained by him in consequence of the injury to the child, including expenses of treatment.

6. Same: Abatement and Revival § 11—Survival of father's right of action for injury of child resulting in its death.

While a father has no right of action for negligent injury of his child which immediately results in its death, the right of action for wrongful

death existing only under C. S., 160, in favor of the administrator or executor, where negligent injury to the child does not immediately result in death, the father may maintain an action for loss of services and expenses of treatment, at least, during the period between the infliction of injury and the child's death, although the right of action for prospective earnings of the child during minority abates.

7. Same: Animals § 3—Facts alleged held sufficient to entitle father to mandamus to compel commissioners to appoint freeholders to assess damages for fatal injury of son inflicted by dog.

The complaint alleged that plaintiff's son was attacked and fatally injured by a dog, that plaintiff had demanded of the county commissioners that they appoint freeholders to ascertain the amount of damages sustained by plaintiff, including the necessary treatment and all reasonable expenses incurred by plaintiff, and that defendants had refused his demand. *Held:* Upon the facts alleged, plaintiff is entitled to *mandamus* to compel the county commissioners to appoint freeholders to assess damages, since the complaint alleges satisfactory proof to the commissioners of damages done by a dog, making the appointment of freeholders by the commissioners a legal duty under C. S., 1681, and facts showing a peculiar interest in plaintiff entitling him to compel the performance of the duty.

APPEAL by plaintiff from *Williams, J.,* at Regular Term, 25 September, 1939, of JOHNSTON.

Civil action for writ of *mandamus* to require appointment of jury to assess alleged damage under provision of C. S., 1681, heard upon demurrer.

The complaint alleges substantially these facts: Plaintiff, a resident of Johnston County, North Carolina, and the father of William Joseph White, an infant, who died on 29 June, 1938, as result of "injury caused by a dog," has made complaint to defendants, the duly elected, qualified and acting commissioners of said county, and given to them satisfactory proof of said injury and requested the appointment of a jury of "three freeholders to ascertain the amount of damages done, including the necessary treatment and all reasonable expense incurred by plaintiff in sum of $1,500." Though repeated demand has been made upon them by plaintiff, defendants as such county commissioners have failed and refused, and still fail and refuse, to perform the legal duty required of them as county commissioners with regard to appointing the jury as demanded, in accordance with the provisions of the statute, C. S., 1681.

Defendants demur to the complaint for that it appears upon the face thereof that same does not state facts sufficient to constitute a cause of action in that: (1) It being alleged that William Joseph White, an infant, is dead, the cause of action for injury sustained by him does not survive. (2) It is not alleged that defendants are liable by statute or at common law for wrongful death of said infant caused by a dog or any other means by reason of their negligence or of any omission of duty,

or that any provision of law is made for compensation to plaintiff under such circumstances. (3) This being an action in the nature of *mandamus,* it is not "alleged that defendants have neglected or failed to perform some duty imposed upon them by law."

Upon the hearing below the presiding judge sustained the demurrer. From judgment in accordance therewith plaintiff appeals to the Supreme Court, and assigns error.

A. M. Noble for plaintiff, appellant.
J. R. Poole for defendants, appellees.

WINBORNE, J. It is well settled in this State that: "*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; *Martin v. Clark,* 135 N. C., 178, 47 S. E., 397; *Wilkinson v. Board of Education,* 199 N. C., 669, 153 S. E., 163; *Powers v. Asheville,* 203 N. C., 2, 164 S. E., 324; *Rollins v. Rogers,* 204 N. C., 308, 168 S. E., 206; *John v. Allen,* 207 N. C., 520, 177 S. E., 634; *School District v. Alamance County,* 211 N. C., 213, 189 S. E., 873; *Reed v. Farmer,* 211 N. C., 249, 189 S. E., 882; *Mears v. Board of Education,* 214 N. C., 89, 197 S. E., 752.

Admitting the facts alleged in the present action, which we must do in testing the sufficiency of the complaint challenged by demurrer, *Ins. Co. v. McCraw,* 215 N. C., 105, 1 S. E. (2d), 369, and numerous other cases, (1) Are the defendants as county commissioners of Johnston County under a legal duty to perform the act sought to be enforced? (2) If so, does the plaintiff have a clear right to demand it? Both questions must be answered in the affirmative.

1. The statute, C. S., 1681, relating to disposition of moneys collected as license taxes on dogs, provides that: "The money arising under the provisions of this article shall be applied to the school funds of the county in which said tax is collected: Provided, it shall be the duty of the county commissioners, upon complaint made to them of injury to person or injury to or destruction of property by any dog, upon satisfactory proof of such injury or destruction, to appoint three freeholders to ascertain the amount of damages done, including the necessary treatment, if any, and all reasonable expenses incurred, and upon the coming in of the report of such jury of the damages as aforesaid, the said county commissioners shall order the same paid out of any money arising out of the tax on dogs as provided for in this article . . ."

Speaking of the provisions of this statute, in the case of *McAlister v. Yancey County,* 212 N. C., 208, 193 S. E., 141, relating to sheep alleged to have been killed by a dog, this Court said: "If, as alleged in the complaint, the board of commissioners of Yancey County has arbitrarily refused to consider the claim of the plaintiff, and to hear proof of such claim, and determine whether or not such proof was satisfactory to said board, as it was its statutory duty to do, then and in that event the plaintiff can maintain an action against said board of commissioners for a writ of *mandamus* compelling the said board of commissioners to consider his claim, and determine whether or not his proof of said claim is satisfactory to the said board. See *Reed v. Farmer, supra; Barnes v. Comrs.,* 135 N. C., 27, 47 S. E., 737."

In like manner, if the plaintiff, as is alleged in the complaint in the present case, conceding for the moment that he has a clear right to so act, has made complaint to defendants as county commissioners of Johnston County and given to them "satisfactory proof" of the injury to William Joseph White, an infant, by a dog, the statute, C. S., 1681, makes it the duty of the said county commissioners "to appoint three freeholders to ascertain the amount of damages done, including the necessary treatment, if any, and all reasonable expenses incurred" by plaintiff as the result of such injury to and resulting in the death of his minor child, and upon their refusal to perform that duty, plaintiff can maintain an action against them for a writ of *mandamus.*

2. The authorities generally concur in support of the proposition that an individual may have a particular interest of his own in the performance of a statutory duty imposed on an officer or board, and that in such case he is the possessor of a separate and peculiar right which enables him to say that he is the party beneficially interested, and so entitles him to the writ of *mandamus.* 18 R. C. L., 327. Has the plaintiff in the case at bar such right?

From the allegation of expenses incurred by plaintiff "including the necessary treatment," admitted for the purpose of testing the sufficiency of the pleading, it is necessarily deducible as an inference of fact that some time elapsed between the injury to and death of plaintiff's child. Upon this allegation of fact, pertinent principles of law follow: It is elementary that a parent, primarily the father, as between the father and mother, nothing else appearing, is entitled to the services and earnings of his child during minority. See *Killian v. R. R.,* 128 N. C., 261, 38 S. E., 873; *Floyd v. R. R.,* 167 N. C., 55, 83 S. E., 12; *Daniel v. R. R.,* 171 N. C., 23, 86 S. E., 174.

On the other hand, the father is under the duty to support his child during minority, if he is able to do so. *Haglar v. McCombs,* 66 N. C., 346; *Williams v. R. R.,* 121 N. C., 512, 28 S. E., 367. See, also, *Floyd*

v. R. R., supra. Also, if the child should die during minority, it is the duty of the father to pay the funeral expenses. 46 C. J., 1278; *Hunycutt v. Thompson,* 159 N. C., 29, 74 S. E., 628.

If a minor child is injured by the wrongful act or omission of another, a cause of action arises under the common law on behalf of the child to recover damages for pain and suffering, permanent injury, and impairment of earning capacity after attaining majority. At the same time, the father ordinarily has a right of action for the loss of services of the child during minority and for other pecuniary damages sustained by him in consequence of such injury, including expenses of treatment. 46 C. J., 1294. See, also, *Killian v. R. R., supra; Rice v. R. R.,* 167 N. C., 1, 82 S. E., 1034; *Croom v. Murphy,* 179 N. C., 393, 102 S. E., 706; *Little v. Holmes,* 181 N. C., 413, 107 S. E., 577; *White v. Charlotte,* 212 N. C., 539, 193 S. E., 738.

The father's right of action in accordance with the generally accepted view is based not only upon the right to services of the child but also upon his duty to care for and maintain the child. 46 C. J., 1297.

However, if the child dies as a result of such wrongful act or omission of another, the right of action inuring to the benefit of the child as result of the injury abates, as does the right of action of the father for prospective earnings of the child during minority. The only action that lies thereafter in such case in this State for wrongful death is that authorized by C. S., 160, in favor of the administrator or executor. *Russell v. Steamboat Co.,* 126 N. C., 961, 36 S. E., 191; *Killian v. R. R., supra; Davis v. R. R.,* 136 N. C., 115, 48 S. E., 591; *Bolick v. R. R.,* 138 N. C., 370, 50 S. E., 689; *Hood v. Tel. Co.,* 162 N. C., 70, 77 S. E., 1096; *Hood v. Tel. Co.,* 162 N. C., 92, 77 S. E., 1094; *Hope v. Peterson,* 172 N. C., 869, 90 S. E., 141; *Hanes v. Utilities Co.,* 191 N. C., 13, 131 S. E., 402; *Brown v. R. R.,* 202 N. C., 256, 162 S. E., 613.

However, if death does not result instantaneously, the father may maintain an action to recover damages for the loss of services at least, of his minor child intermediate the injury and the death. *Croom v. Murphy, supra.* See discussion in *Hinnant v. Power Co.,* 189 N. C., 120, 126 S. E., 307. But this principle does not apply when death follows instantaneous the injury to the child. *Craig v. Lumber Co.,* 189 N. C., 137, 126 S. E., 312.

Applying these principles to the statute under consideration, C. S., 1681, in so far as applicable to a case of "injury to person" of a minor child, by a dog, resulting in the death of the child, these rights, limitations and remedies are given, limited and provided: While the right of action for the "amount of damage done" by "injury to person" is personal to and abates upon the death of the child, the father, under the clause "the amount of damage done, including the necessary treatment,

if any," administered in fulfillment of his parental duty, would be entitled to receive such amount of pecuniary loss sustained by him in consequence of the injury to the child during the period between the time of the injury and the death of the child, as is ascertained by the jury of three. Hence, the father has such personal and peculiar interest in the benefits provided by the statute as gives to him clear right to have the jury of three appointed for the purpose of ascertaining the amount due to him in accordance with the provisions of the statute. If there be claim for expenses subsequent to death of the child, it may only be asserted by the personal representative.

Whether plaintiff can make good his allegations is not before us, and with respect thereto we express no opinion. However, on facts alleged he is entitled to his day in court.

Reversed.

JOHNSTON COUNTY v. MRS. D. J. STEWART AND HUSBAND, D. J. STEWART (ORIGINAL PARTIES DEFENDANT), AND MRS. ALICE MOORE, EZRA PARKER, TRUSTEE, J. V. PENNY AND WIFE, NANCY C. PENNY, MRS. LULA JANE HODGES AND HUSBAND, W. E. HODGES, LOVIE D. PARKER, AND THE TOWN OF BENSON (ADDITIONAL PARTIES DEFENDANT).

(Filed 27 March, 1940.)

1. Parties § 10—

The court has the power to order additional parties made, even after judgment.

2. Taxation § 40b—

Owners of property or those having registered liens thereon are not bound by judgments in tax foreclosure suits in which they are not parties, and they are not barred by the judgment therein from asserting their rights in the property or from setting up defenses to the action, but they may be joined as parties upon motion even after sale by the commissioner under the decree of foreclosure.

3. Same—

In an action to foreclose a tax sale certificate, a description of the property as "4 lots lying and being in Banner Township, Johnston County," is insufficient in itself and does not refer to anything extrinsic which might render the description certain, and a demurrer to the complaint containing such description should have been sustained.

4. Pleadings § 23—

Where the Supreme Court holds that the demurrer to the complaint should have been sustained, the plaintiff may move for leave to amend in accordance with C. S., 515.

JOHNSTON COUNTY *v.* STEWART.

APPEAL by defendants, Ezra Parker, Trustee, and Lovie D. Parker, from *Grady, Emergency Judge,* at January Term, 1940, of JOHNSTON. Reversed.

Action was instituted by the county of Johnston against Mrs. D. J. Stewart and her husband, in 1930, to foreclose the lien evidenced by tax sale certificate, pursuant to sale for nonpayment of taxes for the year 1927, on land listed in the name of Mrs. D. J. Stewart, and described in the complaint as "4 town lots lying and being in Banner Township, Johnston County." Decree of foreclosure was entered, and the property sold by a commissioner, and purchased by the town of Benson for $360.00. The money was paid and deed made by commissioner to the town of Benson in February, 1932. In 1939, the town of Benson offered the property for sale, and the purchaser, upon tender of deed, declined to pay the purchase price, on the ground that at the time of the foreclosure suit instituted by the county of Johnston there were outstanding liens on the property and the lienors were not made parties to the suit. Thereupon motion was made in the original action in the name of the county of Johnston that certain lien-holders and other persons interested in the property be made parties, including appellants. Summons was accordingly served, and the appellants demurred to the complaint on the ground that it did not state a cause of action, in that the description of the property set out in the complaint was void for indefiniteness, and that no proper judgment affecting title to land could be predicated upon a void description. Other defenses were set up by the demurrer relating to matters not alleged in the complaint.

The court below overruled the demurrer, and defendants Ezra Parker and Lovie D. Parker appealed.

L. L. Levinson and J. R. Pool for plaintiff, appellee.
Parker & Lee and E. A. Parker for defendants, appellants.

DEVIN, J. The power of the court to order additional parties made even after judgment was recognized in *Daniel v. Bethell,* 167 N. C., 218, 83 S. E., 307.

Judgments in tax foreclosure suits to which the real owners of the property or those holding registered liens thereon are not made parties are not binding upon such owners and lienors, and they are not barred thereby from asserting their rights in the property or from setting up defenses to the action. *Beaufort County v. Mayo,* 207 N. C., 211, 176 S. E., 753; *Buncombe County v. Penland,* 206 N. C., 299, 173 S. E., 609; *Hill v. Street,* 215 N. C., 312, 1 S. E. (2d), 850. When the appellants were brought into the case by the service of summons, it was their first opportunity to be heard, and they had the right to set up any defect of

which they were advised in the original proceeding. This they have done by demurring to the complaint on the ground that the description of the property therein contained was too vague and indefinite to constitute the basis for a valid judgment. The only description of the property in the complaint is that "there was listed in the name of Mrs. D. J. Stewart the following described land: "4 lots lying and being in Banner Township, Johnston County." It is apparent that the description is neither sufficient in itself, nor capable of being reduced to a certainty by a recurrence to something extrinsic to which it refers. *Harris v. Woodard,* 130 N. C., 580, 41 S. E., 790; *Rexford v. Phillips,* 159 N. C., 213, 74 S. E., 337; *Speed v. Perry,* 167 N. C., 122, 83 S. E., 176; *Higdon v. Howell,* 167 N. C., 455, 83 S. E., 807; *Bissette v. Strickland,* 191 N. C., 260, 131 S. E., 655; *Bryson v. McCoy,* 194 N. C., 91, 138 S. E., 420; *Katz v. Daughtrey,* 198 N. C., 393, 151 S. E., 879; *Self Help Corp. v. Brinkley,* 215 N. C., 615, 2 S. E. (2d), 889; C. S., 992.

The demurrer should have been sustained, with right to the plaintiff to move for leave to amend in accordance with the provisions of C. S., 515. *Cody v. Hovey,* 216 N. C., 391; *Scott v. Harrison, ante,* 319.

The judgment overruling the demurrer in the respect herein pointed out is

Reversed.

STOKES BURLESON, FLORENCE LEDFORD, LAURA GREEN, FONZE GREEN, FLETA PITMAN, ODA BURLESON, FRANK BURLESON, FRED BURLESON, LUCY LEDFORD, NATHANIEL BURLESON, AND ..... BURLESON v. CONNIE BURLESON, W. G. VANCE, JEFFERSON WARD, AND THE NORTHWESTERN BANK.

(Filed 27 March, 1940.)

1. Pleadings § 16—Demurrer for misjoinder of parties and causes should have been sustained, all of defendants not being necessary parties to each of the several causes alleged.

Plaintiffs as heirs at law instituted this action to recover certain lands of their ancestor, alleging that their ancestor had executed two separate mortgages on separate tracts to different mortgagees, that both mortgages had been foreclosed after the right of foreclosure had been barred by the statute of limitations, that the purchaser at the foreclosure of one of the mortgages, the first defendant, had also taken possession of other of the ancestor's lands without any paper title, that the purchaser at the foreclosure of the other mortgage had conveyed same by quitclaim deed to another, the second defendant, who conveyed part of the lands to the third defendant who was also the mortgagee in the first named mortgage, and that the second defendant executed deed of trust on the part of the lands purchased by him and not conveyed to the third defendant, to the original mortgagor, which deed of trust was foreclosed and the land purchased

by the original mortgagor, the fourth defendant being the successor to the original mortgagor. *Held:* All of the defendants were not necessary parties to each of the several causes alleged, only the first defendant being a necessary party in the action to recover the land taken without any paper title, and only the first and third defendants being necessary parties in the controversy respecting the land foreclosed under one of the mortgages, only the second and third defendants being necessary parties in the controversy relating to part of the lands foreclosed under the other mortgage, and only the second and fourth defendants being necessary parties to the controversy relating to the balance of the lands foreclosed thereunder, and the demurrer of the third and fourth defendants on the ground of misjoinder of parties and causes should have been sustained.

2. Same—

Where there is a misjoinder of parties and causes of action a severance is not permissible and the action must be dismissed upon demurrer without prejudice to plaintiffs' rights to prosecute their several claims in separate actions against the various defendants, grouped according to their interest in the property.

APPEAL by defendants, W. G. Vance and The Northwestern Bank, from *Armstrong, J.*, at September Term, 1939, of MITCHELL. Reversed.

Civil action to remove cloud from title to real property; to have certain instruments purporting to be deeds declared null and void; and to recover possession of certain lands from the defendants.

The defendants W. G. Vance and The Northwestern Bank, in apt time, filed their written demurrer to the complaint on the grounds that there is a misjoinder of causes of action and a misjoinder of parties defendant.

Upon the hearing upon the demurrer the court overruled the same and entered judgment accordingly. The said defendants excepted and appealed.

Huskins & Wilson for plaintiffs, appellees.

W. C. Berry, Geo. L. Greene, and McBee & McBee for defendants, appellants.

BARNHILL, J. The plaintiffs are the heirs at law of Sherman Burleson, deceased, and as such are the owners as tenants in common of all lands of which he died seized and possessed. In the complaint the plaintiffs describe five separate tracts of land, four of which are located in Cane Creek Township and one in Grassy Creek Township, Mitchell County, and allege that they, as the heirs at law of Sherman Burleson, are the owners thereof.

The lands involved in the controversy between the defendant bank and plaintiff are located in Cane Creek Township. The lands involved in controversy between the plaintiffs and Jefferson Ward are likewise in

said township and the lands in controversy between the plaintiffs and W. G. Vance are in Grassy Creek Township.

It is alleged in the complaint that the first, second, third and fifth tracts therein described were conveyed by Sherman Burleson by mortgage to the Merchants & Farmers Bank. The date of the mortgage is not disclosed. It is further alleged that on 8 March, 1934, there was a foreclosure sale under the terms of the mortgage and foreclosure deed was executed to John C. McBee, Jr., 7 September, 1934; that the exercise of the power of sale occurred more than ten years after the maturity of the indebtedness and at a time when the power of sale was barred by the statute of limitations; that McBee purchased as agent of and for the mortgagee; that no consideration was paid; that he, at the request of the mortgagee, his principal, executed a quitclaim deed to the defendant Connie Burleson. It is further alleged that one George L. Green, acting for Merchants & Farmers Bank, procured Connie Burleson to execute a deed in trust on that property (presumably omitting the fifth tract) in behalf of Merchants & Farmers Bank; that thereafter Green, trustee, executed the power of sale and delivered a foreclosure deed to the Merchants & Farmers Bank; that all of said transactions constituted a maneuver on the part of Farmers & Merchants Bank, mortgagee, to purchase at its own sale and the said bank acquired no title thereto and its successor, the defendant Northwestern Bank, which by consolidation has succeeded to all the rights, duties and liabilities of the Merchants & Farmers Bank, is not the owner thereof.

As to the fifth tract, plaintiffs allege that Connie Burleson, subsequent to receiving the foreclosure deed from McBee, trustee, undertook to convey said tract to W. G. Vance, who has entered into possession thereof.

The complaint then alleges that Jefferson Ward is in possession of that portion of plaintiffs' land described as fourth tract; that he claims title through a foreclosure deed executed by W. G. Vance, mortgagee, under a mortgage from Sherman Burleson dated 12 March, 1926; that foreclosure sale was had at a time when the power of sale was barred by the lapse of time; and that the defendant Jefferson Ward acquired no title thereunder. It is likewise alleged that the defendant Jefferson Ward has taken possession of 40 acres of land outside the description contained in said mortgage.

Thus it appears that Jefferson Ward and W. G. Vance are in no wise interested in the controversy between the plaintiffs and the defendants Connie Burleson and Northwestern Bank as to the first, second and third tracts. Neither Jefferson Ward nor Northwestern Bank are necessary parties in the controversy respecting the fifth tract. The Northwestern Bank is not involved in any respect as to the title to the fourth or fifth tracts. As it is alleged that Jefferson Ward has taken possession of

forty acres without any apparent paper title thereto he alone is the necessary party in respect thereto.

From the foregoing facts it is made to appear there is a misjoinder both of parties and causes of action. The demurrer should have been sustained. *Shuford v. Yarborough,* 197 N. C., 150, 147 S. E., 824; *Bank v. Angelo,* 193 N. C., 576, 137 S. E., 705; *Lucas v. Bank,* 206 N. C., 909; *Wilkesboro v. Jordan,* 212 N. C., 197, 193 S. E., 155; *Vollers Co. v. Todd,* 212 N. C., 677, 194 S. E., 84; *Smith v. Land Bank,* 213 N. C., 343, 196 S. E., 481; *Holland v. Whittington,* 215 N. C., 330, 1 S. E. (2d), 813.

Where there is a misjoinder both of parties and causes of action a severance is not permissible. *Jones v. McKinnon,* 87 N. C., 294; *Cromartie v. Parker,* 121 N. C., 198; *Mitchell v. Mitchell,* 96 N. C., 14.

The action must be dismissed as to the demurring defendants without prejudice to the rights of the plaintiffs to prosecute their several claims in separate actions against the various defendants, grouped according to their interests in the property. *Roberts v. Mfg. Co.,* 181 N. C., 204, 106 S. E., 664; *Shore v. Holt,* 185 N. C., 312, 117 S. E., 165; *Weaver v. Kirby,* 186 N. C., 387, 119 S. E., 564; *Bickley v. Green,* 187 N. C., 772, 122 S. E., 847.

Reversed.

STATE v. E. H. KILLIAN.

(Filed 27 March, 1940.)

Bastards § 7—Prosecution must be instituted within three years from acknowledgment of paternity made within three years from date of birth of child.

In a prosecution against the reputed father for failure to maintain and support his illegitimate child, proceedings to determine the paternity of the child must be instituted within three years from the date of its birth, with the proviso that where the reputed father acknowledges paternity by making payments for the support of such child, prosecution may be instituted at any time within three years from the date of such payments made within three years from the date of birth, section 3, chapter 217, Public Laws of 1939, so that the greatest length of time that may elapse between the birth of the child and a prosecution to establish the paternity, even under the proviso of the statute is six years, and a prosecution is properly dismissed upon a special verdict establishing that the reputed father continuously supported the child for eight years and that such prosecution was not instituted until more than nine years after its birth.

STATE *v.* KILLIAN.

APPEAL by State from *Bobbitt, J.*, at November Term, 1939, of CATAWBA.

This is a proceeding upon a warrant charging defendant with the willful neglect and refusal to support his illegitimate child. The case was heard upon appeal by the defendant from the municipal court of the city of Hickory. A special verdict was rendered in which the essential facts found were as follows:

1. The child in question, Herman Hollander, was born 5 August, 1930.

2. The said Herman Hollander is the illegitimate child of the defendant E. H. Killian begotten by him upon the body of the prosecuting witness Mae Hollander.

3. The defendant paid the medical and other expenses of Mae Hollander incident to her confinement in connection with the birth of said child.

4. That upon the birth of said child and continuously thereafter until November, 1938, the defendant substantially and adequately provided for the support thereof.

5. Commencing in November, 1938, and continuously to the present time the defendant has willfully failed and refused to support and maintain said child.

6. That no prosecution or proceeding of any kind was instituted in any court until the issuance of the warrant herein on 30 September, 1939, relating either to the paternity of or the willful failure and refusal to support and maintain said child.

Upon the special verdict rendered the defendant was adjudged not guilty, and the State appealed, assigning error.

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

Hunter Martin for defendant.

SCHENCK, J. Under the provision of sec. 1, ch. 228, Public Laws 1933, as amended by sec. 2, ch. 217, Public Laws 1939, "Any parent who willfully neglects or who refuses to support and maintain his or her illegitimate child (fourteen years of age or under) shall be guilty of a misdemeanor. . . ."

Section 3 of chapter 217, Public Laws 1939, strikes out sec. 3, ch. 228, Public Laws 1933, and substitutes in lieu thereof the following: "Sec. 3. Proceedings under this act to establish the paternity of such child may be instituted at any time within three years next after the birth of the child, and not thereafter: Provided, however, that where the reputed father has acknowledged the paternity of the child by payments for the

support of such child within three years from the date of the birth thereof, and not later, then, in such case, prosecution may be brought under the provisions of this act within three years from the date of such acknowledgment of the paternity of such child by the reputed father thereof."

Under section 3 of chapter 228, Public Laws 1933, it was held in *S. v. Bradshaw,* 214 N. C., 5, that a judgment of not guilty was properly entered upon a special verdict which found that a proceeding against a reputed father for the willful neglect and refusal to support and maintain his illegitimate child was instituted more than three years after the birth of the child. This section, however, was definitely changed by sec. 3 of ch. 217, Public Laws 1939, which limited the application thereof to proceedings "to establish the paternity of such child," and added the proviso thereto.

In the case at bar it was necessary for the State to bring the facts within the proviso of section 3, chapter 217, Public Laws 1939, above quoted, since more than three years elapsed between the birth of the child in 1930 and the issuance of the warrant in 1939. In order to bring the facts within such proviso it was necessary to establish first, that the defendant acknowledged the paternity of the child by payments for the support thereof within three years of the date of its birth, and not later, and second, that the proceeding was brought within three years from the date of such acknowledgment made within three years of the birth of such child. The special verdict establishes the first requisite fact, but fails to establish the second, since the proceeding was not instituted until 30 September, 1939.

It would seem that six years is the greatest length of time which may elapse between the birth of an illegitimate child and the institution of a valid proceeding against its reputed father to establish the paternity of the child. Such a proceeding could be maintained by establishing that the reputed father acknowledged the paternity by making payments for the support of such child just three years after its birth, and that the proceeding was instituted just three years after the date of such acknowledgment. In the case at bar more than nine years elapsed between the birth of the illegitimate child and the institution of the proceeding.

The proceeding was properly dismissed upon the special verdict rendered.

No error.

ESSIE E. HYMAN AND HUSBAND, AARON HYMAN, v. NATHAN A. EDWARDS AND WIFE, EMMA R. EDWARDS; LILLIE E. COHEN (WIDOW); F. B. DANIELS, TRUSTEE; AND THE BANK OF WAYNE, TRUSTEE IN THE LIFE INSURANCE TRUST OF GEORGE K. FREEMAN, DECEASED.

(Filed 27 March, 1940.)

1. Partition § 4: Courts § 3—In proceedings for actual partition all orders are interlocutory until the decree of confirmation.

In a proceeding for partition in which actual partition is ordered, all orders are interlocutory until the decree of confirmation, and upon the hearing on the report of the commissioners, the clerk may confirm the report or set the same aside and order a sale, and the judge, on appeal, may reverse, modify or confirm the clerk's judgment or set aside the report and order a sale, even though another Superior Court judge had theretofore affirmed the clerk's order for actual partition, since the former order, being interlocutory, is not *res judicata* and is subject to be set aside or modified.

2. Same: Partition § 1: Appeal and Error § 2—

Since a tenant in common has the right to actual partition unless it is made to appear by satisfactory proof that actual partition cannot be made without injury to some or all of the parties interested, C. S., 3233, an order for sale for partition affects a substantial right, and an appeal will lie to the Supreme Court from such order entered by the judge on appeal from the clerk.

3. Appeal and Error § 2—

An order of the judge entered upon appeal from the clerk affirming the order of the clerk decreeing actual partition is an interlocutory order and is binding on the Supreme Court unless an error of law has been committed, and an appeal therefrom will be dismissed as premature.

APPEAL by petitioners from *Williams, J.*, at October Term, 1939, of WAYNE. Appeal dismissed.

Special proceeding to sell land for division in which the defendant Edwards, answering, alleged that the land was susceptible of actual partition and prayed that his interest be set apart for him in severalty.

When the petition came on to be heard before the clerk of the Superior Court of Wayne County the clerk found as a fact that the property described in the petition can be partitioned without injury to any of the parties interested. He thereupon entered his order directing an actual partition and appointing commissioners to make the division. The petitioners excepted and appealed.

When the appeal came on to be heard before the judge evidence was offered by the plaintiffs and the defendants. After hearing the evidence

and after viewing the premises the judge below affirmed the order of the clerk by entering his order finding as a fact "that the property as such can be partitioned without injury to the parties owning an interest therein" and decreeing an actual partition. The cause was then remanded to the clerk for further proceedings. The petitioners excepted and appealed to this Court.

Royall, Gosney & Smith and M. Jacob Markmann for plaintiffs, appellants.

J. Faison Thomson and Walter T. Britt for defendants, appellees.

BARNHILL, J. The defendants, other than Nathan A. Edwards and wife and Lillie E. Cohen, are joined as parties defendant by reason of their interest as lienors. The plaintiffs own a one-fourth interest in the property which consists of four brick buildings in the town of Goldsboro and the defendant Nathan A. Edwards now owns a three-fourths interest, he having purchased the interest of the defendant Lillie E. Cohen since the institution of the proceeding.

The defendants, contending that the order of Williams, J., was interlocutory from which no appeal lies, moved to dismiss the appeal as being premature.

All orders in a proceeding for the partition of land other than the decree of confirmation are interlocutory. *Navigation Co. v. Worrell,* 133 N. C., 93; *Telegraph Co. v. R. R.,* 83 N. C., 420; *Hendrick v. R. R.,* 98 N. C., 431; *Crocker v. Vann,* 192 N. C., 422, 135 S. E., 127.

Until the confirmation of the report in a special proceeding for partition the whole matter rests in the judgment of the clerk, subject to review by the judge, whose action is binding on us unless an error of law has been committed. *Taylor v. Carrow,* 156 N. C., 6, 72 S. E., 76. An order appointing commissioners is preliminary and interlocutory and the judgment of the judge affirming the clerk in ordering actual partition is not *res judicata* and is not appealable. *Navigation Co. v. Worrell, supra; Telegraph Co. v. R. R., supra; Hendrick v. R. R., supra.*

It is the decree of confirmation which is the final judgment. *Navigation Co. v. Worrell, supra; Taylor v. Carrow, supra; Crocker v. Vann, supra.*

The clerk may, upon the hearing on the report of the commissioners, confirm the report or set the same aside and order a sale. His judgment on appeal may be reviewed by the judge and reversed, modified or confirmed and the judge has the authority to set aside the report and order a sale. *Taylor v. Carrow, supra.* It makes no difference that the appeals may go up to different judges. The appeals are all from the

clerk to the judge of the Superior Court. The former judgments of the judge, being interlocutory, are subject to be set aside or modified by him or his successors. *Taylor v. Carrow, supra.*

Being better advised by the report of the commissioners the clerk, upon the motion for confirmation, or the judge on appeal, may find that the former order directing actual partition was impracticable and that a sale is essential to do justice between the parties. When the court has the information coming from disinterested commissioners appointed by the court it then, perhaps, can form a more satisfactory opinion as to the rights of the parties. *Taylor v. Carrow, supra.*

Likewise, it may be that upon the report of the commissioners appointed to make an actual partition the plaintiffs will be content with the allotment made. In any event, they should now note their exception and then challenge the inequity of the division made by exceptions to the report of the commissioners. Then the whole matter may come up on appeal from the final order, should the plaintiffs be dissatisfied therewith.

It is well to note that there is a distinction between orders directing an actual partition and orders directing a sale for partition.

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 unless it is made to appear by satisfactory proof that an actual partition of the land cannot be made without injury to some or all of the parties interested. C. S., 3233; *Windley v. Barrow,* 55 N. C., 66; *Holmes v. Holmes,* 55 N. C., 334; *Haddock v. Stocks,* 167 N. C., 70, 83 S. E., 9; *Foster v. Williams,* 182 N. C., 632, 109 S. E., 834; *Barber v. Barber,* 195 N. C., 711, 143 S. E., 469; *Talley v. Murchison,* 212 N. C., 205, 193 S. E., 148. Consequently, a decree denying the right to actual partition and ordering a sale affects a substantial right which is not again presented to the court for review by exceptions to the report of the commissioner appointed to make sale. This Court will entertain appeals therefrom. *Talley v. Murchison, supra; Trust Co. v. Watkins,* 215 N. C., 292, 1 S. E. (2d), 853; *Windley v. Barrow, supra; Trull v. Rice,* 85 N. C., 327; *Barber v. Barber, supra.*

The motion of the appellees to dismiss the appeal for that it is premature must be sustained.

Appeal dismissed.

STATE v. LEE FLYNN.

(Filed 27 March, 1940.)

1. Criminal Law § 80—

Where defendant, convicted of a capital felony, fails to file his case on appeal within the time allowed, the motion of the Attorney-General to docket and dismiss will be allowed when an examination of the record proper fails to disclose error. Rule of Practice in the Supreme Court, No. 17.

2. Criminal Law § 69—

Defendant's petition for *certiorari* denied for want of merit.

APPEAL by defendant from *Armstrong, J.*, at January Term, 1940, of McDOWELL. Judgment affirmed. Appeal dismissed.

Attorney-General McMullan for the State, appellee.
D. F. Giles for defendant, appellant.

PER CURIAM. Lee Flynn was tried at January Term, 1940, of McDowell Superior Court, on an indictment charging him with the murder of one Mae Flynn, was convicted of murder in the first degree, and judgment thereupon was entered that he suffer death by asphyxiation, as provided by law. From this judgment the defendant gave notice of appeal to the Supreme Court and was allowed the statutory time to make up and serve his case on appeal; but, as appears from the record, the appeal was not perfected.

The Attorney-General, as his duty requires, filed a motion in this Court to docket and dismiss the appeal under Rule 17 for the stated cause, and filed therewith a transcript of the case and certificate of the clerk of the Superior Court of McDowell County, setting forth the fact that no case on appeal has been filed in his office, and that the time allowed by the Court for perfecting the appeal has expired, and the same has not been perfected. *S. v. Stovall,* 214 N. C., 695, 200 S. E., 426; *S. v. Watson,* 208 N. C., 70, 179 S. E., 455. The defendant's petition for *certiorari* is denied for want of merit. The motion to dismiss the appeal must be allowed; but, as it is required to do by law in capital cases, this Court has diligently examined the record before it and, upon said record, finds no error.

The appeal is, therefore, dismissed. *S. v. Day,* 215 N. C., 566, 2 S. E. (2d), 569; *S. v. Young,* 216 N. C., 626.

Judgment affirmed. Appeal dismissed.

G. W. SMITH AND SUSAN SMITH v. LAND AND MINERAL COMPANY.

(Filed 10 April, 1940.)

1. Appeal and Error § 40a—

Where appellant's only exception is to the signing of the judgment and there is no request for findings of fact or exceptions to the facts found, it will be presumed that the court found all facts necessary to support the judgment.

2. Judgments § 4—Facts found held to support order refusing to set aside consent judgment.

A husband and wife instituted action against a mineral company to adjudicate their title to mineral interests in certain lands. Consent judgment was signed by the husband and by the attorneys for plaintiffs and defendant but was not signed by the wife, and check in settlement was made payable to the husband. The wife made motion in the cause to set aside the consent judgment on the ground that in fact she had not consented thereto, but did not contend that the judgment was obtained by fraud or through mutual mistake. The trial court found that in plaintiffs' written contract of employment of their attorneys, signed by both the husband and wife, the attorneys were empowered, among other things, to settle the action by compromise or consent, that the husband informed his wife of the receipt of the check in full settlement, that part of the sum was expended for her benefit and part invested, and that she had knowledge that the said sums were part of the proceeds of the consent judgment. *Held:* The findings support the court's holding that the wife consented to or ratified the consent judgment, and sustains its order refusing to set aside the judgment.

APPEAL by plaintiff Susan Smith from *Armstrong, J.*, at September Term, 1939, of MITCHELL. Affirmed.

Plaintiffs originally brought an action against the defendant in which plaintiffs prayed: "That they have judgment declaring them to be the owners in fee simple of the minerals in said land, and that the cloud cast upon their title by the claim of the defendant be removed," etc. Attorneys Huskins and Wilson signed the complaint, which was verified.

The defendant's prayer was: "That the plaintiffs recover nothing by reason of their said alleged causes of action, and that the defendant be declared the owner and entitled to possession of the mineral interest in that portion of the land and premises described in the complaint specifically claimed by the defendant as set forth in the answer herein." The answer was filed by attorneys Heazel, Shuford & Hartshorn and McBee & McBee. There was a consent judgment at July Term, 1937, which was signed by "G. W. Smith, Witness Carrie Bryant. Huskins & Wilson, Attorneys for Plaintiffs. Alfred S. Barnard, Geo. Shuford, W. C. Berry, McBee & McBee, Attorneys for Defendant."

Susan Smith made an affidavit and motion on 5 May, 1938, in the cause to set aside the judgment and, after setting forth certain facts, says: "Therefore, it is respectfully requested that your Honorable Court correct the great abuse and injustice that has been done this affiant by setting aside the judgment in which it is adjudged that the Land and Mineral Company is the owner of the lands and minerals described in the complaint and in the affidavit and motion filed herein, and the provision that the plaintiff pay the cost; that this action stand for trial in the Superior Court of Mitchell County according to the course and practice of the courts, and for such other and further relief as to the Court may seem just and proper. This 5th day of May, 1938."

The cause came on for hearing before Armstrong, J., who found certain facts, among others the following: "That following the entering of the consent judgment aforesaid, and on the same date the said Susan Smith was notified and advised by her husband that said consent judgment had been entered and the above entitled action compromised and settled, and she was advised of the terms of said judgment; that though said consent judgment was entered into during the last week of July, 1937, payment of the sum of $2,300.00 was not made until August 25, 1937. That on August 25, 1937, payment of the sum of $2,300.00 was made by the defendant to the attorneys of the plaintiffs, Messrs. Huskins and Wilson, and though the consent judgment provided that the plaintiffs should pay the costs, nevertheless the same was paid by the defendant, pursuant to an agreement entered into by said parties, said costs amounting to the sum of $353.50. That said J. Frank Huskins, one of the attorneys for the plaintiffs, after deducting his compensation for services rendered, paid to the plaintiffs, by check, the sum of $1,700.00, which check bore the notation, 'For full settlement of case G. W. Smith and wife, Susan Smith, *v.* Land and Mineral Company'; that said check was payable to the order of G. W. Smith, husband of said Susan Smith, who was attending to said litigation for and on behalf of himself and his wife, and said G. W. Smith advised his wife, Susan Smith, that said payment had been made, in full compromise and settlement of said action on the day that said payment was made. That with the knowledge and consent of said Susan Smith, a portion of said money has been expended for the benefit of said Susan Smith, for food and wearing apparel and living expenses, and the said Susan Smith has received and will receive the benefits from the money paid as aforesaid, and with her knowledge and consent a portion of the same has been invested in Government Bonds, while another portion has been held on deposit in a bank for the benefit of said G. W. Smith and wife, Susan Smith, and said Susan Smith has ratified said settlement and the completion thereof, and disposition of the proceeds made as aforesaid. That the said Susan

Smith made no objection to the terms of said consent judgment after she was advised of its contents, and prior to the payment of the sum agreed to be paid, nor did she make any objection to said judgment at any time until the filing of a motion to vacate the same on or about 5th day of May, 1938. That the plaintiffs have not offered to return to defendant the sum paid them, as hereinabove set forth. That by reason of the matters and things appearing to the court, the court is of the opinion that there is no merit in said motion to set aside said judgment, and the same does not appeal to the conscience of the court, and the court further finds that the defendant compromised and settled said action and consented to said judgment and paid the same in good faith. It is, therefore, ordered, adjudged and decreed by the court that the motion of the plaintiff Susan Smith to set aside said judgment be and the same hereby is denied, and the judgment heretofore entered at the July Term, 1937, is adjudged to be a solemn and binding judgment of this court, and binding in all respects on the plaintiffs G. W. Smith and wife, Susan Smith, and the defendant. This the 23rd day of September, 1939."

The following is the attorneys' contract of employment signed by plaintiffs and witnessed by Brown McKinney: "This agreement, made and entered into this 1st day of March, 1935, by and between G. W. Smith and wife, Hannah (signed Susan) Smith, of the first part, and R. W. Wilson and Frank Huskins, under the firm name of Huskins & Wilson, of the second part: WITNESSETH: That the said G. W. Smith and wife have employed the said Huskins and Wilson as Attorneys to represent them in removing a cloud from the mineral interest in a tract of land on the waters of Cane Creek, in Mitchell County, and which is described in the complaint in an action entitled, G. W. Smith and Susan Smith *v.* Land & Mineral Company, and to pay them for their services the said Parties of the First Part agree to pay to them a one-fourth interest in such mineral interests involved in case the Parties of the First part succeed in removing the cloud and procuring a clear title thereto, and they agree and bind themselves and their heirs that they will convey by deed as soon as a favorable judgment may be obtained, a one-fourth undivided interest therein, or in case of sale before judgment they will pay one-fourth of the sale price received for same and if leased thereafter and before conveyance they will pay one-fourth of the net royalties received upon any lease, of the property involved, and/or one-fourth of any damages recovered. And they hereby grant and authorize the said parties of the Second part to act for them in relation thereto and to bring any action they deem necessary in their name, and to settle same by judgment or compromise by consent. And the said Huskins & Wilson agree to render their best services, and bring the matter to as speedy termination as the court will permit. And in

case an unfavorable judgment to the parties of the First Part be rendered, the Parties of the First Part will owe them nothing for their services. The Parties of the First Part agree to furnish the necessary prosecution bond and evidence available for the prosecution and trial of the title to said lands. In Testimony Whereof, the said Parties of the First and Second Parts have hereunto set their hands and seals the day and year first above written."

The plaintiff, Susan Smith, excepted and assigned as error the signing of the judgment by Armstrong, Judge, overruling plaintiff Susan Smith's motion to set aside the consent judgment heretofore entered in the cause, and appealed to the Supreme Court.

Briggs & Atkins for plaintiff Susan Smith.

Heazel, Shuford & Hartshorn, McBee & McBee, and W. C. Berry for defendant.

CLARKSON, J. We do not think the exception and assignment of error made by Susan Smith, "to the signing of the judgment" by the court below, can be sustained. The plaintiff, Susan Smith, tendered no request for findings of fact and failed to except to any of the findings of fact set forth in the judgment. There is no allegation made by Susan Smith that the consent judgment was obtained by fraud or mutual mistake, but does charge that it was made without her consent. The court below found the facts fully upon which the judgment was based and among other things that Susan Smith received the benefit of a portion of the money and a portion was invested with her knowledge and consent. That she was advised of the consent judgment and ratified the settlement. She was advised by her husband, G. W. Smith, on the day the payment was made that it was "in full compromise and settlement" of the action.

In *Dennis v. Redmond,* 210 N. C., 780 (784), is the following: "The only exception and assignment of error made by plaintiff is 'to the foregoing judgment.' A case where the facts are similar in all respects to the present one is that of *Ingram v. Mortgage Co.,* 208 N. C., 329. At page 330 it is said: 'The first exception is to the judgment itself. This judgment is regular upon its face, and the facts found by the trial judge are sufficient to support the decree.' Consequently, the first exception must fail, *Warren v. Bottling Co.,* 207 N. C., 313; *Moreland v. Wamboldt, ante,* 35. The second exception is 'to the finding and signing of the order of the finding of facts. It is to be observed that the plaintiff requested no findings of facts and there is no specific exception to any particular finding of fact. Obviously, some of the findings of fact are necessary and beyond question. The Court is not endowed with the

gift of prophecy, and, therefore, is unable to determine which particular finding of fact is objectionable to the plaintiff. Hence, the second exception must likewise fail.'" *Bank v. Duke,* 187 N. C., 386; *Hickory v. Catawba County,* 206 N. C., 165 (170); *Moreland v. Wamboldt,* 208 N. C., 35 (36); *Ingram v. Mortgage Co.,* 208 N. C., 329 (330).

In *Gardiner v. May,* 172 N. C., 192 (194-5), citing many authorities, it is said: "Where parties solemnly consent that a certain judgment shall be entered on the record, it cannot be changed or altered, or set aside, without the consent of the parties to it, unless it appears, upon proper allegation and proof and a finding of the court, that it was obtained by fraud or mutual mistake, or that consent was not in fact given, which is practically the same thing, the burden being on the party attacking the judgment to show facts which will entitle him to relief."

In *Banking Co. v. Bank,* 211 N. C., 328 (329), citing many authorities, we find: "In a motion of this kind, where the correctness of the court's ruling is dependent upon facts *aliunde* or *dehors* the record, a request should be made that the facts be found, otherwise it will be presumed that they were determined in support of the judgment." *Cason v. Shute,* 211 N. C., 195; *Boucher v. Trust Co.,* 211 N. C., 377.

Do the facts support the judgment of the court below? We think so. The presumption is that they do. There is much evidence in the record to support the judgment to which no exception was taken and the court below found sufficient facts to justify a refusal to set the judgment aside.

We find in McIntosh, N. C. Prac. and Proc. (in Civil Cases), at p. 772: "Whether the consent of an attorney in the case is sufficient to bind the client in a consent judgment will depend upon the authority of such attorney; 'every agreement of counsel entered on record and coming within the scope of his authority must be binding on the client.' The authority of the attorney extends to all matters necessary to the protection and promotion of the rights of his client, but he has no authority to waive any of his substantial rights, nor to compromise the case without the consent of the client, and a consent judgment would be a final determination of the rights beyond the power of the attorney." *Bank v. McEwen,* 160 N. C., 411.

The court below had sufficient evidence on which to base the judgment rendered, including the authority given by Susan Smith to her attorneys, "And they hereby grant and authorize the said parties of the Second Part to act for them in relation thereto and to bring any action they deem necessary in their name, and *to settle same by judgment or compromise by consent.*"

The plaintiff gave her attorneys broad powers. From the record, the trouble seems to be not so much her consent and ratification of the judgment but from the fact that her attorneys made the check to her husband

(who does not repudiate his consent), but he has given her very little of the money which was a part of the compromise. Her husband had an inchoate right to curtesy and holds most of the proceeds of compromise which belongs to her, and which she should collect from him and not defendant, who has paid out its money in good faith.

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

Affirmed.

H. J. McCUNE v. RHODES-RHYNE MANUFACTURING COMPANY AND D. A. HOYLE.

(Filed 10 April, 1940.)

1. Appeal and Error § 38—

The burden is upon appellant to show error.

2. Constitutional Law § 6a—

A court has only that jurisdiction granted it by the Constitution and by statute, and it cannot acquire jurisdiction by waiver or consent, and objection to the jurisdiction may be taken at any time during the progress of the action. C. S., 518.

3. Pleadings § 14—

Demurrer *ore tenus* to the jurisdiction was made by the corporate defendant immediately after the jury was impaneled. The court reserved ruling thereon until after the close of all the evidence, when it sustained the demurrer. *Held:* Demurrer to the jurisdiction can be made at any time during the course of the trial, and the court correctly dismisses an action whenever it perceives that it has no jurisdiction thereof.

4. Appeal and Error § 40a—

Where the court does not find the facts and appellant makes no request therefor, it will be presumed on appeal that the court on proper evidence found facts sufficient to support the judgment.

5. Master and Servant § 36—

The contention that the Workmen's Compensation Act is unconstitutional for that it destroys the right of trial by jury is untenable.

6. Master and Servant § 49—Remedies under Compensation Act excludes the recovery of both actual and punitive damages at common law.

Where both the plaintiff and corporate defendant are presumed to have accepted the provisions of the Workmen's Compensation Act they are bound thereby, and the rights and remedies therein granted are exclusive, Public Laws of 1929, chapter 120, section 4, as amended by Public Laws of 1933, chapter 449, Michie's Code, 8081 (rr), and the contention that since the Compensation Act does not provide for the award of punitive damages, plaintiff had not waived his right to trial by jury on the issue of punitive damages, is untenable.

7. Same—

In this action by an employee against the employer and the employer's foreman to recover for alleged malicious and willful assault on plaintiff by the foreman in the course of the employment, judgment sustaining the demurrer of the corporate defendant to the jurisdiction of the Superior Court on the ground that the Industrial Commission has exclusive jurisdiction is upheld, it being presumed that the court found facts sufficient to support its judgment in the absence of findings or request therefor.

8. Same—

In an action by an employee against the employer and the employer's foreman for alleged joint tort, the action is properly dismissed as to the corporate defendant when it appears that the Industrial Commission has exclusive jurisdiction of its liability, and is properly retained as to the individual defendant, the right of action against the individual defendant remaining at common law in the Superior Court.

APPEAL by plaintiff from *Gwyn, J.*, at January Term, 1940, of LINCOLN.

Civil action to recover compensatory and punitive damages for alleged malicious and willful and wanton assault.

While plaintiff, in his complaint, sets forth allegations which he denominates as "his first cause of action" in which he prays actual damages, and "a second cause of action" in which he demands punitive damages, it is agreed by counsel for both the plaintiff and defendants, in stipulation filed as a part of the case on appeal, with the approval of the trial judge, that only one cause of action is alleged.

Plaintiff alleges substantially these facts: That on 7 March, 1939, defendant Rhodes-Rhyne Manufacturing Company, a corporation of this State with its principal place of business in Lincoln County, was operating a cotton mill; that plaintiff was then regularly employed as a weaver in the weave room, over which defendant D. A. Hoyle was foreman in said cotton mill; that while on said date plaintiff in the regular course of his employment was operating a loom, defendant D. A. Hoyle, while in discharge of his duties as such foreman, came upon plaintiff and "without provocation . . . cursed and abused plaintiff for the manner in which" he "was operating said loom, and in a violent, abusive and insulting manner informed plaintiff that he was fired and fully discharged from further service as an employee of his said codefendant, and, without warning or provocation" violently and in anger "grabbed plaintiff around the body and dragged and carried" him "to a nearby open doorway which provided an exit to the ground about six feet below . . . and in the struggle which plaintiff was making for his release and escape from his said violent and forcible ejectment and imminent peril both plaintiff and said D. A. Hoyle fell to the floor, with the result that plaintiff was painfully injured about his arms and shoulders

and suffered violent internal pains and distress, from which he suffered for several weeks thereafter."

That, as restated in paragraph one of second cause of action, "On said date of March 7, 1939, while employed as a weaver in the weave room of defendant Rhodes-Rhyne Manufacturing Company, plaintiff, without just cause or provocation, was suddenly beset and brutally assaulted by defendant D. A. Hoyle, foreman of said weave room, and who at said time was on duty as the agent, servant or factor of his said codefendant . . . that said Hoyle . . . was acting within the scope of his authority and line of duty"; that the said acts of defendant Hoyle were committed (a) for the purpose of intimidating the plaintiff, and coercing him to obey the orders of defendant, (b) "with malice and with willful and wanton disregard for the rights of plaintiff," and (c) while acting in the scope of his authority and line of duty as foreman of the weave room in cotton mill of defendant company.

Defendant, Rhodes-Rhyne Manufacturing Company, in answer filed, admits: That on 7 March, 1939, it was a corporation of and with principal place of business in North Carolina; that D. A. Hoyle was employed by it as a second hand or assistant to the foreman in its weave room; that for several years prior to such date plaintiff was employed as a weaver in its weave room; that on said date as it is informed and believes, upon defendant Hoyle, as such second hand or assistant to foreman, notifying plaintiff that he was discharged from further service as a weaver for defendant company, plaintiff denies Hoyle's authority to discharge him, and as a result thereof and of his refusal to leave the weave room and of words and acts of disrespect, insult and insubordination addressed by plaintiff to said Hoyle, in the presence of other employees in said room, a personal quarrel arose and a slight struggle or tussle ensued between plaintiff and Hoyle with the result that both fell to the floor.

The evidence introduced on the trial below is not contained in the case on appeal. However, in the judgment below it appears that when the case came on for trial, and after the jury was impaneled and the pleadings read, the defendant Rhodes-Rhyne Manufacturing Company, demurred *ore tenus* to the jurisdiction of the court for that the matters and things of which plaintiff complains, in so far as same relate to it, are within the exclusive jurisdiction of the North Carolina Industrial Commission. "Whereupon, in response to inquiry by counsel for said defendant, the plaintiff's counsel entered an admission in the record that at the time complained of said defendant was a textile manufacturer and had in its employment more than five employees, and the court, at the close of all the evidence in the cause, sustained the demurrer of the corporate defendant, Rhodes-Rhyne Manufacturing Company for that

any right which the plaintiff may have against the corporate defendant is governed by the Workmen's Compensation Act, and that the court has no jurisdiction of this case as it relates to the corporate defendant."

Plaintiff, reserving exception to the ruling of the court, took voluntary nonsuit as to defendant Hoyle, and, from judgment dismissing the action as to corporate defendant, appeals to Supreme Court and assigns error.

W. H. Childs and L. E. Rudisill for plaintiff, appellant.
Jonas & Jonas for defendant, appellee.

WINBORNE, J. Upon the record on this appeal appellant, having the burden to do so, has failed to show error in the judgment below.

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. There can be no waiver of jurisdiction over the subject matter, and objection may be made at any time during the progress of the action. C. S., 518; *Miller v. Roberts,* 212 N. C., 126, 193 S. E., 286; *Henderson County v. Smyth,* 216 N. C., 421, 5 S. E. (2d), 136; *Burroughs v. McNeill,* 22 N. C., 297, and numerous other decisions in this State.

It is stated in *Burroughs v. McNeill, supra,* that: "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."

In the present case it is noted that though the demurrer *ore tenus* to the jurisdiction of the Superior Court was made by defendant Rhodes-Rhyne Manufacturing Company on the trial below immediately after the jury was impaneled and the pleadings were read, the court deferred ruling thereon until "the close of all the evidence in the cause." In view of this fact, which is recited in the judgment, it is patent that the court acted upon the demurrer in the light of the factual situation as revealed by the evidence.

However, while the court adjudged that any right which plaintiff may have against the corporate defendant is governed by the Workmen's Compensation Act, the record does not show findings of fact upon which the judgment is based, nor does it appear that plaintiff requested the court to find the facts. In the absence of such findings and of request therefor, it is presumed that the court, upon proper evidence, found facts sufficient to support the judgment. *Lumber Co. v. Buhmann,* 160 N. C., 385, 75 S. E., 1008; *McLeod v. Gooch,* 162 N. C., 122, 78 S. E., 4; *Gardiner v. May,* 172 N. C., 192, 89 S. E., 955; *Mfg. Co. v. Lumber Co.,* 177 N. C., 404, 99 S. E., 104; *Holcomb v. Holcomb,* 192 N. C., 504, 135

S. E., 387; *Rutledge v. Fitzgerald,* 197 N. C., 163, 147 S. E., 816; *Comr. of Revenue v. Realty Co.,* 204 N. C., 123, 167 S. E., 563; *S. v. Harris,* 204 N. C., 422, 168 S. E., 498; *Powell v. Bladen County,* 206 N. C., 46, 173 S. E., 50; *Dunn v. Wilson,* 210 N. C., 493, 187 S. E., 802; *Banking Co. v. Bank,* 211 N. C., 328, 190 S. E., 472.

Plaintiff, however, contends that the Workmen's Compensation Act is unconstitutional for that it destroys the right of trial by jury. This challenge has been fully considered and denied in previous decisions of this Court. *Heavner v. Lincolnton,* 202 N. C., 400, 162 S. E., 909; appeal dismissed, 53 S. Ct., 4, 287 U. S., 672, 77 L. D., 579; *Hanks v. Utilities Co.,* 204 N. C., 155, 167 S. E., 560; *Lee v. Enka Corp.,* 212 N. C., 455, 193 S. E., 809.

Plaintiff further contends that the Workmen's Compensation Act having no provision for the award of punitive damages, plaintiff has not waived a right to trial by jury for the ascertainment thereof as against both defendants. For the purpose of considering this question, it is assumed from the judgment that the court below found as a fact that at the time of and with respect to the alleged injury to plaintiff, the relationship of employer and employee existed between defendant, Rhodes-Rhyne Manufacturing Company, and the plaintiff. Therefore, under the provisions of the North Carolina Workmen's Compensation Act, both the company and plaintiff, neither being in the excepted class as therein stated, are presumed to have accepted the provisions of the act and are bound thereby. *Pilley v. Cotton Mills,* 201 N. C., 426, 160 S. E., 479; *Hanks v. Utilities Co., supra; Miller v. Roberts, supra; Lee v. Enka Corp., supra; Murphy v. Enka Corp.,* 213 N. C., 218, 195 S. E., 536; *Tscheiller v. Weaving Co.,* 214 N. C., 449, 199 S. E., 623.

The act expressly provides that the rights and remedies granted to an employee who has accepted the provisions of the act to accept compensation on account of personal injury or death by accident, "shall exclude all other rights and remedies of such employee . . . as against his employer at common law, or otherwise, on account of such injury, loss of service, or death." Public Laws 1929, ch. 120, sec. 11, as amended by ch. 449, Public Laws 1933. Michie's Code of 1935, 8081 (r). This provision has been upheld by decisions of this Court. *Pilley v. Cotton Mills, supra; Lee v. Enka Corp., supra; Murphy v. Enka Corp., supra; Tscheiller v. Weaving Co., supra.*

Plaintiff further contends that the action being for an alleged joint tort, there is error in allowing the demurrer to jurisdiction as to corporate defendant and retaining the cause as to the individual defendant. This contention is answered in *Tscheiller v. Weaving Co., supra,* where the Court held that the Industrial Commission has exclusive jurisdiction of plaintiff's claim only against the employer, but that his right

against the individual defendant remains at common law in the Superior Court.

Other contentions of plaintiff are deemed untenable.

The judgment below is

Affirmed.

K. E. WOOD v. WOODBURY & PACE, INC.

(Filed 10 April, 1940.)

1. Appeal and Error § 40a—

The Supreme Court will not review conflicting affidavits in order to find a fact necessary to support a judgment, but in the absence of a request by appellant for findings of fact in the trial court, will presume that the court found the facts necessary to support its judgment.

2. Receivers § 9—Refusal of petition that receiver abandon property pledged and turn it over to secured creditor for liquidation, held not error.

The total assets of the insolvent corporation consisted of warehoused lumber, and the warehouse receipts had been pledged as security for loans. There was conflict in the allegations and affidavits as to whether any equity in the property existed over and above the secured debts for the benefit of general creditors. The court denied the petition of a secured creditor that the receiver abandon the property pledged to it and that it be allowed to liquidate same. *Held:* It will be presumed on appeal that the court found facts necessary to support its judgment, and the denial of the secured creditor's petition will not be disturbed.

3. Receivers §§ 12c, 14—Where receiver manages and sells pledged property, the proceeds of sale are chargeable with proportionate costs of receivership.

While it is the duty of a receiver to preserve priorities, and while priorities are unaffected by receivership, where the receiver manages, cares for and sells the pledged property for the benefit of the secured creditors, the cost of receivership, including the allowance to the receiver for his services, take precedence over the lien, and it is proper for the court to order that upon the sale of the pledged property by the receiver that he turn over 80% of the proceeds to the secured creditors and retain 20% to pay expenses of receivership allowed by the court, any balance remaining to be held subject to future orders.

APPEAL by Reconstruction Finance Corporation (hereinafter called RFC), creditor of defendant Woodbury & Pace, Inc., in receivership, from *Pless, J.*, at Chambers in Marion, 11 November, 1939. From YANCEY.

Whitlock, Dockery & Shaw for RFC, appellant.
Weaver & Miller for W. H. Woodbury, receiver, appellee.

SCHENCK, J. This is an appeal by a creditor from judgment of Pless, resident judge, authorizing and directing the receiver to sell and liquidate certain warehoused lumber, the warehouse receipts covering which had been pledged with RFC and three banks as security for certain debts.

RFC, appellant, contends that the court should have ordered the receiver to abandon the lumber and turn it over to it for liquidation, and in no event should the court have authorized or directed any expense to be paid out of the proceeds from the sale of the lumber.

The receiver, appellee, contends that the court correctly ordered the sale of the lumber for liquidation under the authority and supervision of the court, and that the proceeds from such sale should bear the direct and incidental expense of handling, selling and caring for said lumber.

The receiver was appointed and authorized to conduct the business of the defendant corporation, Woodbury & Pace, Inc., without objection from the appellant or anyone else. Thereafter, the receiver, by petition used as an affidavit, brought to the court's attention the following facts: (1) That since his appointment as receiver on 12 September, 1939, he had been unable to liquidate the assets of the defendant corporation. (2) That the sole assets of said corporation consist of lumber on hand and warehoused, and that the warehouse receipts on all of said lumber are held as collateral security by the RFC and three banks. (3) That the banks take the position that they want their warehouse receipts handled in the same manner as the receipts of the RFC are handled, and that the RFC takes the position that it will not release any of the warehouse receipts held by it until the indebtedness due it is paid in full, or unless the entire funds derived from the sale of any lumber covered by said receipts is turned directly over to it. (4) That without the warehouse receipts it is impossible to liquidate the lumber in the usual course of business, and that before the moneys received from the sale of lumber are turned over to the holders of the warehouse receipts certain charges and expenses must be paid, such as storage, insurance, transportation, bookkeeping and other administrative expenses. (5) That by reason of the foregoing the business of the defendant corporation is effectively stalemated and expenses are accumulating. (6) That if the lumber can be liquidated in the usual course of business there is reasonable grounds to believe that all of the secured creditors can be paid in full, and some amount realized for the unsecured creditors. (7) That upon a forced sale, or a sale of the lumber as a whole, an amount sufficient to pay the secured creditors would not be realized, and that the interest of the

secured as well as that of the unsecured creditors make it imperative that the receiver be authorized to sell the lumber in the normal course of business.

Upon the foregoing facts the receiver suggested two methods by which the sale of the lumber could be best handled with safety to the secured creditors, namely, (1) by an order requiring the holders of the warehouse receipts covering the lumber to deposit them with a custodian, where they could be immediately available to the receiver upon making sales of lumber, and as such sales were made the receiver could pay the expenses incident thereto, and administrative expenses authorized by the court, and remit the balance to the holders of the warehouse receipts, so that at no time the receiver would have on hand receipts or money in excess of his bond; or (2) in the event the holders of the warehouse receipts refused to deliver them to the receiver, or to the custodian, that the warehouse company be authorized and directed to deliver the lumber to the receiver, on court order, without presentation of receipts, and that the interest of the holders of the receipts be protected as above suggested.

The RFC filed answer and cross petition directly controverting only one material allegation of the receiver's petition, namely, that there is any equity in the lumber above the indebtedness due the creditors secured thereby; and requested that the RFC be permitted to proceed with the collateral to the loan it made to Woodbury & Pace, Inc., consisting of warehouse receipts for said lumber, as the owner thereof.

After hearing upon the petition of the receiver and the answer and cross petition of RFC, appellant, the court entered an order "That all of the warehouse receipts of the Lawrence Warehouse Company, of Chicago, Illinois, covering lumber stored in its field warehouse at Pensacola, N. C., belonging to Woodbury & Pace, Inc., or its receiver, W. H. Woodbury, be and the same are hereby impounded and the holders of said warehouse receipts, as pledgees, to wit: Reconstruction Finance Corporation, The Bank of Spruce Pine, Spruce Pine, N. C., and the receipts held by the Bank of Black Mountain, Black Mountain, N. C., for itself and its trustee for the Citizens Bank of Marshall, Marshall, N. C., individually and collectively, are authorized, ordered and directed to forward said receipts to First National Bank, Asheville, North Carolina.

"And it is further ordered that the lumber covered by said warehouse receipts is hereby authorized and directed to be released from said receipts by said Lawrence Warehouse Company upon there being exhibited to said Warehouse Company, or its representative, a statement by W. H. Woodbury, receiver of the subject defendant, showing sale at a price of not less than current New York market, as quoted

in the New York Lumber Journal, or that may be approved in writing by Mr. J. E. Fulghum, of Asheville, N. C.

". . .

"And be it further ordered that W. H. Woodbury, receiver, when he sells said lumber at the price, as hereinbefore determined, shall receive cash upon delivery of said lumber, or, if he sells the same on credit, the terms and credit risk thereof shall be approved by said W. H. Woodbury, receiver, and J. E. Fulghum, jointly, in writing.

"And be it further ordered that all moneys received from the sale of said lumber covered by said warehouse receipts . . . shall be held by the said W. H. Woodbury, receiver, and that from the moneys so received from the sale of said lumber, the said W. H. Woodbury, receiver, shall, within fifteen days after the funds covering the sale of said lumber are available, remit to the holders of the warehouse receipts . . . 80% of the net amount so received, covering the lumber sold who deposited them in accordance with this order.

"From the remaining 20%, payment of expenses in connection with the sale and receivership shall be made in accordance with the former orders of the court and the balance held by the receiver for future orders of the court.

". . .

"And it is further ordered and decreed that the funds received by said receiver from the proceeds of lumber sold, as hereinbefore ordered, shall retain their character as lumber and shall be subject to the pledge of the warehouse receipts formerly covering the same, in the same manner as if the said lumber had not been sold, and subject to this order and to further orders of the court."

To this order the RFC, appellant, excepted and appealed to the Supreme Court, assigning as error (1) the refusal of the court to grant RFC's motion that the receiver be directed to abandon any interest he might have in the collateral pledged as security to it, and (2) the impounding RFC's collateral and otherwise dealing with the same without making proper provision for the payment of the proceeds to such corporation.

The first question involved and presented in the appellant's brief is: "Did the court below err in not granting RFC's cross motion or petition requesting an abandonment by the receiver of his equity, if any, in the warehouse receipts pledged to it?"

The reason advanced for the first assignment of error is that there is no finding of fact with respect to whether any equity existed in the receiver in the lumber covered by the warehouse receipts pledged to RFC. It does not appear from the record that the appellant requested such a finding, and, under the decisions of this Court, where the correct-

ness of the court's ruling is dependent upon facts *aliunde* or *dehors* the record a request should be made that the facts be found, otherwise it will be presumed that they were determined in support of the judgment. *Banking Co. v. Bank,* 211 N. C., 328, and cases there cited. The allegations and affidavits in the record bearing upon the question of whether there was any equity in the receiver in the lumber covered by the warehouse receipts are conflicting, and "we do not consider affidavits for the purpose of finding facts ourselves," *Gardiner v. May,* 172 N. C., 192, since it is incumbent upon the appellant to request such findings below. *Holcombe v. Holcombe,* 192 N. C., 504; *Lumber Co. v. Buhmann,* 160 N. C., 385. This question must be answered in the negative.

The second question involved and presented in the appellant's brief is: "Did the court below err in signing the order of November 11, 1939, in (a) impounding RFC's pledged warehouse receipts and further dealing with the lumber covered thereby as is provided in said order, and (b) in providing for payment of expenses, etc., other than those benefiting RFC, from funds to be received from the sale of lumber covered by warehouse receipts pledged to RFC prior to payment in full of the obligation secured thereby?"

The lumber, covered by the warehouse receipts ordered impounded, constituted the entire assets of Woodbury & Pace, Inc., to come into the hands of the receiver, and the impounding of such receipts under the conditions fixed by the order made possible a practical way of handling said assets and enabled the receiver to continue the business of the corporation as a going concern, and at the same time protected the interest of those creditors whose debts were secured thereby, as well as the interest of the unsecured creditors.

That portion of the order providing for the payment of certain expenses from 20% of the amount derived from the sale of the lumber was in accord with the practice in this jurisdiction. While the general rule is that a receiver receives all property impressed with all existing rights and equities of creditors and that any liens remain unaffected by the receivership, and that it is as much the duty of the receiver to protect valid preferences and priorities as it is to make just distribution among general creditors, "there is no question but that a court of equity which has appointed a receiver to take charge of property and to care for and protect the same may decree the charges therefor as a prior claim and lien against the property paramount to all mortgages or other liens or encumbrances. The property becomes chargeable with the necessary expenses incurred taking care of and saving it, including the allowance to the receiver for his services. He is the officer and agent of the court and not of the parties; and it is a right of the court essential to its own efficiency in the protection of things so situated to keep them

under its control, until such expenses and allowances are paid or secured to be paid. Proper attorneys' fees, like other expenses of administration, take precedence over preëxisting liens on the funds; but they can be ascertained and allowed only by the court that appointed the receiver." 23 R. C. L., 109.

Ordinarily, it is the rule with us, when a receivership inures to his benefit, to hold that a lienholder should pay a fair share of the administrative expenses, where the receiver has managed, cared for and sold the encumbered property. *Kelly v. McLamb,* 182 N. C., 158; *Bank v. Country Club,* 208 N. C., 239.

The judgment of the Superior Court is

Affirmed.

CHARLES C. PARKS v. THE TOWN OF PRINCETON, A MUNICIPAL CORPORATION, WILBUR F. BARBOUR, DAVID OLIVE, AND BOB RAINS.

(Filed 10 April, 1940.)

1. Pleadings § 20—

In passing upon a demurrer the facts alleged in the complaint, and relevant inferences of fact necessarily deducible therefrom, will be taken as true.

2. Municipal Corporations § 12—Ordinarily, a municipality is not liable for tort committed in discharge of governmental function.

In the absence of statute subjecting it to liability, a municipality is not liable for torts committed by its officers and agents while performing a governmental function of the municipality or a duty imposed upon it solely for the public benefit, but it may be held liable for tortious acts of its officers or agents committed by them in the performance of their duties relating to an activity carried on by the municipality in its corporate character or in the exercise of powers for its own advantage.

3. Same—

In arresting and imprisoning a person, a municipal corporation is performing duties imposed upon it solely for the public benefit, and therefore it cannot be held liable for alleged negligence of its agents in imprisoning a person or in failing to search other prisoners for objects which might result in injury to the prisoner.

4. Same—

Art. XI, section 6, of the Constitution of North Carolina imposes liability on a municipality only for such injuries to prisoners as result from its failure to properly construct and furnish the prison to afford prisoners reasonable comfort and protection from suffering an injury to health.

5. Same—Held: Facts alleged failed to show causal connection between the construction and equipment of prison and injury to prisoner.

The complaint alleged that plaintiff was imprisoned in a cell in defendant municipality's prison which was without lights or toilet facilities,

that another prisoner in a drunken and violent condition was put in the same cell without searching him for articles that might result in injury to plaintiff, that a short while thereafter plaintiff became conscious and found himself wrapped in a blanket with an old and highly inflammable mattress on top of him, which was on fire, and that the other prisoner was astride of him holding him down, resulting in plaintiff's being severely burned to his great damage. *Held:* The facts alleged failed to disclose any causal connection between the alleged improper construction and equipment of the prison and the injury to plaintiff, and the demurrer of the municipality was properly sustained.

SEAWELL, J., dissents.

APPEAL by plaintiff from *Williams, J.*, at September Term, 1939, of JOHNSTON.

Civil action to recover for personal injuries allegedly resulting from negligence of defendant, heard upon demurrer of town of Princeton.

The plaintiff, in his amended complaint, alleges substantially these facts: (1) That on 8 May, 1938, the defendant, town of Princeton, as a municipal corporation, duly organized and existing under and by virtue of its charter and the general laws of the State applicable to such corporation, had in its employment as police officer the defendant, Bob Rains, "and had adopted and was enforcing certain laws and ordinances, a violation of which was to be drunk on its streets." (2) That on the night of said date "defendant Bob Rains, policeman as aforesaid, . . . while in the regular discharge of his duty as such," finding "the plaintiff near the edge of the sidewalk of one of its streets in an intoxicated and unconscious condition, . . . quiet and apparently asleep," with the assistance of another carried the plaintiff and placed him in the town prison which had theretofore been erected, and was then being maintained by the town. (3) That about a half hour later another person, much larger and stronger than plaintiff, who had been arrested "for drunken and disorderly conduct at a dance pavilion," and "who at the time was in an ugly, violent and dangerous mood," was put in prison with plaintiff by defendants, Barbour and Olive, deputy sheriffs, and said policeman, without having first searched him for matches or other things that might be used by him to injure the plaintiff, and then closed and locked the door and left without any provision of the plaintiff.

(4) That "in the structure, superintendence and maintenance" of said prison defendant town of Princeton was "guilty of gross continuing negligence" in respects substantially these: (a) In that said prison for white prisoners was a small, tight, boxlike room, seven by ten feet in size, in which the only means of light or ventilation is a 20-inch square opening, partially obstructed by bars, located in the upper part of the back wall and opening on an unlighted back lot; (b) in that said room was not lighted or equipped for lighting, electrically or otherwise,

although the town used electric lights on its streets, and same were available for installation and could easily have been installed therein; (c) in that said room was not provided with water, toilet and other conveniences for the comfort, protection and health of persons confined therein; (d) in that said room was not equipped with electric or other alarm device for use by persons confined therein in case of fire or other dangers originating therein; (e) in that the town failed "to give proper superintendence" to said prison, and permitted same to be supplied with an old cotton pad and cotton blanket, worn and frazzled, and in filthy and highly inflammable condition, as a result of which the room so constructed, equipped and maintained was a constant and continuing menace to the safety, comfort and health of any person confined therein; and (f) in that said town failed to provide a watchman to give alarm and protect prisoners therein, "which duty to so provide means for his protection, the defendant, the town of Princeton, owed to the plaintiff," all "in violation of its duty to the plaintiff under the provisions of Article XI, section 6, of the Constitution of the State and the laws made pursuant thereto."

(5) That a short time after said other person was locked in said prison with plaintiff, as above stated, "the old cotton pad and blanket was on fire, and when plaintiff became conscious the old blanket, which was on fire, was wrapped tightly around him and the old pad or mattress on the top of it and he was held down "by the other person astride of him," and as a result of which plaintiff was severely burned and injured to his great damage.

(6) "That the grossly negligent, careless, reckless, unlawful and wanton jointly tortious conduct of the defendants, as set out in the preceding paragraphs in violation of the duty they owed the plaintiff under the circumstances was the proximate cause of the plaintiff's injury as above set out, which was the joint and concurring cause of the plaintiff's injury."

Defendant, town of Princeton, demurs to the amended complaint for that it does not state facts sufficient to constitute a cause of action against said town in that:

"1. The alleged negligent acts of this defendant were governmental in their nature and were done in the exercise of judicial, discretionary or legislative authority, or in the discharge of a duty imposed solely for the benefit of the public.

"2. That the alleged negligence of this defendant is a conclusion of law and not facts; and

"3. That no alleged act of this defendant can, upon the face of the complaint, be held to constitute the proximate cause of any injury the plaintiff may have sustained."

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

Parker & Lee, Paul D. Grady, and W. H. Massey for plaintiff, appellant.

Ward, Stancil & Ward for defendants, appellees.

WINBORNE, J. Admitting the truth of the allegations of fact set forth in the complaint, as well as relevant inference of facts necessarily deducible therefrom, as we must do in testing the sufficiency of the complaint, challenged by demurrer, *Ins. Co. v. McCraw,* 215 N. C., 105, 1 S. E. (2d), 369, and numerous other cases, we are of opinion that the complaint fails to state a cause of action against defendant town of Princeton.

The decisions of this Court uniformly hold that in the absence of some statute which subjects it to liability therefor, a city and town, when acting in its corporate character, or in the exercise of powers for its own advantage, may be liable for the negligent acts of its officers and agents; but when acting in the exercise of police power, or judicial, discretionary, or legislative authority, conferred by its charter or by statute, and when discharging a duty imposed solely for the public benefit, it is not liable for the tortious acts of its officers and agents. *Moffitt v. Asheville,* 103 N. C., 237, 9 S. E., 695, 14 Am. St. Rep., 810; *Nichols v. Fountain,* 165 N. C., 166, 80 S. E., 1059, 52 L. R. A. (N. S.), 942, Ann. Cas., 1915-D, 152, 8 N. C. C. A., 872; *Hodges v. Charlotte,* 214 N. C., 737, 200 S. E., 889, and numerous other cases.

Applying these principles to the facts alleged in the complaint, the acts of the police officer with respect to the arrest and imprisonment of plaintiff, and to the arrest, search and imprisonment of the other person, pertain to the discharge of duties imposed solely for the public benefit, for which the town of Princeton is not liable.

But with regard to the prison, the Constitution of North Carolina, Article XI, sec. 6, provides that: "It shall be required, by competent legislation, that the structure and superintendence of penal institutions of the State, the county jails and city police prisoners, secure the health and comfort of the prisoners . . ."

The subject of the duty of a municipality in respect to its jails has been considered in several decisions of this Court: *Lewis v. Raleigh,* 77 N. C., 229; *Moffitt v. Asheville, supra; Shields v. Durham,* 116 N. C., 394, 21 S. E., 402; *S. c.,* 118 N. C., 450, 24 S. E., 794, 36 L. R. A., 293; *Coley v. Statesville,* 121 N. C., 301, 28 S. E., 482; *Hobbs v. Washington,* 168 N. C., 293, 84 S. E., 391; *Nichols v. Fountain, supra.* See, also, Annotation in 46 A. L. R., 94, at page 98.

In these decisions, the Court, recognizing and applying the general principal that a municipality is not liable for the acts of its officers done in performance of purely governmental powers for the benefit of the public, declares the settled rule in this State to be that a municipality is liable only for failure to properly construct the prison or to so furnish it as to afford to prisoners reasonable comfort and protection from suffering and injury to health.

The factual situation in the case of *Nichols v. Fountain, supra,* is very similar to that in the present case. There the Court held that the town was not liable.

In order to establish actionable negligence, "the plaintiff must show: First, that there has been a failure to exercise proper care in the performance of some legal duty which the defendant owed the plaintiff, under the circumstances in which they were placed; and second, that such negligent breach of duty was the proximate cause of the injury—a cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such result was probable under all the facts as they existed." *Whitt v. Rand,* 187 N. C., 805, 123 S. E., 84; *Ramsbottom v. R. R.,* 138 N. C., 39, 50 S. E., 448; *Templeton v. Kelley,* 215 N. C., 577, 2 S. E. (2d), 696.

In the light of these principles, if it be conceded that the prison of the town of Princeton is not properly constructed and properly equipped, the complaint fails to show any causal connection between such condition and the injury suffered by plaintiff.

The judgment below is

Affirmed.

SEAWELL, J., dissents.

TOWN OF CLAYTON AND STATE OF NORTH CAROLINA ON RELATION OF JOHN D. HENRY, v. N. CLYDE WALL, INDIVIDUALLY AND AS DELINQUENT TAX COLLECTOR OF TOWN OF CLAYTON, AND NATIONAL SURETY CORPORATION.

(Filed 10 April, 1940.)

1. Taxation § 34—

Ordinarily, the nonpayment of taxes is not a criminal offense, and if a delinquent tax collector arrests a person in order to enforce the payment of a delinquent tax, the tax collector is not acting under color of his office but is acting beyond his official authority and therefore in his individual capacity.

2. Principal and Surety § 5a—

The surety on a bond of a delinquent tax collector is not liable for an arrest made by the collector in order to force the payment of a delinquent tax, since such act of the tax collector is not done under color of his office and does not come within the condition of the bond that he should "well and truly perform all the duties of his said office."

3. Same—

The liability of the principal and surety on an official bond is to be determined by the language of the contract and cannot be enlarged beyond the scope of its definite terms, and the provision that the principal should "well and truly perform all the duties of his office" includes only acts done under *colore officii* and does not impose the obligation that the principal will commit no wrong nor do anything not authorized by law.

APPEAL by plaintiff from *Grady, Emergency Judge,* at January Term, 1940, of JOHNSTON.

Winfield H. Lyon and A. M. Noble for plaintiff, appellant.
Abell & Shepard for corporate defendant, appellee.

SCHENCK, J. This is an appeal by the plaintiff from judgment sustaining demurrer filed by the corporate defendant.

The complaint alleges that the individual defendant, N. Clyde Wall, was duly appointed by the governing body of the town of Clayton collector of delinquent taxes, and executed and filed his bond in the sum of one thousand dollars with the corporate defendant, the National Surety Corporation, as surety thereon; that said bond contained the following provision: "The condition of the foregoing obligation is such that if the said principal shall well and truly perform all the duties of his said office or position, and shall pay over and account for all funds coming into his hands by virtue of his said office or position as required by law, then this obligation shall be null and void, otherwise it shall be and remain in full force;" and further alleges that on 7 September, 1939, when said bond was in effect, the plaintiff was arrested by the individual defendant, without any warrant, on the public streets of Clayton in view of divers persons, and was unlawfully, wrongfully, purposely, willfully, wantonly and in a high-handed manner, restrained of his liberty, and forcibly made to accompany the individual defendant and the chief of police through the streets of Clayton to the city jail, and notwithstanding his pleas that he be released, the individual defendant wantonly and maliciously forced the plaintiff to enter one of the iron cells of the city jail, in which he was locked up, restrained of his liberty and confined, although he asked to know the cause of his detention and that he be given a prompt trial for any alleged offense, and that he be allowed to give bond; that the individual defendant failed and refused to state any

charge, or to show any warrant, or to allow any bond, or to have a speedy trial for any alleged offense; that later in the day of 7 September, 1939, the individual defendant informed the plaintiff that if he would promise to pay a stated amount from his pay checks received from the WPA projects he would be released and discharged; and "that while the plaintiff was confined in the said city jail and under the control and custody of the defendant herein, and while the said defendant was unlawfully and willfully exacting, demanding and coercing the plaintiff into paying an alleged debt, and in order to oppress, embarrass, coerce, extort and wrest from the plaintiff his salary to be earned and paid him in the future while working on WPA project, all of which is done by the said defendant, in order that he might collect a commission on taxes alleged to be due by the plaintiff; that the said defendant's conduct herein was not warranted by law, was done in a high-handed manner in violation of the duties and authorities conferred upon him and in violation of the duties of his said office and the terms of his bond, and thereupon he committed a breach of his bond."

The question presented for answer is: Does the complaint allege a breach of the condition of the bond, which reads: ". . . that if the said principal shall well and truly perform all the duties of his office or position." The answer is in the negative.

It cannot be held, even by a most liberal construction, that "the duties of his office or position" as delinquent tax collector authorized or contemplated that the individual defendant would or could arrest and imprison anyone in order to coerce the payment of taxes alleged to be due. Ordinarily, the nonpayment of taxes is not a criminal offense, and if a tax collector arrests and imprisons a tax delinquent in an effort to enforce payment of a tax he is not acting *colore officii,* but acting beyond his official authority and therefore in his individual capacity.

The cases of *Kivett v. Young,* 106 N. C., 567; *Warren v. Boyd,* 120 N. C., 56; and *Price v. Honeycutt,* 216 N. C., 270, relied upon by the appellant, are distinguishable from the case at bar in that in each of those cases the acts complained of were performed under color of office. In the *Kivett case, supra,* it was one of the official duties of the defendant, as register of deeds, to properly register all instruments filed with him for registration and his failure to do so was held to be a breach of the provision of the bond to "at all times truly and faithfully discharge the duties of his office." In the *Warren case, supra,* the defendant was a constable and it was held that an allegation that he illegally and without authority of law arrested and imprisoned the plaintiff was an allegation of a breach of his bond which provided for the "faithful discharge of all the duties devolving upon him as constable and according to law," since the acts of the constable in making the arrest and imprisoning the

plaintiff were "done by said official by virtue and under color of his office." Code 1883 (C. S., 354). In the case of *Price v. Honeycutt, supra,* it was held that the demurrer by the surety should have been overruled, since the allegation was that injury to the plaintiff was caused by a malicious and brutal assault upon him made by the individual defendant while making an arrest as sheriff, when the bond contained the clause prescribed for the official bond of a sheriff by C. S., 3930, namely, "and in all other things well and truly and faithfully execute the said office of sheriff during his continuance therein." This for the reason that the act of the defendant in making an arrest was within the scope of his official duties as sheriff. C. S., 354.

In the case at bar the alleged arrest and imprisonment of the plaintiff by the individual defendant were not acts within the scope of his authority or duties as a delinquent tax collector, but were acts entirely foreign to and beyond even any apparent power or right vested in him as such tax collector, and were not contemplated by the corporate defendant, the surety, when it executed the bond.

The condition of the bond as written does not impose on the surety the obligation that the principal should do no wrong and should in all respects observe the law. The phrase "well and truly perform all the duties of his said office or position" obviously refers to the duties incumbent upon him as delinquent tax collector. The principal and his surety are liable under a contract expressed in definite terms and their liability cannot be carried beyond the fair meaning of those terms. The clause only binds the principal affirmatively to the faithful performance of the duties of his office or position and does not cover the case of an abuse or usurpation of power. There are no negative words that the principal will commit no wrong nor do anything unauthorized by law.

The judgment of the Superior Court is

Affirmed.

PAUL W. BROWN v. MONTGOMERY WARD & COMPANY.

(Filed 10 April, 1940.)

1. Negligence § 4d—

The proprietor of a store is not an insurer of the safety of its patrons but is under duty to exercise due care to keep the premises in a reasonably safe condition and to give warning of any hidden peril.

2. Same—

In order to hold a store proprietor responsible for injury to a patron caused by some article or substance on the floor at a place where customers may be expected to walk, the customer must show that the pro-

prietor either placed or permitted the substance to be there, or knew or by the exercise of due care should have known of its presence in time to have removed the danger or given proper warning of its presence.

3. Evidence § 42d—

Plaintiff was injured when he slipped and fell on oil or grease on the floor near a washing machine on display as he was going towards his wife who was inspecting rugs in another part of the store. Plaintiff testified that after he fell, the rug salesman made a declaration to the effect that the oil was from the washing machine which was "leaking again." *Held:* The declaration was not a part of the *res gestæ* and the testimony should have been excluded as hearsay.

4. Appeal and Error § 39d—

The admission of incompetent testimony is rendered harmless by the later admission of testimony of the same import by another witness without objection.

5. Appeal and Error § 40e—

Where incompetent evidence is admitted in support of plaintiff's cause of action, the fact that had such evidence been excluded plaintiff might have offered competent evidence upon the point, will be considered by the Supreme Court in passing upon defendant's exception to the refusal of its motions for judgment of nonsuit.

6. Same: Negligence § 4d—Defendant held not entitled to nonsuit on this appeal from judgment in favor of customer injured in fall in store.

Plaintiff's evidence tended to show that while he was a customer in defendant's store, he slipped on oil or grease on the floor of an aisle and fell to his injury. Incompetent testimony of a declaration of defendant's rug salesman to the effect that the oil or grease came from a washing machine on display which was "leaking again," was admitted over objection. Defendant contended that the only evidence tending to show the source of the oil or grease or that it had been on the floor for a sufficient length of time to give defendant express or implied knowledge of its presence, was the incompetent testimony of the declaration, and that therefore it is entitled to judgment as of nonsuit. *Held:* There being testimony of another witness to the same declaration, admitted without objection, the testimony objected to was rendered harmless, and further, since plaintiff might have offered competent evidence of such fact had the incompetent testimony been excluded, defendant's contention cannot be sustained.

7. Negligence § 20—

An instruction on the issue of contributory negligence to the effect that plaintiff would not be entitled to recovery if his negligence was the proximate cause of the injury *held* for error in failing to charge on the question of concurring negligence that recovery would also be barred if plaintiff's negligence was one of the proximate causes of the injury.

APPEAL by defendant from *Gwyn, J.*, at January Term, 1940, of CATAWBA. New trial.

This was an action for damages for personal injury due to a fall in defendant's store, alleged to have been caused by defendant's negligence.

Plaintiff's evidence tended to show that about 1 p.m., 1 February, 1939, he and his wife were prospective customers in defendant's department store in the city of Hickory, on the second floor, in the furniture section. While plaintiff's wife was engaged with one of defendant's salesmen in examining some rugs, and plaintiff was looking at other articles in another part of the room, plaintiff started walking toward his wife in response to her call, when his foot slipped on some grease on the floor and he fell, sustaining injury. It was observed after his fall that there was grease or oil on the floor covering a space of ten or twelve inches, and that the grease appeared to be coming from underneath a washing machine located on a small platform six inches from the floor. The grease or oil appeared to be dripping from the washing machine on to the platform and running off on the floor, forming a puddle. The place was not well lighted and plaintiff did not see the grease on the floor before he fell. Over objection of defendant, plaintiff was permitted to testify that shortly after he fell he heard defendant's salesman, head of rug or furniture department, speaking of the grease on the floor, say, "It is the washer leaking again."

Defendant's evidence tended to show that there had been no grease or oil or other substance on the floor immediately before plaintiff fell, and that after he was discovered to have fallen there was, at the spot, kerosene oil on the floor; that there was also found at the same time kerosene oil on the wringer post of the washing machine, whence it had run down to the platform, but nothing to show where the oil had come from; that no kerosene was used or kept on or about the washing machine, or in that department; that the heavy packing oil in the washing machine was not fluid enough to run or drip, and was enclosed in the casing of the machine, bolted and sealed, with no crack or seam. The washing machine was new and was being exhibited for sale. The place was well lighted. Plaintiff previously had been employed by defendant in one of its stores in another state.

Issues of negligence, contributory negligence and damage were answered by the jury in favor of the plaintiff. From judgment on the verdict, defendant appealed.

Whitlock, Dockery & Shaw for plaintiff, appellee.
Theodore F. Cummings for defendant, appellant.

DEVIN, J. The duty of proprietors of buildings with respect to invitees on their premises has been frequently stated in the decisions of this Court (*Bowden v. Kress,* 198 N. C., 559, 152 S. E., 625; *Anderson v. Amusement Co.,* 213 N. C., 130, 195 S. E., 386), and in those of other jurisdictions (*Kresge v. Fader,* 116 Ohio St., 718, 58 A. L. R.,

132). The concensus of these authorities is that the occupant of premises to which others are invited to come for business or pleasure owes to such persons the duty to exercise due care to keep the premises in a reasonably safe condition and to give warning of any hidden peril. The proprietor, however, is not an insurer of safety, and, when claim is made on account of injury caused by some article or substance on the floor along and upon which customers may be expected to walk, in order to justify recovery it must be made to appear that the proprietor either placed or permitted the harmful substance to be there, or that he knew or by the exercise of due care should have known of its presence in time to have removed the danger or given proper warning of its presence. *Fox v. Tea Co.,* 209 N. C., 115, 182 S. E., 662; *Cooke v. Tea Co.,* 204 N. C., 495, 168 S. E., 679; *Parker v. Tea Co.,* 201 N. C., 691, 161 S. E., 209; *Robinson v. Woolworth,* 80 Mont., 431. As was said in *Cummings v. R. R., ante,* 127, "There must be legal evidence of every material fact necessary to support the verdict."

In the instant case the appellant urges the view that its motion for judgment of nonsuit should have been allowed, for the reason that plaintiff's evidence fails to show the source of the grease or oil, either that it was put there by defendant or that it had been on the floor at the place where plaintiff fell for a sufficient length of time to constitute evidence of knowledge of its presence on the part of defendant, and that the only material evidence on this point was the plaintiff's testimony as to the declaration of one of defendant's salesmen to the effect that the grease came from the washing machine which was "leaking again." Defendant insists that this evidence was incompetent, as being the declaration of an agent after the event, and that defendant's objection thereto should have been sustained and the evidence excluded from consideration.

We concur in the defendant's view that this testimony was incompetent and that objection thereto should have been sustained. The declaration of this salesman, who was the salesman in charge of the rug and furniture department and at the time engaged in showing rugs to plaintiff's wife, was made after the plaintiff's fall and did not constitute part of the *res gestæ.* The testimony objected to was hearsay and incompetent. *Hubbard v. R. R.,* 203 N. C., 675, 166 S. E., 802; *Staley v. Park,* 202 N. C., 155, 162 S. E., 202; *Batchelor v. R. R.,* 196 N. C., 84, 144 S. E., 542; *Young v. Stewart,* 191 N. C., 297, 131 S. E., 735; *Nance v. R. R.,* 189 N. C., 638, 127 S. E., 635; *Queen v. Ins. Co.,* 177 N. C., 34, 97 S. E., 741; 76 A. L. R., 1132; *Smith v. R. R.,* 68 N. C., 107; 20 Am. Jur., 571.

The defendant further contends that the elimination of this testimony would entitle it to have its motion for judgment of nonsuit allowed. But we cannot reach that conclusion for two reasons: (1) another wit-

ness later testified without objection to the same declaration, thus rendering harmless the error complained of (*Wolfe v. Smith,* 215 N. C., 286, 1 S. E. [2d], 815), and (2) it has been several times held with us that where a plaintiff's case depends upon incompetent testimony which has been erroneously admitted, this Court will consider the fact that if the court below had excluded the testimony, the plaintiff might have offered other competent evidence of the fact. This was the ruling in *Morgan v. Benefit Society,* 167 N. C., 262, 83 S. E., 439, and *Midgett v. Nelson,* 212 N. C., 41, 192 S. E., 854, where new trials were awarded and nonsuit denied.

The defendant assigns as error a portion of the judge's charge on the issue of contributory negligence. The court charged the jury as follows: "The court charges you, that if the defendant has satisfied you from the evidence, and by its greater weight—the burden being upon the defendant—that the plaintiff, on the occasion in question was negligent, and that such negligence on the part of the plaintiff was the proximate cause of his injury and damage, then, upon such finding by the greater weight of the evidence, it would be your duty to answer the second issue yes. But, if the defendant has failed to so satisfy you, it will be your duty to answer the issue No."

The vice of this instruction is that it omits the essential element of concurring negligence, as pointed out in *Wright v. Grocery Co.,* 210 N. C., 462, 187 S. E., 564, where a new trial was awarded for a similar error.

For the errors pointed out, there must be a

New trial.

MRS. NETTIE M. ABERNETHY v. J. H. ARMBURST, EXECUTOR OF MRS. W. L. ABERNETHY.

(Filed 10 April, 1940.)

1. Judgments § 35—

This action was instituted by a husband and wife against an executrix to recover for personal services rendered to the testatrix under contract. The executrix pleaded as an estoppel a prior judgment rendered in an action instituted by testatrix against the husband and wife. *Held:* The record in the prior action was properly admitted in evidence, and is the only evidence competent to prove its content.

2. Judgments § 32—Prior judgment held to bar subsequent action, it appearing that both actions were based upon same contract and that rights of parties thereunder had been adjudicated.

A husband and wife instituted an action against an executrix alleging that they had boarded and cared for testatrix under an agreement with

testatrix that in return therefor she would permit them to occupy part of her house, furnish lights and water and further compensate them in money out of the proceeds of a contemplated sale of a certain parcel of land. The executrix pleaded in bar a judgment entered in an action instituted by testatrix a year prior to her death under which the husband and wife were ejected from the premises upon adjudication that they had breached their contract to care for testatrix and were therefore no longer entitled to occupy the premises. The husband took a voluntary nonsuit and the action against the executrix was prosecuted by the wife. *Held:* Although the prior action was in ejectment, it adjudicated the existence of the contract and that plaintiff had breached same and therefore the judgment bars the second action and precludes the *feme* plaintiff from seeking to recover on the same contract which a jury had theretofore found had been breached by her.

APPEAL by plaintiff, Nettie M. Abernethy (plaintiff R. O. Abernethy having submitted to a voluntary nonsuit), from *Bobbitt, J.,* at November Term, 1939, of CATAWBA. Affirmed.

Civil action to recover compensation for personal services rendered defendant's testatrix. Plaintiffs allege, and offer evidence tending to show, that on or about 7 June, 1935, they entered into a contract with the defendant's testatrix under the terms of which they were to move to and occupy a part of the residence of the deceased and have access to certain other portions thereof in consideration of the agreement on their part to pay the grocery bills of the deceased and to render such care, attention and assistance as one in her physical condition required, and that the deceased would further compensate them in money when she received funds from the contemplated sale of a parcel of land adjoining her residence lot.

The defendant admits an agreement between the plaintiffs and his testatrix under the terms of which, as he alleges, plaintiffs were to have the right to occupy a certain portion of the home of his testatrix, in return for such care, attention and assistance from the plaintiffs as the condition of the deceased might reasonably require, the said deceased to provide water and lights.

The defendant further pleads that the matters and things herein at issue have heretofore been adjudicated in an action instituted by Mrs. W. L. Abernethy, now deceased, against these plaintiffs, tried at the May Term, 1939, Catawba County Superior Court.

The defendant offered in evidence the judgment roll in the former action and at the conclusion of all the evidence the court below entered judgment allowing defendant's plea of *res judicata* and dismissing the action. The plaintiff excepted and appealed.

W. A. Self and M. H. Yount for plaintiff, appellant.
Theodore F. Cummings for defendant, appellee.

BARNHILL, J. There was no error in the admission of the judgment roll in the former action. Defendant's testatrix was the party plaintiff therein and these plaintiffs were the parties defendant. The record in the former action being in existence is the only evidence admissible to prove its contents. *Gauldin v. Madison,* 179 N. C., 461, 102 S. E., 851; *Little v. Bost,* 208 N. C., 762, 182 S. E., 448; *Gibson v. Gordon,* 213 N. C., 666, 197 S. E., 135; *Whitaker v. Garren,* 167 N. C., 658, 83 S. E., 759; *Bruton v. Light Co., ante,* 1.

The former action was an action in ejectment to recover from these plaintiffs possession of that portion of the house occupied by them under the contract set forth in this complaint upon the allegation that these plaintiffs had breached the contract. In that action these plaintiffs demanded a bill of particulars in respect to the terms and conditions of the contract, the breach of which was alleged. In response to this demand defendant's testatrix, plaintiff therein, filed the following: "Mrs. W. L. Abernethy was to furnish to Mr. and Mrs. R. O. Abernethy, house, water and lights in consideration of said Abernethys' furnishing to Mrs. W. L. Abernethy board and care."

At the trial of said cause in the Superior Court the jury, by its verdict, found as a fact that there was a contract as alleged by the plaintiff therein; that the defendants therein (plaintiffs herein) had breached said contract; and that the plaintiff therein (defendant's testatrix) was entitled to the immediate possession of said premises. These plaintiffs removed from said premises after a writ of possession had been issued in that action and an officer had called to their attention the fact that he had said writ for service.

The plaintiff R. O. Abernethy having submitted to a voluntary nonsuit, became a witness for the plaintiff Nettie M. Abernethy for the purpose, in part, of proving the contract. He testified: "Let me explain. I testified in that case and I swore to exactly the same state of facts that I have sworn to here today, as near as I can recall. There should not be any difference in my testimony that I have given today and the testimony given in that case. It is as near the same as any human being can tell it. Upon that the issue (as to) the contract were answered adversely to me and to my wife. My wife and I did not appeal from the judgment rendered in that case. Upon that verdict and the judgment is what this order (the writ of possession) was issued upon."

While the former action was an action in ejectment and for the possession of real property, the plaintiff therein was entitled to possession only in the event that the plaintiffs herein had breached their contract to furnish food and care for the plaintiff therein, a paralytic, now deceased. The judgment roll in that case and the evidence offered by the plaintiff

herein show conclusively that the issue as to what the contract was between these plaintiffs and the defendant's testatrix was fully litigated. It was further found as a fact by the jury that these plaintiffs breached the contract about 12 months before the death of defendant's testatrix. The *feme* plaintiff seeks now to again litigate these issues and to recover compensation for services under a contract which a jury has heretofore found was breached by her. This may not be permitted. She has had her day in court and must abide by the judgment rendered. As it was adjudged in the former action that she has breached the contract she may not now recover thereon in this action.

The judgment below is

Affirmed.

SPEIGHT BOX & PANEL COMPANY, A CORPORATION, v. C. F. IPOCK AND E. R. IPOCK.

(Filed 10 April, 1940.)

1. Claim and Delivery § 16—

A surety on a replevin bond, within the limits of his obligation, is a party to the action and, if the bond is properly executed by him, is bound by the judgment against the principal and may not deny liability on the merits of the original controversy and therefore, except in case of fraud, the proper procedure to challenge his liability on the ground that he did not in fact sign the bond is by motion in the cause.

2. Same—Held: It was error for the trial court to sign final judgment against surety prior to determination of surety's motion in the cause.

During the hearing on the referee's report in an action in claim and delivery, the surety on defendant's replevin bond made motion that his name be stricken therefrom upon his contention that he did not in fact sign same. The issue was submitted to the jury, which found that the surety did not in fact sign the bond. The court set aside the verdict and, upon the conclusion of the hearing, rendered judgment against the defendant and the surety. *Held:* While the court had the power to set aside the verdict, the surety's motion was still pending, and although a surety is not ordinarily prejudiced prior to the rendition of judgment, it was error for the court to sign final judgment prior to the determination of his motion.

3. Appeal and Error § 2—

The appeal of the surety on a replevin bond from final judgment entered against him and his principal prior to the determination of the surety's motion that his name be stricken from the bond on the ground that in fact he did not sign same, *is held* not premature, since the final judgment would preclude the surety from thereafter litigating the question.

PANEL CO. *v.* IPOCK.

MOTION in the cause by C. D. Heath, alleged surety on replevin bond of defendants, before *Hamilton, Special Judge,* at October Term, 1939, of CRAVEN. New trial.

Plaintiff instituted the action to recover possession of certain personal property conveyed by mortgage to the plaintiff. A writ of claim and delivery was issued and the defendants filed a replevin bond. The name of C. D. Heath appears thereon as surety.

The cause was referred and upon the report of the referee at the October Term, 1939, the judge proceeded to hear the exceptions to the referee's report. During the hearing, Heath, having been advised that his name appeared upon the replevin bond as a surety for the defendant, filed a motion that his name be stricken from the defendant's undertaking, which motion was supported by an affidavit that he never signed or authorized the signing of said bond.

The said Heath, by consent, was permitted to file the motion in the cause pending the hearing and the court suspended proceedings upon the referee's report to submit to a jury the issue raised by the motion. After hearing the evidence and the charge of the court the jury answered the issue submitted finding that Heath did not sign the bond.

After the rendition of the verdict, the court, in the exercise of its discretion, set the verdict aside and, upon the completion of the hearing upon the referee's report, rendered judgment against the defendants and the said Heath. Heath excepted and appealed.

R. E. Whitehurst for plaintiff, appellee.
W. B. R. Guion for C. D. Heath, appellant.

BARNHILL, J. The plaintiff is entitled to a judgment against the sureties on the defendant's undertaking according to the terms of the instrument, to be recovered in the original action. The sureties, within the limits of their obligation, are considered parties of record, and the defendants their principals. *McDonald v. McBryde,* 117 N. C., 125, 23 S. E., 103; *Wallace v. Robinson,* 185 N. C., 530, 117 S. E., 508; *Trust Co. v. Hayes,* 191 N. C., 542, 132 S. E., 466; *Long v. Meares,* 196 N. C., 211, 145 S. E., 7. It is upon this theory that judgment against the sureties is rendered in the original action to the end that the whole controversy may be adjusted at once.

Ordinarily, the sureties are not prejudiced until judgment is rendered. Except in case of fraud, *Wallace v. Robinson, supra,* a surety upon a replevin bond may challenge his liability for that he did not in fact sign the bond, or for other cause, by motion in the original action. *Long v. Meares, supra; Nimocks v. Pope,* 117 N. C., 315. But if he signed the bond he may not deny liability on the merits of the original contro-

versy. He is bound even by a judgment consented to by defendants. *Nimocks v. Pope, supra; Wallace v. Robinson, supra; Long v. Meares, supra.*

The movant was permitted to appear in the original action and to file a motion to strike his name from the replevin bond for the reason he never signed or authorized the signing of the same prior to judgment. The issue raised by the motion was submitted to a jury upon the evidence offered and was answered in his favor. The court, as it had a right to do, set the verdict aside. But in so doing it did not order a new trial on the issue. Instead, it proceeded to judgment not only against the principals but against the appellant as well. This was done notwithstanding the fact that the issue raised by the motion was still pending and undetermined.

The movant is liable upon the judgment rendered only in the event that he signed the replevin bond or authorized someone else so to do in his name, place and stead. He has raised, by proper procedure, an issue as to his liability upon the judgment rendered. The court was without authority to hear and determine the facts in respect thereto. Even if it be conceded that the motion was prematurely made judgment has now been entered and the court adjudged his liability while his motion was pending. A substantial right is thereby affected and if the judgment is affirmed as against him, upon the present record, he may be precluded hereafter from litigating the question presented.

The appellant is entitled to his day in court and upon the issue raised he is entitled to a trial by jury. If it shall be determined that he in fact signed the bond, then the plaintiff is entitled to judgment against him as against the principals. Under the circumstances presented on this record we are of the opinion that his appeal from the judgment to which he duly excepted is not premature.

As to C. D. Heath, on the question of his suretyship upon the bond, there must be a

New trial.

M. M. RICKMAN v. R. J. HOLSHOUSER AND R. J. HIGGINBOTHAM, TRADING AND DOING BUSINESS AS MOORESVILLE IRON WORKS.

(Filed 10 April, 1940.)

Assignments § 2—

An assignment by an employee of wages earned and due him by the employer is valid without acceptance by the employer, and the assignee may sue the employer thereon, C. S., 446, the provision of chapter 410, Public Laws of 1935, being applicable only to wages to be earned in the future.

KEEN *v.* PARKER.

APPEAL by defendants from *Gwyn, J.*, at November Term, 1939, of IREDELL. Affirmed.

Action to recover $5.50 wages due one of defendant's employees which had been assigned by him to the plaintiff. From judgment for plaintiff on agreed statement of facts, defendants appealed.

W. C. Coughenhour and R. Lee Wright for plaintiff.
Walter H. Woodson for defendants.

DEVIN, J. The right of the assignee of a chose in action arising out of contract to sue therefor in his own name has been declared by statute (C. S., 446), and has been upheld in numerous decisions of this Court. *Fertilizer Works v. Newbern,* 210 N. C., 9, 185 S. E., 471; *Horne-Wilson, Inc., v. Wiggins Bros., Inc.,* 203 N. C., 85, 164 S. E., 365; *Trust Co. v. Williams,* 201 N. C., 464, 160 S. E., 484; *Craig v. Stewart,* 163 N. C., 531, 79 S. E., 100; *Vaughan v. Davenport,* 159 N. C., 369, 74 S. E., 967; *Harris v. Burwell,* 65 N. C., 584.

The contention of defendants that the assignment of wages by an employee is invalid unless accepted in writing by the employer, as provided by ch. 410, Public Laws 1935, cannot avail, since that act applies only to assignments of wages to be earned in the future. Here it is agreed that the amount sued for is based upon the assignment of wages already earned and due by the defendants to the assignor. The fact that another instrument executed by the employee refers to wages to become due is immaterial.

The judgment below is
Affirmed.

ROSELLA KEEN AND HUSBAND, P. G. KEEN, AND VANCY BELLE BLACKMON, V. D. T. PARKER AND WIFE, ALICE PARKER, T. H. SANSEM, TRUSTEE, AND N. M. JOHNSON, TRADING AS THE JOHNSON COTTON COMPANY, AND BESSIE JOHNSON.

(Filed 10 April, 1940.)

1. Ejectment § 9—

In ejectment plaintiff may not rely upon the weakness of defendant's title, but has the burden of pleading and proving title good against the world, or good against the defendant by estoppel.

2. Same—

Plaintiff in ejectment may connect defendant with a common source of title and show in himself a better title from that source.

3. Judgments § 1—

A consent judgment is the contract of the parties entered upon the records with the approval and sanction of a court of competent jurisdiction, and its provisions cannot be modified or set aside without consent of the parties except for fraud or mistake.

4. Judgments § 4—

The procedure to set aside a consent judgment for fraud or mistake is by independent action.

5. Judgments § 2—

It is not required that the provision of a consent judgment be predicated upon issues raised by the pleadings, it being sufficient if the court has general jurisdiction of the subject matter of the agreement of the parties. C. S., 593, as amended by chapter 92, Public Laws, Extra Session, 1921.

6. Same: Partition § 4—Consent judgment in partition that life tenant was owner in fee of property upheld upon facts in this case.

The owners of land executed deed to their three daughters as tenants in common, reserving a life estate. The life tenants and two of the remaindermen instituted partition proceedings for actual partition and the third remainderman sought sale for partition. Actual partition was ordered. Defendants, the third remainderman and her husband, excepted to the report of the commissioners and prayed for a redivision or a sale for partition. Thereupon judgment was entered by consent of all the parties which provided that the male life tenant should be the owner in fee of the property and that it should be charged with a lien in a specified sum in favor of each of the remaindermen. *Held:* The clerk of the court had general jurisdiction of the subject matter of the consent judgment and same is binding upon the parties, since the clerk has jurisdiction of proceedings for actual partition or for public or private sale for partition, and upon issue of title being raised, to enter a consent judgment relating thereto, certainly after transfer of the cause to the civil issue docket, and even if it be conceded in the present action that he had no jurisdiction to adjudicate title, the consent judgment amounted in effect to a private sale for partition over which he had jurisdiction.

7. Judgments § 1—

Where a judgment recites that it is entered by consent of all the parties, but is signed only by the attorneys for the respective parties, naming them, it will be presumed, nothing else appearing, that the attorneys had authority to sign same, and the judgment is binding upon the parties and those standing in privity to them.

8. Ejectment §§ 12, 13—

In an action in ejectment, matters in the nature of an estoppel *in pais*, whether relied upon affirmatively or by way of defense, must be pleaded, and in the absence of a specific plea, evidence of estoppel by conduct is incompetent.

9. Same—

In an action in ejectment evidence impeaching an alleged title deed is competent under a general denial.

10. Same—

Where the deed to plaintiff contains an agreement under which plaintiff assumed a prior mortgage on the land, defendant, claiming under *mesne* conveyances from the purchaser at the foreclosure sale of the mortgage, may rely upon the debt assumption agreement to estop plaintiff from denying the validity of the mortgage, even though the estoppel is not specifically pleaded, since the evidence is in derogation of the title asserted by plaintiff.

11. Mortgages § 23b: Estoppel § 1—

Where a grantee in a deed assumes the payment of a debt secured by mortgage or deed of trust on the land conveyed he thereby becomes the principal debtor and is estopped to deny that the mortgage or deed of trust is valid.

APPEAL by plaintiffs from *Parker, J.*, at February Term, 1939, of JOHNSTON.

Civil action in ejectment and to remove cloud upon title.

Plaintiffs allege: In first cause of action: That they are owners and entitled to possession of two certain tracts of land in Ingrams Township, Johnston County, described in and conveyed by a deed dated 13 March, 1925, duly registered, from J. M. Blackmon and wife, Phereby Blackmon, to the plaintiffs Rosella Keen and Vancy B. Blackmon, and Oza D. Smith, in which life estates are reserved to J. M. Blackmon and Phereby Blackmon, both of whom are now dead; and that by deed dated 1 December, 1938, Oza D. Smith conveyed her interest in said land to the plaintiff Rosella Keen.

In second cause of action: That on 3 December, 1934, defendants N. M. Johnson and wife, Bessie Johnson, executed a deed which is duly recorded and purports to convey said lands in fee to defendant D. T. Parker, who on the same day executed a deed of trust, duly registered, to defendant T. H. Sansem, trustee for defendant N. M. Johnson, trading as Johnson Cotton Company; that said deed and deed of trust are cloud upon the title of the plaintiffs for that they create no estate for longer period than the duration of said life estates.

All defendants except D. T. Parker and wife filed answer and deny title of plaintiffs alleged in the first cause of action, and, while admitting the execution of the deed and deed of trust, as alleged in the second cause of action, deny that same are clouds upon the title of plaintiffs.

And for a further defense to both causes of action alleged in the complaint, defendants aver in substance that: In a special proceeding instituted 24 January, 1928, in Superior Court of Johnston County, entitled "J. M. Blackmon and wife, Phereby E. Blackmon, Rosella (Blackmon) Keen and husband, P. G. Keen, and Vancy B. Blackmon *v.* Oza D. (Blackmon) Smith and husband, Ira Smith," a petition, sub-

scribed by Marion Lee, as attorney for petitioners and verified by Vancy B. Blackmon, was filed alleging that J. M. Blackmon and wife, Phereby, have a life estate and Rosella Blackmon Keen, Oza D. Blackmon Smith and Vancy B. Blackmon, one-third each in and to said land, and praying for partition of said lands into three equal shares; that on 27 February, 1928, an answer subscribed by Parker & Martin, as attorneys for defendants, and verified by defendant Oza D. Smith, was filed in which it is averred that said lands cannot be divided without serious injury to all parties, and especially the defendants, and that same should be sold for partition; that if actually divided, the defendants would own only about 16⅔ acres, which would be subject to the life estate of J. M. Blackmon and wife, Phereby, and would be of practically no value; and a sale would be to the advantage and best interest of all concerned; that on 12 May, 1928, the defendant therein, Oza D. (Blackmon) Smith, filed exceptions to the report of the commissioners appointed to make the partition of the lands described in the petition and prayed the court to set aside division as made and order a re-division, or that the interest of the parties in the lands be sold as prayed for in her original answer; and that on 26 May, 1928, "by consent of all the parties" evidenced by the signatures of J. Ira Lee and Marion Lee, by J. Ira Lee, attorneys for the plaintiffs, naming them, and of James D. Parker, attorney for the defendants, naming them, the clerk of Superior Court entered judgment in said special proceeding in which it is adjudged and decreed:

"1. That the report of commissioners heretofore appointed in this cause to make partition of the remainder interest in the said lands be and the same is hereby set aside.

"2. That J. M. Blackmon is declared the owner in fee simple of the lands described in said petition.

"3. That the said plaintiff J. M. Blackmon is indebted to the plaintiff Vancy B. Blackmon in the sum of $162.46, together with interest on the same at the rate of six per cent per annum from January 12, 1926, and that the same is a specific lien on the lands described in the petition in this cause.

"4. That the plaintiff is indebted to the defendant Ira Smith in the sum of $162.46, together with interest on the same from January 12, 1926, until paid, and that the same is a specific lien on the lands described in the petition in this cause.

"5. That the plaintiff is indebted to the defendant Ira Smith in the further sum of $387.50, together with interest on the same from January 1, 1928, and that the same is a specific lien on the lands described in the petition in this cause, and that $224.00 of said amount is for debt assumed by the plaintiff, J. M. Blackmon, the same being indebtedness due by his said daughter, Rosella B. Keen, over and above the amount which

he has assumed for either one of his other two daughters in consideration of the adjudication herein made that he is the owner of the remainder interest in the lands described in the petition in this cause, which interest was heretofore conveyed to his said daughters, Rosella Blackmon Keen, Vancy B. Blackmon and Oza D. Blackmon Smith, as tenants in common."

6. That J. M. Blackmon shall pay the costs of this action; and

7. That upon certificate by the clerk to the register of deeds the deed from J. M. Blackmon and wife to Rosella Blackmon Keen, Vancy B. Blackmon and Oza D. Blackmon Smith, which is recorded in Book 170, p. 40, "be marked on the margin thereof as set aside and canceled by this judgment."

Defendants further aver "that plaintiffs Rosella Keen and husband, P. G. Keen, and Vancy Belle Blackmon are precluded and estopped from asserting any rights to" the said land, and "plead such estoppel against the plaintiffs." (2) That on 29 August, 1928, pursuant to the consent judgment the register of deeds of Johnston County canceled of record the deed from J. M. Blackmon and wife, Phereby Blackmon, to Rosella Keen, Oza D. Blackmon and Vancy B. Blackmon. (3) That the defendants N. M. Johnson and wife, Bessie Johnson, in defense of the warranty contained in their deed to defendants D. T. Parker and wife, Alice Parker, referred to in plaintiffs' second cause of action, aver that since the rendition of the said consent judgment in said special proceeding title to said lands has passed to them by and through these conveyances: (a) Warranty deed from J. M. Blackmon and wife to M. F. Holly, dated 21 August, 1928, duly registered 5 September, 1928; (b) deed of trust from M. F. Holly and wife to Raleigh Savings Bank & Trust Co., Trustee, securing note of $1,500 due to Atlantic Joint Stock Land Bank of Raleigh, dated 26 September, 1928, duly registered 26 September, 1928, in Book 230, at p. 4; (c) deed of foreclosure from North Carolina Bank & Trust Co., Trustee, successor of the Raleigh Savings Bank & Trust Company, Trustee, and James P. Lee to Atlantic Joint Stock Land Bank, dated 10 October, 1928, duly registered 31 October, 1932; and (d) deed from Atlantic Joint Stock Land Bank to N. M. Johnson, dated 31 October, 1932, which contains covenants of seizin, of right to convey, against encumbrance, and general warranty—all of which are by reference made a part of the answer.

Plaintiffs in reply admit the averments as to judgment roll in the special proceeding, but deny that they are estopped by the consent judgment therein for that they allege said judgment, as entered, is "void for that the court had no jurisdiction of the matters attempted to be adjudicated and settled in said judgment, particularly paragraph two of said judgment declaring the plaintiff J. M. Blackmon to be owner in fee

simple of the lands described in said petition, as there was no such allegation or admission in the pleadings"; and that there was no allegation or admission in the pleadings upon which to base that part of the judgment providing for cancellation of the deed, and the court was without jurisdiction of the subject matter, and, hence, the judgment with respect thereto is therefore void; and deny that they are estopped by said judgment; and that they were advised by attorneys at the time that said judgment "did not change the status of the property and if the said grantees in said deed from J. M. Blackmon and wife to plaintiffs in this action desired the remainder interest of said property in the said J. M. Blackmon and wife, it would be necessary for them to execute deeds for that purpose, which was never done."

While plaintiffs in reply further admit the entry of cancellation made by the register of deeds as averred by defendants, they deny that such entry has the force and effect of cancellation of the deed, and allege that entry was notice to subsequent purchasers and others dealing with respect to said land that the entry was based upon the said special proceeding and was constructive notice to them that the judgment in said special proceeding is void for lack of jurisdiction; and that in dealing with said property subsequent grantees took the conveyances with notice that J. M. Blackmon and wife, Phereby E. Blackmon, could convey only an estate for the duration of their lives. Plaintiffs further say in reply that the title acquired by N. M. Johnson was only during the lives of J. M. Blackmon and wife, Phereby E. Blackmon.

Upon the trial below it was stipulated that summons in this action, with complaint, was duly served on defendants D. T. Parker and wife on 2 January, 1939, and on other defendants on 5 January, 1939; that J. M. Blackmon is the common source of title asserted by plaintiffs and by defendants to the land in question and that same are the lands described in the various instruments in evidence.

Plaintiffs introduced in evidence records of the deeds referred to in the first cause of action set forth in their complaint, and testimony tending to show that both J. M. Blackmon and his wife, Phereby Blackmon, are dead; and for the purpose of attack: (1) Record of the deed and deed of trust referred to in the second cause of action set forth in their complaint, (2) record of the special proceeding entitled "J. M. Blackmon *et al. v.* Oza D. Smith," referred to in the answer and in the reply; and (3) record of the entry of cancellation of deed of date 13 March, 1925, from J. M. Blackmon and wife to Rosella Keen, Oza D. Smith and Vancy B. Blackmon.

Defendants, who filed answer, introduced in evidence the judgment roll in said special proceeding and record of said deeds in fee simple form and of said deed of trust purporting to convey the land in question

as averred in the further answer, as follows: (a) Deed from J. M. Blackmon and wife to M. F. Holly; (b) deed of trust from M. F. Holly and wife to Raleigh Savings Bank & Trust Co., Trustee, to secure note of $1,500 due Atlantic Joint Stock Land Bank; (c) deed of foreclosure from North Carolina Bank & Trust Company, Trustee, successor of Raleigh Savings Bank & Trust Company, Trustee, to Atlantic Joint Stock Land Bank; (d) deed from Atlantic Joint Stock Land Bank to N. M. Johnson; and (e) deed from N. M. Johnson and wife to D. T. Parker, dated 3 December, 1934, and duly registered.

Defendant, for the purpose of proving estoppel against Vancy B. Blackmon, then offered: (1) Deed from M. F. Holly and wife to J. M. Blackmon, dated 26 September, 1928, in fee simple form, registered, and purporting to convey the lands in question. Exception. (2) Deed in like form from J. M. Blackmon and wife to Vancy Belle Blackmon dated 1 November, 1928, duly registered, purporting to convey said lands in fee simple, reserving to grantors life estates therein, which deed contains the following provision: "The said Vancy Belle Blackmon, grantee herein, assumes the payment of an amortization mortgage, which was obtained by M. F. Holly and wife, from the Atlantic Joint Stock Land Bank of Raleigh, dated 1 September, 1928, of record in the registry of Johnston County, in Book 230, at page 4, in the sum of $1,500.00, and payable in semi-annual installments of $52.50 each, due on September 1, and March first of each year for a period of 33 years." (3) Mortgage deed from P. G. Keen and wife, Rosella Keen, to Ira C. Smith, dated 12 January, 1926, conveying an undivided ⅓ interest in said lands as security for a note for $387.50, due 1 January, 1937—Exception—and the marginal record of the mortgage deed showing cancellation by register of deeds upon the original instrument, together with the note secured thereby, marked paid and satisfied by the mortgagee, being exhibited on 29 September, 1928. (4) Mortgage deed from Vancy Belle Blackmon to Ira C. Smith dated 12 January, 1926, duly registered, and conveying ⅓ undivided interest in said lands as security for a note of $165.00, due 1 January, 1927, showing marginal record of cancellation on 28 January, 1938, in the manner last above set forth.

Defendant further offered oral uncontradicted testimony of the witnesses, M. F. Holly and Claude C. Cannady, tending to show that M. F. Holly took title to the lands in controversy from J. M. Blackmon and wife for the sole purpose of obtaining a loan from the Atlantic Joint Stock Land Bank with which "to pay off the then existing indebtedness against said lands"; that he procured the loan of $1,500; that out of the proceeds of the loan Ira Smith was given $596.23, 22 September, 1928, in payment of the mortgage from Rosella Keen and husband to him for $387.50, and judgment against J. M. Blackmon, and $521.81

was paid to J. W. Sanders in satisfaction of a mortgage from Vancy Belle Blackmon to him; that a few days after securing the loan, M. F. Holly and his wife, who did not profit by the transaction, reconveyed the land to J. M. Blackmon; and that Mrs. Rosella Keen and Vancy B. Blackmon knew what Holly was doing and "approved of his acts in reference to all transactions thereto."

Defendant, having reserved exception to refusal to grant motion for judgment as of nonsuit at the close of plaintiffs' evidence, renewed motion at close of all the evidence. From judgment allowing same, plaintiffs appeal to Supreme Court and assign error.

Ezra Parker for plaintiffs, appellants.
I. R. Williams for defendants, appellees.

WINBORNE, J. These are the decisive questions on this appeal:

1. Where it appears upon the face of the record that, in a special proceeding for partition of remainder in land subject to life estates, instituted by some of the remaindermen, including a married woman and her husband, with whom the life tenants join, as petitioners, against the other remaindermen, a married woman and her husband, as defendants, no issue of fact as to the respective interests of the parties being raised by the pleading, the clerk of Superior Court enters a judgment recited to be "by consent of all parties," but only signed by counsel for petitioners, naming them, and by counsel for defendants, naming them, adjudging the life tenant to be the owner in fee simple of the land, charged with the lien of specific sums of money payable to or for the remaindermen, respectively, payment of which the life tenant assumes in consideration of such adjudication, nothing else appearing, is the judgment as a matter of law *res judicata* of the rights of the remaindermen in and to the land?

2. In an action for the recovery of land, may estoppel by conduct or *in pais* be invoked as a matter of defense without special and specific plea?

3. Is the grantee in a deed, who assumes payment of mortgage on the land, estopped to deny the validity of the mortgage? If so, may such estoppel be invoked in an action in ejectment without special plea?

We are of opinion that the first and third questions, as well as the question following the latter, are properly answerable in the affirmative, but that the second should be answered "No."

In an action for the recovery of land plaintiff must rely upon the strength of his own title, and not upon the weakness of that of his adversary. To recover in such action plaintiff must show title good against the world, or good against the defendant by estoppel. Plaintiff must

assume the burden of allegation as well as of proof. *Mobley v. Griffin,* 104 N. C., 112, 10 S. E., 142; *Rumbough v. Sackett,* 141 N. C., 495, 54 S. E., 421; *Shelly v. Grainger,* 204 N. C., 488, 168 S. E., 736; *Carson v. Jenkins,* 206 N. C., 475, 174 S. E., 271. See, also, *Prevatt v. Harrelson,* 132 N. C., 250, 43 S. E., 800; *Moore v. Miller,* 179 N. C., 396, 102 S. E., 627.

A *prima facie* showing of title may be made by either of several methods. By one of these plaintiff may connect the defendant with a common source of title and show in himself a better title from that source. *Mobley v. Griffin, supra.*

1. In the present action, it being admitted that both plaintiffs and defendants claim under a common source of title, plaintiffs elect to show in themselves a better title from that source. The controversy in the main involves the question as to the validity of the consent judgment of 26 May, 1928, in the special proceeding for partition of the lands which are the subject of the case in hand.

Defendants assert the validity of that judgment, claim title by virtue of it through *mesne* conveyances, and plead it as an estoppel in bar of plaintiffs' right to maintain this action.

On the other hand, plaintiffs deny that they are estopped by the judgment and allege by way of attack that the judgment is void for that the court had no jurisdiction of the matters attempted to be adjudicated and settled therein, particularly, (1) wherein, in the absence of allegation or admission in the pleadings, J. M. Blackmon is declared to be the owner in fee simple of the lands described in the petition, (2) wherein there is an attempt to set aside and cancel the deed from J. M. Blackmon and wife to Rosella B. Keen, Vancy B. Blackmon, and Oza D. Blackmon Smith, theretofore registered, for that not only is there an absence of pleading upon which to base same, but that the clerk of Superior Court is without jurisdiction of the subject matter, and (3) for the further reason, as contended in brief filed here, that evidence of compliance with constitutional and statutory requirements for the conveyance of land by married women does not appear in the judgment roll.

In this connection it is noted that plaintiffs in their attack upon the consent judgment do not rely upon or offer evidence tending to show fraud or mistake, nor do they allege or offer evidence tending to show that the attorneys, who consented thereto, were not in fact authorized to act "by consent of all the parties" as therein recited. Hence, the force of plaintiffs' attack is directed to matters appearing upon the face of the judgment roll and judgment, that is, is the judgment in the light of the pleadings void as a matter of law? We do not think so.

It is a settled principle of law in this State that a consent judgment is the contract of the parties entered upon the records with the approval

and sanction of a court of competent jurisdiction, and that such contracts cannot be modified or set aside without the consent of the parties thereto, except for fraud or mistake, and that in order to vacate such judgment an independent action must be instituted. *Weaver v. Hampton,* 201 N. C., 798, 161 S. E., 480; *Wilcox v. Wilcox,* 36 N. C., 36; *Edney v. Edney,* 81 N. C., 1; *Stump v. Long,* 84 N. C., 616; *McEachern v. Kerchner,* 90 N. C., 177; *Vaughan v. Gooch,* 92 N. C., 524; *Bank v. Comrs.,* 119 N. C., 214, 25 S. E., 966; *Henry v. Hilliard,* 120 N. C., 479, 27 S. E., 130; *Bunn v. Braswell,* 139 N. C., 135, 51 S. E., 927; *Bank v. McEwen,* 160 N. C., 414, 76 S. E., 222; *Simmons v. McCullin,* 163 N. C., 409, 79 S. E., 625; *Harrison v. Dill,* 169 N. C., 542, 86 S. E., 518; *Belcher v. Cobb,* 169 N. C., 689, 86 S. E., 600; *Gardiner v. May,* 172 N. C., 192, 89 S. E., 955; *Holloway v. Durham,* 176 N. C., 550, 97 S. E., 486; *Morris v. Patterson,* 180 N. C., 484, 105 S. E., 25; *Distributing Co. v. Carraway,* 189 N. C., 420, 127 S. E., 427; *Bank v. Mitchell,* 191 N. C., 190, 131 S. E., 656; *Board of Education v. Comrs.,* 192 N. C., 274, 134 S. E., 852; *Ellis v. Ellis,* 193 N. C., 216, 136 S. E., 350.

The Court has expressed the principle in various forms, among which are these: "A decree by consent is the decree of the parties put on file with the sanction and permission of the court; and in such decrees the parties acting for themselves may provide as to them seems best concerning the subject matter of the litigation." *Edney v. Edney, supra.*

"Consent judgments are in effect mere contracts of parties, acknowledged in open court in order to be recorded. As such they bind the parties themselves thereto as fully as other judgments." *Bank v. Comrs., supra.*

Speaking with respect to jurisdiction in such cases, *Clark, C. J.,* in *Morris v. Patterson, supra,* states that: "It is true that consent cannot confer jurisdiction but when, as in this case, the court had jurisdiction and the parties had power to consent, the judgment is conclusive."

The question then arises as to whether in the proceeding in question the clerk had jurisdiction of the subject matter of the judgment. In some respects, we think so.

In this connection it may be noted that while the primary purpose of special proceedings for partition is the severance of the unity of possession, the parties may put the title in issue, and when they do so, and the title is adjudicated, the judgment is conclusive and binding. In such proceeding when tenancy in common, which is the necessary basis for it, is denied and there is a plea of sole seizin or an issue of title raised, the proceeding in legal effect is converted into an action in ejectment and should be transferred to the civil issue docket for trial upon issue of title. *Gibbs v. Higgins,* 215 N. C., 201, 1 S. E. (2d), 554, and cases

cited. In that event, after such transfer, unquestionably the clerk of Superior Court has express statutory authority to sign a consent judgment. The statute provides that the clerk of Superior Court is authorized to enter consent judgments at any time, and such consent judgments so entered become the judgments of the Superior Court. C. S., 593, as amended by Public Laws 1921, Extra Session, ch. 92. *Weaver v. Hampton, supra.*

On the other hand, it may be said that although in a special proceeding for partition so converted into an action of ejectment, the clerk may have jurisdiction to so sign a consent judgment, the pleadings in the proceedings in question do not raise an issue of title. This is true, but, on the contrary, the judgment in effect put the title in issue and settles it. It is generally held that provisions in judgments and decrees entered by consent of all the parties may be sustained and enforced, though they are outside the issues raised by the pleadings, if the court has general jurisdiction of the matters adjudicated. Annotations 86 A. L. R., 84. And, in this connection, this quotation from opinion by *Hoke, J.*, in *Holloway v. Durham, supra,* is appropriate: "The decisions of this State have gone far in approval of the principle that a judgment by consent is but a contract between the parties put upon the record with the sanction and approval of the court and would seem to uphold the position that such a judgment may be entered and given effect as to any matters of which the court has general jurisdiction, and this with or without regard to the pleadings," citing cases.

Moreover, in the special proceeding in question it appears that the purpose of the action was the partition among tenants in common of their interest in remainder in certain lands. The petitioning remaindermen sought actual partition. The responding remaindermen contended for a sale for partition. For either purpose the clerk of Superior Court had jurisdiction both of parties and of subject matter. Chapter 63 of Consolidated Statutes of 1919, as amended. An actual partition was ordered by the clerk, but upon the coming in of the report of the commissioners the defendants filed exceptions to report and prayed that the division as made be set aside, and that an order of re-division or for sale of the lands be made. Thereupon, the judgment, "by consent of all the parties," as therein recited, and as hereinabove described, was entered, striking out the report of the commissioners and declaring J. M. Blackmon, one of the life tenants, father of remaindermen, and party to the proceeding, to be owner in fee simple of the lands in question, charged with the lien of specific sums of indebtedness to or for the remaindermen, respectively, payment of which he assumed in consideration of the adjudication of title so made. Though not in accordance with statutory

procedure, the judgment, in the light of the factual setting, in effect confirmed a private sale of the interests in remainder.

That the jurisdiction of the clerk includes the right to authorize private sale of land "has too frequently been decided by this Court to be now open to question." *Wooten v. Cunningham,* 171 N. C., 123, 88 S. E., 1, and cases cited. While in this State the clerk of Superior Court is a court of very limited jurisdiction, having only such authority as is given by statute, *Beaufort County v. Bishop,* 216 N. C., 211, 4 S. E. (2d), 525; *McCauley v. McCauley,* 122 N. C., 288, 30 S. E., 344; *Dixon v. Osborne,* 201 N. C., 489, 160 S. E., 579, it is settled that the clerk in the exercise of his probate jurisdiction is an independent tribunal of original jurisdiction. Mordecai in his Law Lectures, Vol. 2, p. 490. See *Hardy v. Turnage,* 204 N. C., 538, 168 S. E., 823, where the Court said: "The performance of a judicial act necessarily implies a court with both jurisdiction and discretion to hear and rule." See *Graham v. Floyd,* 214 N. C., 77, 197 S. E., 873. "A *prima facie* presumption of rightful jurisdiction arises from the fact that a court of general jurisdiction has acted in the matter." *S. v. Adams,* 213 N. C., 243, 195 S. E., 822, and cases cited.

However, if it be conceded that here the clerk has signed a judgment with respect to two subjects, the one within and the other without his jurisdiction, the latter will be disregarded. For analogy see *Ashe v. Gray,* 90 N. C., 137; *Mfg. Co. v. Barrett,* 95 N. C., 36.

Finally, in respect to the consent judgment in question, it being therein recited to be "by consent of all the parties" though signed only by counsel for the parties, the authorities seem to sustain the view that it is presumed that the attorneys had the necessary authority from their clients, and that, nothing else appearing, the judgment is binding upon the parties to the proceeding and those standing in privity to them. *Gardiner v. May, supra; Chemical Co. v. Bass,* 175 N. C., 426, 95 S. E., 766.

It is stated by *Walker, J.,* in *Gardiner v. May, supra,* that: "A judgment entered of record, whether *in invitum* or by consent, is presumed to be regular, and an attorney who consented to it is presumed to have acted in good faith and to have had the necessary authority from his client, and not to have betrayed his confidence or to have sacrificed his right. The law does not presume that a wrong has been done. It would greatly impair the integrity of judgments and destroy the faith of the public in them if the principle were different." And further speaking to the same subject, *Walker, J.,* said: "It is expressly stated in the order that it is made by consent of all the parties. We are bound by the statement as a matter of record."

In *Chemical Co. v. Bass, supra, Brown, J.,* said: "The law presumes the attorneys had the necessary authority and the burden is on the party seeking to set aside a consent judgment to prove that no such authority existed."

2. In the trial of an action for recovery of land, it is competent, under a general denial, to show that any deed offered by a party as evidence of title is void, for the reason that it is executed in the face of a statute prohibiting its execution, or by reason of want of capacity in the grantor, or for fraud in the *factum.* In truth, in controversies as to title, "evidence impeaching an alleged title deed is always as competent as that sustaining it." *Mobley v. Griffin, supra.* See, also, *Higgins v. Higgins,* 212 N. C., 219, 193 S. E., 159; *Toler v. French,* 213 N. C., 360, 196 S. E., 312. But matters in the nature of an estoppel *in pais,* whether relied upon affirmatively, or by way of defense, must be pleaded. *Toler v. French, supra.* Hence, in the absence of specific plea, the proof tending to show estoppel by conduct is here unavailing to defendants.

3. It is a well established principle in this jurisdiction that when the grantee in a deed assumes the payment of a debt secured by mortgage or deed of trust on the land conveyed, he thereby becomes the principal debtor, *Baber v. Hanie,* 163 N. C., 588, 80 S. E., 57, and is estopped to deny that the mortgage or deed of trust is valid. *Keller v. Parrish,* 196 N. C., 733, 147 S. E., 9. Thus, when on 1 November, 1928, in deed from J. M. Blackmon and wife purporting to convey the land in question in fee simple, reserving to themselves life estates therein, Vancy Belle Blackmon, as grantee, assumed the payment of the debt secured by the deed of trust from M. F. Holly and wife to Raleigh Savings Bank & Trust Company, Trustee, for the benefit of Atlantic Joint Stock Land Bank, she became the principal debtor, and will not now be heard to challenge the validity of the deed of trust, under foreclosure of which the evidence shows defendants trace their claim of title. And this being an action for the recovery of land, the deed, though not pleaded by way of estoppel, is competent as evidence in derogation of title asserted by Vancy Belle Blackmon.

The judgment below is

Affirmed.

JOHN G. COX, V. A. ABBOTT, R. L. ABBOTT, J. L. SASSER, JESSE G. BROWN, MIKE TAYLOR, C. B. BROOKS, NOEL HOBBS, DREW W. POLLOCK, DAVID STADIEM, THOMAS MEWBORN, JR., MIKE LEE, SR., SUING FOR THEMSELVES AND ALL OTHER TAXPAYERS SIMILARLY SITUATED, WHO DESIRE TO COME IN AND MAKE THEMSELVES PARTIES TO THIS CAUSE, v. THE CITY OF KINSTON, A MUNICIPAL CORPORATION, J. R. ROUNTREE, H. C. WOOTEN, JOHN C. HOOD, J. F. PARROTT, JR., AND C. A. KRAMER, AND HOUSING AUTHORITY OF THE CITY OF KINSTON, NORTH CAROLINA.

(Filed 10 April, 1940.)

1. Municipal Corporations § 1—

A Housing Authority created under the provision of chapter 456, Public Laws of 1935, Michie's Code, 6243, is a municipal corporation created for a public governmental purpose, and such Authority is invested with a governmental function.

2. Constitutional Law § 3½—

The creation by the Legislature of a board or municipal corporation and the conferring upon such board or municipal corporation *quasi*-judicial and administrative functions does not violate the constitutional provision that the legislative and the supreme judicial powers of the Government shall be separate and distinct, Constitution of North Carolina, Art. I, sec. 8.

3. Same—

A Housing Authority created under chapter 456, Public Laws of 1935, is not invested with legislative and supreme judicial powers, and therefore its creation does not violate the constitutional provision that these powers be and remain separate and distinct.

4. Constitutional Law § 4c—

The fact that an administrative board or municipal corporation is authorized to investigate and determine the existence or nonexistence of facts upon which depend the application of the law it is charged with administering, is not a delegation of legislative functions. Constitution of North Carolina, Art. II, sec. 1.

5. Same—

The provision of chapter 456, Public Laws of 1935, investing municipal corporations with the power to determine each for itself the existence or nonexistence of facts necessary for the creation of a housing authority to perform a proper municipal governmental function within its limits is not an unconstitutional delegation of legislative authority. Constitution of North Carolina, Art. II, sec. 1.

6. Municipal Corporations § 23: Eminent Domain § 1—

The power of a municipal corporation to purchase or condemn land for a public purpose is not affected by the fact that its acquisition of the property for such public purpose has the effect of retiring the property from the tax books.

7. Injunctions § 1—

Injunction will not lie to control the exercise of the discretionary powers vested in a board or municipal corporation, and its finding of facts upon which it determines that the law it is charged with administering is applicable is not subject to review by injunction, the scope of the inquiry being limited to the constitutionality of the act and the right of the board or municipality to proceed upon the facts found.

8. Municipal Corporations § 1—

The existence or nonexistence of facts within its corporate limits justifying the creation of a Housing Authority is for the determination of the municipal corporation, chapter 456 (4), Public Laws of 1935, Michie's Code, 6243 (4), which duty is political and not judicial, and in proceedings to enjoin the activities of a Housing Authority created under the act the court does not have authority to hear evidence in regard to the existence of the facts upon which the creation of the Housing Authority is predicated. Whether an appeal will lie from the municipal corporation to review such findings, *quære.*

9. Appeal and Error § 1—

There is no inherent or inalienable right of appeal, the right of appeal being a privilege granted by statute.

10. Constitutional Law § 4a—

Public policy is the exclusive province of the Legislature and its determination is not subject to review by the courts.

11. Injunction § 11—

In a suit for perpetual injunction in which questions of fact are raised for the determination of the court, and in which no issues of fact to be tried by a jury are involved, the court may dismiss the action if it appears that in no aspect of the case would plaintiff be entitled to the relief, but in such case the action must be dismissed at term-time and not at chambers.

APPEAL by plaintiffs from *Parker, J.,* at Chambers in Clinton, N. C., 6 February, 1940. Modified and affirmed.

The plaintiffs, in their character as taxpayers in the city of Kinston and within the area affected by the jurisdiction of the Kinston Housing Authority, brought this action in behalf of themselves and others like situated, to permanently enjoin the defendants from proceeding further with the activities undertaken by them as the Housing Authority for the city of Kinston under authority of chapter 456, Public Laws of 1935, with respect to a housing project in Kinston; and particularly to enjoin them from borrowing money or incurring indebtedness in relation thereto. The defendants are the city of Kinston, the Housing Authority of the city of Kinston, and the individuals composing the Commission constituting such Housing Authority.

Plaintiffs complain that if defendants are not restrained from their operations, which are alleged to be illegal, a debt will be incurred which

will eventually result in a liability on the city of Kinston, for which there is no lawful authority, and a large part of the property subject to taxation will be taken off the tax books, thereby increasing plaintiffs' taxes; and that by reason thereof the injury and damage to plaintiffs will be irreparable.

They allege that the Housing Act cited is unconstitutional and void, in that it creates no municipal corporation, is not in furtherance of any public purpose, delegates to the groups mentioned in the act the legislative or judicial function, is discriminatory in its character and seeks to foreclose substantial rights by denying the right of trial by jury and of appeal.

The proceeding under which the Authority was created is also attacked for alleged want of compliance with the statute.

A temporary restraining order was applied for and granted. Upon hearing of the order to show cause, the trying judge found numerous facts with regard to the contentions involved, finding facts in detail with regard to the step-by-step procedure followed by the city and Housing Authority, both as to the organization of the Authority and subsequent proceedings, and found them to be regular and such as were required by law, and declared them to be a valid exercise of power. He heard evidence as to the conditions of sub-standard housing, the existence of low income occupancy, and other matters dealing with the slum clearance features of the act, and found the facts against plaintiffs' contentions. He adjudged the act to be constitutional, dissolved the restraining order, and dismissed the action. Plaintiffs appealed, assigning numerous errors.

J. A. Jones for plaintiffs, appellants.

Whitaker & Jeffress for defendant, City of Kinston.

Ely J. Perry and John G. Dawson for defendant, Housing Authority of City of Kinston, and individual defendants, appellees.

SEAWELL, J. Most of the objections and exceptions of the plaintiffs are met in *Wells v. Housing Authority,* 213 N. C., 744, 197 S. E., 693. That decision upheld the constitutionality of the act now under review, and discussed the points raised in the case. It is presumed that the decision, constructively at least, covered all of the objections to the constitutionality of the measure which might have been raised in that controversy. Actually the plaintiffs here present some new arguments bearing on that question, not dealt with in the opinion, and these we note.

As we have stated, *Wells v. Housing Authority, supra,* is conclusive as to the more important features of the attack now made on the constitutionality of the measure. It was there decided (a) that the Author-

ity created by the act is a municipal corporation, (b) that the act comprehends a public governmental purpose, and (c) that the Authority is invested by it with a governmental function. These holdings were couched in language as clear and concise as we could employ, and we do not wish to occupy useless space and perhaps create confusion by a repetition here. It is sufficient to say that the arguments presented by plaintiffs' counsel in this immediate connection, both orally and by brief, are the same that were addressed to the Court on the same points in *Wells v. Housing Authority, supra,* and *Webb v. Port Commission,* 205 N. C., 663, 172 S. E., 377, with much force and clarity, and with a wealth of citation of authority, and the conclusions reached by the Court in those cases were neither careless nor perfunctory. We see nothing new or compelling in the instant presentation, and our conclusion as reached in *Wells v. Housing Authority, supra,* remains unchanged. Practically all the courts of the several state jurisdictions, to which the matter has been presented on laws similar to our own, at least eighteen in number, are in accord with this decision. *In re: Opinions of the Justices,* 235 Ala., 485, 179 So., 535; *Housing Authority of the County of Los Angeles v. Isadore B. Dockweiler, Chairman,* 94 P. (2d), 794; *Kraus et al. v. Peoria Housing Authority et al.,* 370 Ill., 356, 19 N. E. (2d), 193; *Dornan v. Philadelphia Housing Authority et al.,* 331 Pa., 209, 200 Atl., 834; *Edwards et al. v. Housing Authority of the City of Muncie et al.,* 19 N. E. (2d), 741. We need not extend the list. Some of the cited cases cover objections to the constitutionality of this law, mentioned in our further discussion, but in the interest of space the citations will not be repeated.

We address ourselves to the more important objections made by the plaintiffs, not included in the above; but we do not deem it necessary to take up the exceptions *seriatim.* Where not here mentioned, they have been considered and not sustained.

The plaintiffs contend that the statute is unconstitutional and void because it delegates to the city council the legislative function, or to such non-judicial body the judicial function, and they base this contention on the constitutional requirement that "The legislative, executive, and supreme judicial powers of the Government ought to be forever separate and distinct from each other." Constitution, Article I, section 8.

It is true that the Constitution gives to the General Assembly the power which has, in this State, been considered exclusive, to enact laws or, as we say, exercise the legislative function, and this cannot be delegated. Constitution, Article II, section 1. As to the judicial function, the Legislature itself has none, and, therefore, the use of the word "delegation" is not apt as regarding the power of the Legislature to confer judicial powers. The Legislature has always, without serious question,

given *quasi*-judicial powers to administrative bodies in aid of the duties assigned to them, without necessarily making them courts. Such powers are given to the Utilities Commission, the Industrial Commission, the Commissioner of Revenue, the State Board of Assessment, and, in lesser degree, to many other State agencies which we might add to the list. The performance of *quasi*-judicial and administrational duties by the same board violates no implication of the cited section of the Constitution, requiring that the supreme judicial power be kept separate from the legislative and executive. Certainly the limited discretion given to these bodies is no part of the "supreme judicial power" of the State.

The creation of investigatory or fact-finding bodies, or the investment of agencies already created with powers of this character, have never been considered a delegation of legislative power. *S. v. Harris,* 216 N. C., 746. While it is sometimes difficult to determine whether the powers conferred for such purposes are legislative in character, we do not consider the present law in that respect even within the penumbra, since the discretion given to the city council in the matter is well within reasonable limitations and standards set up in the act, and does not supplement the act from a legislative point of view.

The act was complete in every respect when it left the hands of the Legislature, and the discretion lodged with the city council bears only upon the question whether certain conditions exist justifying the creation of the Authority under the terms and procedure laid down in the statute.

"The mere fact that an officer is required by law to inquire into the existence of certain facts and to apply the law thereto in order to determine what his official conduct shall be and the fact that these acts may affect private rights do not constitute an exercise of judicial powers. Accordingly, a statute may give to non-judicial officers the power to declare the existence of facts which call into operation its provisions and, similarly, may grant to commissioners and other subordinate officers power to ascertain and determine appropriate facts as a basis for procedure in the enforcement of particular laws." 11 Am. Jur., p. 950.

In passing upon the constitutionality of the powers conferred upon the city council, it must be borne in mind that they are delegated to a municipal government in an act which directly recognizes the purpose to be within the proper governmental pale of the municipality, in so far as the act confers any powers or duties upon it with respect to the creation of the Housing Authority. Thus, a much wider range of powers is within the legitimate bestowal of the Legislature than would be the case if those powers were delegated to a non-municipal body, itself exercising no governmental power. These powers must be considered as in themselves municipal to the extent they engage the governing body of the municipality, since they are incidental to the municipal government

and of local concern. 16 C. J. S., p. 400-401, and cases cited. Amongst the powers which may thus be conferred within constitutional limits are those referring to housing and slum clearance and the creation of commissions for such purpose, as provided for in the act under consideration. 16 C. J. S., p. 402, citing *Wells v. Housing Authority, supra; Spahn v. Stewart,* 268 Ky., 97, 103 S. W. (2d), 651; *State ex rel. Porterie v. Housing Authority of New Orleans,* 190 La., 710, 182 So., 725.

It is well understood that while a legislature may not delegate its powers to make laws, it can delegate the power "to determine some fact or state of things on which the law may depend." 11 Am. Jur., p. 949.

Indeed, it is difficult to see how the structure of a municipal corporation could be maintained or administrational laws could be applied to conditions, the ascertainment of which is necessary to their operation, without the elasticity thus provided.

We note the contention of the plaintiffs that, by reason of the creation of the Housing Authority, property of large taxable value will be taken off the books, to the detriment of the complaining taxpayers. Actually the evidence tends to show that the completion of the project will affect tax collections only to the extent of about $500.00 annually. While consideration of the contention at this juncture would seem to be getting ahead of the procession, we are not sure whether the defense meant this as a moral or legal argument. The position that a municipal corporation may not, either by purchase or by the exercise of eminent domain, acquire property for a public governmental purpose, because this would have the effect of retiring it from the tax books, seems to us without merit.

The trial judge might well have doubted his authority to hear evidence as to conditions in the area with reference to sub-standard housing, prevalence of low income inhabitants, and other matters upon which the creation of the Housing Authority is made to depend. Under section (4) of the act (Michie's Code, section 6243 [4]), this is made the duty of the governing body of the city. No provision is made in the statute for any appeal or any review of this decision, and since we do not regard it as a judicial order, no provision for appeal was necessary. Even if we consider that the judicial function is involved, where the essentials of notice and hearing are provided as they are here, *quære* whether the right of appeal in such a case is guaranteed by the Constitution or required by statute.

There is no inherent or inalienable right of appeal. 2 Am. Jur., p. 847; *Re: petition to transfer appeals,* 202 Ind., 365, 174 N. E., 812. It is a privilege granted by statute. *McCartney v. Shippard,* 60 Oreg., 133, 117 P., 814; *Caudle v. Morris,* 158 N. C., 594, 74 S. E., 98; *Haw-*

kins v. Telegraph Co., 166 N. C., 213, 81 S. E., 161. Compare: *Windsor v. McVay,* 206 N. C., 730, 175 S. E., 83; *Taylor v. Johnson,* 171 N. C., 84, 87 S. E., 981; *Hillsboro v. Smith,* 110 N. C., 417, 14 S. E., 972 (dealing with *certiorari* as a substitute for appeal from action of the board of county commissioners in refusing license to retail intoxicating liquors). "But in all cases the question to be raised upon the *certiorari,* as upon an appeal, must be one involving judicial action from which an appeal would otherwise lie and not a matter of discretion." McIntosh, North Carolina Practice and Procedure, p. 822; *Guilford County v. Georgia Co.,* 109 N. C., 310, 13 S. E., 861. If the plaintiffs had any right of review under these authorities, which we do not concede, injunction cannot be used as a substitute for appeal, and the case was, therefore, not before the trial judge as upon appeal.

In the last few sentences we have discussed this feature of the case with some concession to the plaintiffs' point of view as to the character of the power conferred on the city council. This must be understood as only for the purpose of eliminating the exception on plaintiffs' chosen ground. Actually, the powers delegated are political, not judicial, and whatever discretion is given in aid of them does not involve the exercise of the judicial function. It follows that the challenged delegation of power is not tainted with the unconstitutionality suggested by the plaintiffs, and, furthermore, a review of the exercise of these powers in an action for injunction is practically limited to the constitutionality of the power, which we have discussed, and to the performance or nonperformance of those things upon which its validity must rest. The judgment of the court cannot be made to take the place of the discretion of the city council when exercised in the manner provided by statute.

The statute provides: "In any suit, action or proceeding involving the validity or enforcement of or relating to any contract of the Authority, the Authority shall be conclusively deemed to have been established in accordance with the provisions of this article upon proof of the issuance of the aforesaid certificate by the Secretary of State." We regard this as a perfectly legitimate provision, and similar provisions for the purpose of quieting litigation have often been sustained by the Court. It does not assume judicial power by preventing or curtailing its exercise by the courts. It simply bars an attack on the procedure after a certificate of incorporation has been obtained from the Secretary of State. Indeed, the provision of public notice and hearing was not essential to the validity of the creation of the Authority (although a wise provision), had the Legislature been minded to leave it out. It was, therefore, competent to cure unessential defects in the procedure which the lawmaking body might have seen fit to omit *imprimis.*

The Legislature does not assume the judicial power in declaring the public policy with regard to conditions which it finds to be detrimental to the public interest, socially, economically, or politically, so long as it stays within the limits of the Constitution and invades no naturally inalienable right. The Court does not sit at the entrance of the legislative hall, but rather at the exit. It takes the ball on the rebound. Nor does the judicial power extend to the determination of abstract questions before these settle down concretely upon some person and give him a justiciable cause. Legislative discretion exercised within the broad field of power reserved to the people outside of constitutional limitations is not judicial in its nature but operates by fiat. The findings in the preamble are of this nature. It is not required of us to give them judicial approval either before or after the fact of their enactment.

The policy of the law involves a legislative discretion which is not subject to review. As pointed out in *Lilly & Co. v. Saunders,* 216 N. C., 163, this Court has nothing to do with the propriety of an economic experiment. It seems to us clear, however, that a definite relation has been established between the prevalence of crime, often the result of human misery and neglect, and conditions which it is the purpose of this legislation to remove. The municipal government, where such conditions prevail, is sufficiently interested in these matters to vindicate the propriety of the powers and duties conferred upon the governing body with respect to the investigation of these conditions and the creation of the Authority under the procedure laid down in the law.

There remains to be considered the objection of the plaintiffs to the dismissal of the action. The plaintiffs contend that upon the hearing of the order to show cause the court had no jurisdiction to dismiss the action, citing *Patterson v. Hosiery Mills,* 214 N. C., 806, 200 S. E., 906, in support of their contention. But in *Patterson v. Hosiery Mills, supra,* the injunction was continued to the hearing, not dissolved. Frequently, in the exercise of the equitable jurisdiction of the court in matters of injunction, it becomes necessary to examine into the merits of the case, often dealing with issues of fact which must eventually be left to the jury, in order to decide the immediate question as to the continuance or dissolution of the restraining order. In the cited case, the Court did deal with issues of fact necessary to be considered for the immediate purpose of the Court, and the plaintiff in that case insisted that these findings were *res judicata* between the parties on the final hearing. In the case at bar, the court was dealing with no issues of fact, but only questions of fact, which it is the province of the court to determine.

When the sole object of the litigation is perpetual injunction, and the court proceeds from the pleadings and from the evidence in passing on

questions of fact which it is permitted to decide, and the case does not involve issues of fact to be tried by the jury, it has been common practice for the court to dismiss the action if it appears that from no aspect of the case would the plaintiff be entitled to relief.

While that is the precise situation in this case, the practice followed here does not seem to be in accord with the holding of the Supreme Court in *Bynum v. Powe,* 97 N. C., 374, and the case must be sent back for appropriate action in accordance with this opinion at term time. To that extent the judgment is modified, but with respect to the dissolution of the restraining order and the refusal to continue the same it is affirmed.

Modified and affirmed.

STATE OF NORTH CAROLINA v. RANSOM KIZIAH AND TROY KIZIAH.

(Filed 10 April, 1940.)

1. Criminal Law § 78d—

Defendants must make proper motions for judgment as of nonsuit during the course of the trial in order to present upon appeal the question of the sufficiency of the evidence. C. S., 4643. However, in the present case the evidence *is held* sufficient to be submitted to the jury and to sustain their verdict of guilty of assault upon a female.

2. Rape § 6: Indictment § 22—

An indictment charging the defendants with rape will support a verdict of guilty of assault upon a female when warranted by the evidence, C. S., 4639, 4640.

3. Criminal Law § 41e—

Character evidence of a witness is testimony as to the witness' general reputation or standing in the community and not as to any particular acts, based upon what the character witness has heard or learned as a matter of hearsay.

4. Same—

After a character witness is once qualified, he or she may be cross-examined as to the source of his or her knowledge but the answers go to the credibility of the witness rather than to the competency.

5. Same: Criminal Law § 30—Where transcript at preliminary hearing is offered to impeach witness, defendants should offer only relevant portions of transcript and disclose purpose for which it is offered.

Where defendants seek to introduce the whole of the transcript taken in the recorder's court upon the preliminary hearing without qualification or limitation and without disclosing that their purpose in offering the transcript is to impeach the credibility of the prosecuting witness by

showing that on the preliminary hearing she had made statements repugnant to her testimony at the trial, the action of the trial court in excluding same will not be held for error, since the court must know the purpose for which the evidence is offered in order to pass upon its relevancy and competency, and further, in this case the inconsistent statements related to collateral matters and plaintiffs were not prejudiced by the exclusion of the transcript.

6. Rape § 9—

A charge to the effect that if defendants indecently fondled the prosecuting witness against her will in order to induce her to submit to them, defendants would be guilty of an assault upon a female but not of an assault with intent to commit rape, *is held* without error upon defendants' appeal from a conviction of an assault upon a female.

7. Criminal Law § 53f—

If defendants desire a more definite charge on subordinate features of the case they must aptly tender proper prayers for instruction.

APPEAL by defendants from *Bobbitt, J.*, at August Term, 1939, of CALDWELL. No error.

The defendants were indicted on a bill of indictment charging them with rape on one Elizabeth Holman. The record shows: "The Solicitor for the State in open court announced that he would not ask for a verdict of guilty of the capital offense of rape, but would ask for a verdict of guilty of an assault with intent to commit rape." The jury returned for their verdict as to both defendants "Guilty of assault upon a female." C. S., 4215. The judgment of the court below as to both was: "That the defendants be confined in the common jail of Caldwell County for the term of 18 months and assigned to work upon the roads under the control and supervision of the State Highway and Public Works Commission."

The evidence on the part of the State tended to show that the prosecuting witness, Elizabeth Holman, was a female 17 years of age. That she had never had intercourse with any man. That the defendants were married men—Ransom Kiziah had a wife and two children, and Troy Kiziah a wife and four children. That on Sunday evening, about 1:30, while on her way to Lenoir to get some ice cream for her sister, Elizabeth Holman met defendant Ransom Kiziah and his brother Troy Kiziah. She had come home the night before with Ransom Kiziah, who called himself Herman and said he was unmarried. Ransom Kiziah asked her if she wanted to ride around, but she declined, but agreed to ride if she was let out in town. She got in the car, a four-door Ford sedan, got in the back seat and Ransom got in beside her. Troy was in the front seat and drove the car. When they got down to the forks of the road to go to Lenoir, they turned away on Zack's Forks Road. They went on up the road and she began crying and begging them to let her out. She

continued to cry and Ransom put his hand over her mouth. They went about eight miles and stopped on the side of the road. Ransom asked her, "Have you ever had intercourse with anyone?" and she said, "No, I am not going to," and he said, "You will, too." They drove up in the woods and she was crying and hollering and trying to get out. Troy held her and Ransom had intercourse with her. They had a knife and threatened to kill her and when Ransom got through he held her and Troy had intercourse with her.

The prosecuting witness proved a good reputation and was corroborated in many respects.

The defendant Ransom Kiziah at first denied the charge. He afterwards set up the defense that the intercourse was by consent and in fact Troy Kiziah denied he had intercourse. Upon the conviction of both of an assault upon a female and judgment pronounced, 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.

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

Pritchett & Strickland for defendants.

CLARKSON, J. There was no request made by defendants for nonsuit in accordance with N. C. Code, 1935 (Michie), sec. 4643 (same as 567 in civil actions). The evidence was sufficient to be submitted to the jury on all aspects of the crime. The defendants waived their right to maintain the insufficiency of the evidence to take the case to the jury by not making a motion as of nonsuit thereon at the close of the evidence. *Gibbs v. Telegraph Co.,* 196 N. C., 516; *Murphy v. Power Co.,* 196 N. C., 484 (494). Where the defendant does not move for nonsuit as provided by sec. 567 (4643 in criminal actions) in the lower court he waives his right to have the insufficiency of the evidence to be submitted to the jury considered on appeal. *Lee v. Penland,* 200 N. C., 340; *Debnam v. Rouse,* 201 N. C., 459; *Harrison v. Ins. Co.,* 207 N. C., 487.

Section 4639 is as follows: "On the trial of any person for rape, or any felony whatsoever, when the crime charged includes an assault against the person, it is lawful for the jury to acquit of the felony and to find a verdict of guilty of assault against the person indicted, if the evidence warrants such finding; and when such verdict is found the court shall have power to imprison the person so found guilty of an assault, for any term now allowed by law in cases of conviction when the indictment was originally for the assault of a like character."

Section 4640: "Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime."

The defendants contend: "1. That there was error in the ruling of the court below in permitting the testimony of Mrs. S. Cline as to the good character of the prosecuting witness, Elizabeth Holman, her mother and her father, after she had said she did not know their general reputation." This contention cannot be sustained. The record is not exactly in accord with the defendants' contentions. The record is as follows:

Mrs. S. Cline, witness for the State, testified: "I know C. H. Holman. I have known him for over a year. I have known Mrs. Holman for about the same time. I know Elizabeth Holman. She worked for me about one year. She worked from last June or July until about April of this year. I don't know her general reputation. Q. Do you know the general character and reputation of Mrs. Holman in that community? Ans.: I have just heard people say that they were nice. Q. Do you know the general reputation of Mr. C. H. Holman? Ans.: I don't hardly know what to say, because I have not been out much and I have not heard anybody say much and that is all I know. (Defendants object—overruled—exception)—(Cross-examination) I don't know where the Holman family live. I have not heard anybody talk about Mr. Holman. The opinion I give is just my own personal opinion. If there was anything bad I would have known it. Q. From what you have heard of Mrs. C. H. Holman and the reputation of Elizabeth for that length of time, do you think that you can or cannot say as to her general reputation? Ans.: Yes, it is good. I don't know where the Holman family live. I have not heard anybody talk about Mr. Holman. The opinion I give is just my own personal opinion. If there was anything I would have known it. (Defendants object and move to strike from record—motion denied and defendants except.) I had not heard anyone speak about Elizabeth Holman. She worked for me. I have not heard anyone say anything about the other members of the family. The girl was recommended to me. My mother knew her mother and suggested that I hire Mr. Holman's daughter. I did and when she came I found out she was a nice girl. We had never heard anything but what she was a real good girl. That is the basis of my testimony here today."

Mrs. R. L. Holloway, witness for the State, testified: That she knew C. H. Holman and Mrs. Holman; had known them for thirty or thirty-five years. That she knew Elizabeth and Edith; that all of them had good reputations. (Cross-examination): "Sometimes I see the Holmans every day. I just see the young ladies as they pass the road. I do not visit in their home. The young ladies have never been to my house. The

general report is that their character is good. I can't recall right now any person that I heard say anything about their character. I have heard nothing said for the last two months concerning their character. I just said I haven't heard anything bad. Their character is good as far as I know. I haven't heard anything bad. People speak well of them. I cannot recall when I last heard them discussed."

Mrs. Etta Powell, witness for the State, testified: "I know Carl Holman. I live about a half mile from him. I know his wife and two daughters. I have known Carl 35 or 40 years and his character is good. General reputation of Elizabeth and Edith is good. (Cross-examination): I haven't visited in their home lately. It has been four or five years since I was there. The young ladies do not visit in my home. I have not heard anybody say anything about their character. My statement is based upon my opinion. I don't know what the people in the community at large say about them."

Sylvester St. John, witness for the State, testified: "I know Carl Holman; his wife and his two daughters. I have known Carl 20 or 25 years and his wife about 10 years. Their general reputation is good. General reputation of the two daughters is good. (Cross-examination): I haven't heard anybody talk about their general reputation at all. The opinion that I give is my belief because I think I know them."

T. L. Holder, witness for the State, testified: "I know Mr. and Mrs. Holman and the girls. Mr. Holman has a good reputation; so has Mrs. Holman and the two girls. I make this statement from my own personal knowledge and experience with them. I do not know their general reputation in the community in which they live." The matter of general character was thoroughly discussed in *S. v. Steen,* 185 N. C., 768 (770).

The decisions in this State have consistently held that reputation is the general opinion, good or bad, held of a person by those of the community in which he or she resides. This is eminently a matter of hearsay based upon what the witness has heard or learned, not as to any particular acts, but as to the general opinion or standing in the community.

After a character witness is once qualified, he or she may be cross-examined as to the source of his or her knowledge, but the answers go to the credibility of the witness rather than to the competency. *S. v. Holly,* 155 N. C., 485; *S. v. Carden,* 209 N. C., 404 (412).

We give the testimony of other witnesses not objected to as to the general reputation of the Holmans. Taking the testimony of Mrs. Cline as a whole, we cannot see how it would constitute prejudicial or reversible error. *S. v. Steen, supra,* p. 776. In fact, on cross-examination of Mrs. Cline by defendants as to the general reputation of C. H. Holman and Elizabeth Holman, she answered, "Yes, it is good."

The defendants contend: "2. That the court below committed error in excluding the stenographic report of the evidence of Elizabeth Holman and her father, C. H. Holman, taken at the preliminary hearing for the purpose of impeaching the two said witnesses." This contention cannot be sustained.

In the record is the following: Miss Mae Puitt, witness for the defendants, testified: "I am a stenographer in town. Was appointed by the court to take the evidence at the preliminary hearing in this case. I did take it, transcribed it and this document is a correct transcription of the evidence given in that court." Defendants then offered as evidence the entire transcript of the evidence given in that court. Defendants then offered as evidence the entire transcript of the evidence taken before the recorder, this entire transcript having been offered without qualification or limitation as to the purpose for which offered. Objection by the State, sustained, defendants except.

In 20 American Jurisprudence "Evidence," p. 597, part sec. 711, is the following: "An official reporter who has taken stenographic notes of the testimony of a witness given at a former trial may be permitted to testify therefrom as to the contents of the witness' testimony; and this rule applies although he has no recollection upon the subject and must depend upon his notes entirely. The stenographic notes are also admissible in evidence to reproduce the testimony of an absent witness, when a proper foundation for their admission has been laid. Thus, a copy of the stenographic report of the entire testimony at a former trial, supported by the oath of the stenographer that it is a correct transcript of his notes and of the testimony of the deceased witness, is competent evidence of what the deceased witness said." *Cooper v. R. R.*, 170 N. C., 490 (494).

In *Edwards v. Sullivan*, 30 N. C., 302 (304), it is written: "The first objection is directly and fully answered by the case of *Ingram v. Watkins*, 1 Dev. and Bat. Rep. (18 N. C.), 442, where it was held, that to impeach the credibility of a witness, by proving that he swore differently as to a particular fact on a former trial, it is not necessary that the impeaching witness should be able to state all that the impeached witness then deposed. It is sufficient, if he is able to prove the repugnancy as to the particular fact, with regard to which it is alleged to exist."

In Greenleaf on Evidence, 16th Ed., Vol. 1, part sec. 461, at p. 590, we find: "Another mode of discrediting a witness is by showing (either through cross-examination or by other witnesses) that the witness has at another time stated the opposite of what he now states or has otherwise varied from his present story. Here, 'that which sets aside his credit and overthrows his evidence,' in the words of *Chief Baron Gilbert*, is 'the repugnancy of his evidence,' 'inasmuch as contraries cannot be true,' and

therefore he must be in error in at least one of the two statements; and if in error once, then perhaps also in other undetected instances. The probative value of this process—showing error and the capacity to err—is therefore much the same as in that the preceding section, though the mode is somewhat different. The probative force thus arising merely from this inconsistency and the apparent falsity of one of the two statements, it follows, on the one hand, that the admission of the prior inconsistent statement does not violate the Hearsay Rule, and, on the other hand, that it is not to be taken as affirmative evidence of the fact stated in it; for the reason, in both cases, that it is not offered as a testimonial assertion, but only as inconsistent with the present statement." N. C. Handbook of Evidence (Lockhart), 2d Ed., sec. 285.

In Wharton's Criminal Evidence, Vol. 3, pp. 2247-8, sec. 1363, is the following: "A witness may be impeached by proof of a contrary deposition taken at a time prior to the trial. A witness may also be contradicted by proof of prior contradictory statements made before a grand jury, at a preliminary hearing, at a coroner's inquest, or on a former trial or hearing of the same case. But only that part of the trancript of former testimony should be admitted for this purpose as is contradictory to the present testimony. Such prior inconsistent testimony may be shown, not only by the stenographer's notes, but by any witness who heard and remembers it." The testimony taken by the stenographer on a former hearing was offered "without qualification or limitation as to the purpose for which offered."

In the brief of defendants they now contend that the evidence was inconsistent in two particulars brought out on cross-examination.

We cannot see what bearing the question of where and under what circumstances the prosecuting witness met one of the defendants on the day before the alleged crime was committed, and which party walked in front on the way home, could have on the question of assault on the following day. We cannot see how the question of whether or not a particular doctor was drunk on the night after the commission of the crime could affect the issue in the case. The State contends (which we think correct) that all this matter was brought out on cross-examination and is entirely collateral and immaterial to the issue and should have been excluded. *S. v. Patterson,* 24 N. C., 346; *S. v. Carden,* 209 N. C., 404; *S. v. Roberson,* 215 N. C., 784.

Before a court can pass intelligently upon the evidence which a party desires to offer, it is necessary that he know what it is so that he may determine its bearing upon the issues. The defendants did not state what they expected to prove by the transcript of the testimony which they attempted to offer. We think that the court below was justified in refusing to admit the whole transcript in evidence.

In *In re Smith's Will,* 163 N. C., 464 (466-7), we find: "We may add these authorities to those already cited upon the general question that the party asking the question, which is excluded, must disclose to the court what he expects to prove by the witness. *Overman v. Coble,* 35 N. C., 1; *S. v. Pierce,* 91 N. C., 606; *Boney v. R. R.,* 155 N. C., 95; *Whitmire v. Heath,* 155 N. C., 304. The same rule prevails in other jurisdictions. *In re Pinney's Will,* 27 Minn., 280. We said in the *Whitmire case,* 'A court cannot pass intelligently upon evidence unless it knows what it is, in order that its bearing upon the issue may be determined. The defendant should have stated what he expected to prove, otherwise the question was properly excluded, not because it is incompetent, but because it cannot be seen that it is. The court must judge of its competency and materiality—not the counsel. This is the well settled practice and the rule of reason.' "

Wharton's Crim. Ev., 3rd Vol., pp. 2244-5-6, sec. 1360: "A witness is not to be discredited because of a discrepancy as to a wholly immaterial matter. In application of the rule forbidding contradiction or impeachment of a witness upon immaterial or collateral matters, it is held that, to be impeaching, the prior statement must not only be contradictory to his testimony, but, also, must have reference to matters relevant to his testimony and the case. In other words, the statement which it is intended to contradict must involve facts in evidence, and the varying statements sought to be shown must be relevant to the issues. It is, therefore, a well-established rule that the witness cannot be impeached by the proof of prior statements inconsistent with his testimony on the trial which concern a collateral or irrelevant matter, and evidence by other witnesses on such matters is inadmissible. Accordingly, it is not proper to show that in another unconnected proceeding the witness made contradictory statements. To this rule there is, of course, an exception with respect to prior statements showing the existence of bias, prejudice, or interest denied by the witness."

The defendants contend: "3. That the court below committed error in its charge as set forth in Assignment of Error No. 12, in defining the conduct of the defendants which would constitute an assault upon a female." This contention cannot be sustained.

The jury acquitted defendants of an assault with intent to commit rape; therefore the charge on this aspect need not be considered. As to the charge of an assault on a female, the court below charged: "Now, an assault is the intent, offer or attempt by force or violence to do an injury, that is bodily hurt, to the person of another. It must be intentional. If a person puts his hand upon another in anger, such constitutes an assault. If a person restrains another by force, by holding against the will of such person, such would be an assault. An assault

thus defined, if made upon a female person, is known in law as an assault upon a female. . . . Now, a conviction of an assault with intent to commit rape by force is not warranted by proof that the persons or person accused against the will of the female person upon whom the crime is alleged to have been committed indecently fondled her with intent to induce her thereby to submit to his embrace. If the jury is satisfied from the evidence beyond a reasonable doubt that the person or persons accused were guilty of such conduct, such person or persons would be guilty of an assault upon a female, but would not be guilty of an assault with intent to commit rape."

Under the facts and circumstances of this case, we see no error in the above charge. The question of an assault on a female is gone into at some length in *S. v. Williams,* 186 N. C., 627. We think that case fully justifies the charge in the present case. *S. v. Hill,* 181 N. C., 558 (560); *S. v. Gooding,* 196 N. C., 710. In fact, the defendants having failed to make motions for nonsuit (C. S., 4643) waived their right as to the insufficiency of evidence to warrant a conviction. *S. v. Hayes,* 187 N. C., 490.

The defendants contend: "4. That the court below committed error in failing to charge the jury to some extent upon the evidence of the case, and in failing to charge the jury upon the law relative to a simple assault in accordance with cases: *S. v. Brooks,* 76 N. C., 1, and *S. v. Nash,* 109 N. C., 824." This contention cannot be sustained.

We think the charge sufficient in law and does not impinge C. S., 564. If the defendants wanted more definite charge on some subordinate feature they should have presented same by proper prayers for instruction. *School District v. Alamance County,* 211 N. C., 213 (226). We think none of the exceptions and assignments of error can be sustained.

Upon the whole record we can see no prejudicial or reversible error. The case was carefully tried. The charge sets forth fully the law applicable to the facts. The charge is able, clear and shows thought and painstaking. We find

No error.

FRANCIS A. CODY v. GEORGE I. HOVEY.

(Filed 10 April, 1940.)

1. Appeal and Error § 37b—

The ruling of the trial court as a matter of law that it was without power to permit defendant to amend his answer because of defect in the notice of the motion to amend, is reviewable.

2. Pleadings § 23—Defects in notice of motion to amend are waived by successful application for continuance.

Where plaintiff, after notice of defendant's intention to move to be allowed to amend his answer, requests and obtains a continuance of the motion he thereby waives his right to object that notice of the motion was not given him within the ten-day period prescribed by C. S., 515, even conceding that the provisions of that statute are applicable, the purpose of the requirement of notice being merely to call the matter to the attention of the adverse party and to give him reasonable time for preparation.

3. Appeal and Error § 49a—Decision of Supreme Court held not to confine defendant to the procedure prescribed by C. S., 515, in seeking to amend his answer.

Where the Supreme Court holds that plaintiff's demurrer to an affirmative defense set up in the answer should have been sustained and that defendant might move for leave to amend "in accordance with the provision of C. S., 515," the provision for amendment of the answer in accordance with C. S., 515, is an inadvertence, and cannot be held to confine defendant to the procedure specified in that statute, the provisions of the statute not being applicable to the amendment of an answer after judgment sustaining a demurrer to an affirmative defense or counterclaim, but only to the amendment of the complaint after judgment sustaining a demurrer thereto, and the Supreme Court having no right to require defendant to adopt an inappropriate procedure in seeking an amendment to his answer.

4. Pleadings § 23—C. S., 515, has no application to the amendment of answer after judgment sustaining demurrer thereto.

The provisions of C. S., 515, that plaintiff, after judgment sustaining a demurrer to the complaint must move to be allowed to amend within ten days after the return of the judgment or within ten days after receipt of the certificate from the Supreme Court, applies solely to amendment of the complaint after demurrer thereto is sustained, and the ten-day period prescribed by statute does not apply to an amendment of an answer after judgment sustaining a demurrer to an affirmative defense set up therein, the procedure regulating demurrer to the answer being provided by C. S., 525, which contains no reference to C. S., 515, and this conclusion is in accord with the history of the various amendments relating to civil procedure and with the principal that the adjective law will be liberally construed to promote justice and not to defeat or delay it by technical construction.

5. Same—

In determining the right of a party to be allowed to amend his pleading, the sufficiency of the matter intended to be pleaded is not germane. DEVIN, J., dissenting.

APPEAL by defendant from *Cowper, Special Judge,* at January Special Term, 1940, of CALDWELL. Reversed.

This case was here before and is reported as *Cody v. Hovey,* 216 N. C., at page 391.

The plaintiff sued upon a judgment obtained by him against the defendant in the State of New York.

The complaint set up the pendency of the suit in New York, the rendition of the judgment therein, together with details as to the amount thereof, and the taxing of costs; alleged facts with reference to notice and hearing in that jurisdiction; and that the defendant had appealed from the judgment to the Appellate Division of the New York Supreme Court, and that the judgment had been there affirmed; and asked that a judgment be rendered in the State court for the amount of the New York judgment, with interest, and the costs of the North Carolina proceeding.

The defendant answered, admitting the statements of fact in the complaint and setting up a further defense, alleging new matter: (1) That the judgment was procured by fraud by reason of the false testimony of a witness; (2) that the transaction upon which the New York judgment was rendered was based upon a gaming contract and was therefore void in this State, as in contravention of C. S., 2144; and (3) that he was embarrassed and humiliated and his peace of mind disturbed because of the unjust prosecution of this suit, for which he claimed damages in the amount of $500.00. (The counterclaim was subsequently abandoned and does not appear in the present controversy as to the amendment.)

The plaintiff demurred to the answer and demanded judgment upon the pleadings. The court below sustained the demurrer of the plaintiff to the defense of fraud in the procurement of the judgment and as to the counterclaim, overruled it as to the defense that the judgment was based upon a gaming contract, in violation of C. S., 2144, and denied the motion for judgment on the pleadings. Both plaintiff and defendant appealed.

These appeals were heard at the Fall Term, 1939, of this Court, at which time this Court affirmed that portion of the judgment below sustaining the demurrer to the counterclaim and to the defense of fraud in the procurement of judgment, and reversed it as to overruling the demurrer to the defense that the judgment was based upon a gaming contract within the provision of C. S., 2144, holding the facts were not sufficiently stated, and affirmed the judgment of the court below refusing judgment on the pleadings.

The result was to reverse the trial court upon plaintiff's appeal and affirm it on defendant's appeal.

In returning the case to the Superior Court for further proceeding, this Court suggested that the defendant should be given the "right to move for leave to amend in accordance with the provisions of C. S., 515."

The opinion of the Supreme Court was certified down to the clerk of the Superior Court of Caldwell County, received by him and filed on 8 December, 1939. On 19 December the defendant wrote to the plaintiff that the defendant would, on 8 January, the first day of the Special

Term of the Superior Court of Caldwell County, move for leave to file an amended answer. Plaintiff's counsel received said notice by mail on 20 December, 1939, and immediately requested that the hearing be continued until 15 January, and defendant agreed to said continuance. At this time the judge of the Superior Court hearing the matter refused to permit the defendant to amend his answer so as to set up sufficient supporting facts to the allegation that the New York judgment was obtained upon a gambling contract, and did this as a matter of law, stating that the court was without power to allow defendant to amend his answer. Defendant's appeal from this order is now before the Court.

Gover & Covington and Hugh L. Lobdell for plaintiff, appellee.
Pritchett & Strickland for defendant, appellant.

SEAWELL, J. Since the judge based his refusal to allow the amendment on a want of power under the law his judgment becomes reviewable in this Court. *Balk v. Harris,* 130 N. C., 381, 41 S. E., 940; *Martin v. Bank,* 131 N. C., 121, 123, 42 S. E., 558.

If we concede that it was necessary for the defendant to comply with the terms of C. S., 515, as a condition precedent to obtaining leave of court to amend his answer, the successful application of the plaintiff for a continuance of the hearing must be held as a waiver of any defect of notice, which reached him only two days after the expiration of the ten-day period. A similar rule applies where defendant has requested and the court has given time to file answer; *Garrett v. Bear,* 144 N. C., 23, 56 S. E., 479; *Oettinger v. Livestock Co.,* 170 N. C., 152, 86 S. E., 957; *Trustees v. Fetzer,* 162 N. C., 245, 78 S. E., 152; and there is no reason why it should not apply in the present similar situation, which involves considerations of less importance. The purpose of the law is to secure to the adverse party not only notice but a reasonable time for preparation, or at least attention to the matter involved, which in this case, and in most notices of a like character, has been statutorily fixed at ten days. Here the plaintiff not only had notice but ample time was given him, at his request, for a hearing of the matter at a suitable time, according to his conveniences and the necessities of the case, at which time the plaintiff interposed no other objection to the amendment except that the notice had not been given within the ten days prescribed by C. S., 515. It is true, however, that in this Court plaintiff's counsel argues that the amendment would be ineffective because, as he contends, C. S., 2144, would not preclude plaintiff from recovery upon his judgment obtained in a foreign state.

We are of the opinion that the plaintiff in applying for and receiving time to make whatever defense and whatever preparation he desired to

make in resistance of defendant's motion is the equivalent of notice and has put him in court.

2. Our attention has been called by plaintiff to the fact that in the opinion of the Court, when this case was here before, it is suggested that defendant might move to amend by complying with C. S., 515. This may be regarded as an inadvertence from which no harm has resulted, but it cannot be maintained as an intentional exercise of the supervisory power of the Court without substantial invasion of defendant's rights. Always the obligation resting upon the Court is not to sustain itself but to sustain the law. This Court has no power to require the defendant to adopt an inappropriate procedure in seeking an amendment to his answer that will curtail his rights under the statutes providing rules of procedure in the Superior Court. The Court has never held, in so far as we are able to determine, that C. S., 515, has any application to demurrers to the answer, and the language employed in that section excludes that construction.

Section 515 refers exclusively to demurrers to complaints and not to any demurrer to the answer. A separate section—C. S., 525—deals with demurrers to the answer or parts thereof and undertakes to settle the manner in which these demurrers may be heard and determined.

It is contended that the following provision in this section makes section 515 applicable to the present case: "The plaintiff may in all cases demur to an answer containing new matter, where, upon its face, it does not constitute a counterclaim or defense; and he may demur to one or more of such defenses or counterclaims, and reply to the residue. Such demurrer shall be heard and determined as provided for demurrers to the complaint."

We cannot hold that this language is sufficient to imply that the notices and limitations upon time set out in detail in section 515 are brought forward and made a part of C. S., 525, for several reasons.

Section 525 makes no reference to C. S., 515, only as such a reference might be intended or implied by connection of subject matter, and as to this no mention is made of the filing of any answer or amendment thereto—merely to the hearing and determination of the demurrer. Even if we were uninfluenced by the liberality of construction which we are required to give procedural laws, and especially the Code of Civil Procedure, which was enacted to relieve against the rigors of common law practice (*Page v. McDonald,* 159 N. C., 38, 74 S. E., 642; *Bullard v. Johnson,* 65 N. C., 436; *Cheatham v. Crews,* 81 N. C., 343, 345), the concluding language of this section (525) is not sufficient to justify us in assuming that it meant more than it said, since the hearing and determination of a demurrer is a thing entirely apart from the filing of an answer or amendment thereto, and, indeed, from the exigencies which may be created by passing upon the demurrer.

Section 515 is not the only law regulating the procedure with regard to demurrers to complaints. C. S., 509—embodying the amendment made by chapter 66, Public Laws of 1927, section 4, and with respect to the point under consideration a later enacted statute—provides as follows: "509. Demurrer and answer. The defendant must appear and demur or answer within thirty (30) days after the service of summons upon him, or within thirty (30) days after the final determination of a motion to remove as a matter of right, or after the final determination of a motion to dismiss upon a special appearance, or after the final determination of any other motion required to be made prior to the filing of the answer, or after final judgment overruling demurrer, or after the final determination of a motion to set aside a judgment by default under C. S., section six hundred, or to set aside a judgment under C. S., section four hundred and ninety-two. . . ."

It will be seen that C. S., 515, is repugnant to this statute, at least with respect to the filing of an answer after an unsuccessful demurrer to the complaint.

There is every evidence in the statute itself, and in the history of the various amendments relating to civil procedure, which we partially note, that this provision of section 515 was intended only to bring the hearing and determination of demurrers to the answer within the rule which had been recently provided for the hearing and determination of demurrers to the complaint.

Under the Revisal (1908), section 485, we find no such provision, since demurrer and answer were at that time treated in the same way. Under the Revisal, section 473, the defendant was required to appear and answer or demur at the term to which the summons was returnable. Under the Revisal, section 484, it was required that "the plaintiff shall join issue on the demurrer or reply to the answer at the same term to which such demurrer or answer may be filed; and the issue, whether that of law or fact, shall stand for trial at the term succeeding the term at which the pleadings were completed."

Under C. S., 513, and amendments, after pleadings were again required to be filed with the clerk, it is provided that when a demurrer to the complaint is filed the plaintiff may be allowed to amend, but if he fail to do so within five days after notice the parties may agree upon a time and place for the hearing before a competent judge, and in case no agreement shall be made it becomes the duty of the clerk to send up the complaint and demurrer to the judge holding the next term of the Superior Court in the county where the action is pending. C. S., 513.

Under the old practice (C. C. P., section 111), the clerk was required to send the pleading within ten days to the judge of the court for hearing and determination. Thus it will be seen that the 1919 statute provided a method for the hearing and determination of a demurrer to the com-

plaint entirely different from that under the Revisal or under the original C. C. P. See C. C. P., section 105. As stated, these provisions apply to demurrers to the complaint only, and it was necessary to correlate the practice in case of a demurrer to the answer to these provisions. This we consider to be the function of the provision in C. S., 525, above quoted, which has been cited to us.

We do not consider any other reasoning necessary to support our conclusion. It might be observed, however, that the plaintiff invokes the jurisdiction of the court at his own will, while the defendant may be considered as being brought there *in invitum*. This may account for the fact that more latitude is given to the person who is on defense.

The construction we have put upon this law is in full accord with the authorities, which hold that the liberality of our present practice is inspired by a desire to promote justice rather than defeat it by an insistence on a technical construction. *Brewer v. Ring and Valk,* 177 N. C., 476, 99 S. E., 358; *Deligny v. Furniture Co.,* 170 N. C., 189, 86 S. E., 980; *R. R. v. King,* 125 N. C., 454, 34 S. E., 541; *Swain v. Burden,* 124 N. C., 16, 32 S. E., 319; also cases above cited. So anxious is the law that justice prevail that it permits the court, in some instances, to amend pleadings even after judgment. C. S., 547.

The matter of procedure is of the gravest importance in the judicial system, since it provides, in large part, the instrumentalities by which the ends of justice may be reached, and, in fact, institutes an exclusive method by which decision may be approached. The Court will not impose limitations on the liberal practice provided for this purpose in our civil procedure unless the authority is plainly declared in the law, or appears therefrom by clear inference.

It may not be necessary to advert to the argument made here by defendant's counsel to the effect that a judgment of another state may be enforced in this State notwithstanding section 2144, in which, after denouncing certain sorts of gambling contracts (which defendant seeks to prove were the bases of the foreign judgment), the statute proceeds: ". . . 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." At present, we do not see that the proposed amendment can be resisted on that ground. Since the court refused, as a matter of law, to permit any amendment, the sufficiency of the matter intended to be pleaded is not before us now.

We are of the opinion that the court below had the power to entertain defendant's motion to amend his pleading so as to properly set up the defense which he proposes, and the refusal of the court to do so as a matter of law was error.

Reversed.

DEVIN, J., dissenting: In the former opinion in this case reported in 216 N. C., 391, it was held that the allegations in defendant's answer, attempting to set up an affirmative defense under C. S., 2144, were insufficient to constitute a valid defense to the action based upon plaintiff's judgment, and that the plaintiff's demurrer thereto should have been sustained. This Court disposed of the matter in these words: "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."

It would seem that this Court, in the exercise of its supervisory power over proceedings in the Superior Court, has confined defendant's procedure for the amendment of his pleadings to that prescribed in C. S., 515. With this the defendant has failed to do, as the court below has found. Upon that finding the court denied defendant's right to amend. The letter of plaintiff's counsel, relied on as a waiver, related to the time for arguing the motion and was written after the time limited for filing amendment had expired. There was no petition to rehear the former opinion. The able and accurate judge of the Superior Court rightly interpreted the former decision of this Court as constituting the law of the case, and binding both upon the court and upon the litigants. The procedure prescribed in the former opinion in this case is in accord with the language of this Court in disposing of numerous decided cases. *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; *Scott v. Harrison, ante,* 319; *Johnston County v. Stewart, ante,* 334. In these cases procedure under C. S., 515, was specifically indicated. In the *Morris case, supra, Connor, J.,* speaking for the Court, referring to C. S., 515, said: "This statute is in aid of an expeditious administration of justice and should be liberally construed and applied."

It is immaterial that the demurrer here considered was interposed by the plaintiff to an affirmative defense in the answer, rather than by a defendant to a complaint. By statute and in the decisions of this Court both are treated as governed by the same principle.

If the former opinion of the Court had not limited defendant's procedure for amendment, I agree that the Superior Court would have had ample power, both inherently as well as by virtue of other applicable statutes, to allow amendments. But that was not the question before the trial judge. He was confronted with the language of this Court. Did he err in ruling in accordance with it? I do not think so.

Nor do I agree with the suggestion in the majority opinion that the proposed amendment to defendant's answer could "not be resisted." The amendment has not been filed, and an expression as to the sufficiency of what counsel informally proposed would seem to be, at this time, out of place.

In this connection it may not be improper to suggest that a change in our rules of procedure, in conformity with the practice in the Federal Courts wherein demurrers as a distinct form of pleading have been abolished and motions in the cause substituted, would eliminate a frequent occasion for delay in the trial of cases, and render obsolete much of the technicality and refinement which has grown up in our law with regard to demurrers.

ATLANTIC JOINT STOCK LAND BANK OF RALEIGH v. W. H. FOSTER AND WIFE, DOROTHY L. FOSTER, A. L. OSBORNE, COY ELLER, GURNEY P. HOOD, COMMISSIONER OF BANKS, DEPOSIT & SAVINGS BANK, INC., JAS. McCRAW, INC., L. C. HAFER AND U. L. HAFER, DOING BUSINESS UNDER THE FIRM NAME OF ALEXANDER MOTOR COMPANY, COLUMBIA CASUALTY COMPANY, ASHE MOTOR COMPANY, INC., MOTOR SERVICE COMPANY, JENKINS HARDWARE COMPANY, INC., THE BANK OF NORTH WILKESBORO, YADKIN VALLEY MOTOR COMPANY, GWYN-WRENN INSURANCE AGENCY, INC., C. C. WAGONER AND IRA G. ROYSTER, ERNEST ELLISON AND MARYLAND CASUALTY COMPANY, J. M. BROWN, TRUSTEE AND RECEIVER FOR THE USE OF W. B. SOMERS, W. B. SOMERS, JOHN M. YATES, THE BANK OF YADKIN, ASSIGNEE OF DIXIE BOND & MORTGAGE COMPANY, HARPER MOTOR COMPANY, THE STATE OF NORTH CAROLINA, E. B. SOMERS, TRUSTEE FOR W. B. SOMERS, KYLE HAYES, TRUSTEE, AND D. J. BROOKSHIRE, J. M. BUMGARNER, G. G. ELLEDGE AND A. G. HENDERSON.

(Filed 10 April, 1940.)

1. Insurance § 21—

The rights of the parties under a loss-payable clause in a policy of fire insurance will be determined in accordance with the terms and provisions of the contract, which derive no extra validity by reason of the fact that the form is prescribed by law, Michie's Code, 6437.

2. Insurance § 14—

The assignment of an insurance policy is governed by rules pertaining to other assignments as to requisites, validity, operation, and effect.

3. Insurance § 21—Attachment of standard loss-payable clause to fire insurance policy amounts to virtual assignment of the policy.

A loss-payable clause in favor of the mortgagee, written in accordance with the statutory form, and the delivery of the policy to the mortgagee creates a separate contract between the insurer and the mortgagee upon which the mortgagee may sue to recover loss, C. S., 446, and no act or omission on the part of the mortgagor can affect the mortgagee's right to recover, and the transaction amounts to a virtual assignment of the contract assented to by the insurer by its attachment of the loss-payable clause and delivery of the policy to the mortgagee.

4. Same—Whether mortgagee failed to exercise due diligence to collect proceeds of fire insurance policy held for jury.

Certain structures on the property mortgaged were insured with loss-payable clause in favor of the mortgagee, and the policy was delivered to the mortgagee in compliance with the stipulations contained in the mortgage. A structure valued at much less than the mortgage debt burned, but no notice or proof of loss was given insurer either by the mortgagor or by the mortgagee, and the evidence failed to disclose that either had knowledge that the structure had burned. Several years thereafter the mortgagee, upon the mere request of the insurer, surrendered the policy to the insurer for cancellation. Foreclosure proceedings were instituted, and the personal representative of the deceased mortgagor resisted same on the ground that the mortgagee was liable for the loss of the proceeds of the fire insurance by reason of its failure to use due diligence to collect the amount due on the policy and apply same to the debt. *Held:* Since the mortgagee had possession of the policy with the right to sue on same and apply the whole of the proceeds to the debt, mortgagor not being entitled to any part thereof, whether the mortgagee failed to exercise due diligence to collect on the policy should have been submitted to the jury, there being no evidence of estoppel by conduct on the part of the mortgagor.

5. Mortgages § 30e—

The foreclosure of a mortgage may be enjoined pending the determination of the question of the mortgagee's liability for its failure to exercise due diligence to collect on a policy of fire insurance on the mortgaged premises and apply the proceeds to the mortgage debt.

6. Mortgages § 9—

It is error for the trial court to charge the jury that as a matter of law the mortgagee was entitled to add to the mortgage debt the amount of insurance premiums paid by the mortgagee when there is evidence that the mortgagee voluntarily took out the policy on property which had theretofore been destroyed by fire, and no evidence that the mortgagor had failed to pay fire insurance premiums as required by the mortgage.

APPEAL by defendants, Dorothy L. Foster, administratrix of the estate of W. H. Foster, deceased, A. L. Osborne and P. E. Brown. New trial.

The plaintiff brought this proceeding to foreclose a mortgage made to it by W. H. Foster and wife, Dorothy L. Foster, on certain lands of the defendants in Wilkes County, alleging default in the payment of the notes secured by the mortgage deed and breach of other conditions in the mortgage which accelerated the due date. The plaintiff asked for the recovery of $1,713.21 due it upon the original mortgage indebtedness, with interest, and for $144.34 alleged to have been advanced for insurance and taxes.

The plaintiff sets up that subsequently to the execution of the mortgage to it the defendants W. H. Foster and wife executed another mortgage on a part of the lands to P. E. Brown, and that the said P. E.

Brown subsequently conveyed, as mortgagee, to A. L. Osborne; that a portion of the lands embraced in the original mortgage was subsequently conveyed in a mortgage deed from Foster and wife to Coy Eller; and sets up numerous judgments that were taken against the defendant Foster having liens upon the lands both before and after the junior mortgages referred to, but all subsequent to the original mortgage to plaintiff.

Various defendants other than the Fosters answered the complaint, setting up their own claims and denying material allegations of the complaint. From these answers it appears that the answering parties were junior encumbrancers upon the land, and as between Coy Eller and P. E. Brown and his grantees their encumbrances were upon separate portions of the land. These answers are not material to the phase of the case which controls the Court in this opinion.

Mrs. Dorothy Foster answered as administratrix of W. H. Foster, who had died pending the proceeding or before it commenced. The record is not clear. In her answer she admitted the execution of the deed of trust, did not deny that the payments thereon were as stated in the complaint, but set up that under the contract with the Atlantic Joint Stock Land Bank her intestate, W. H. Foster, had been compelled to take out a policy of fire insurance upon the mortgaged premises payable to the plaintiff in the sum of $1,600.00, and by that contract had been compelled to surrender the said policy into the custody of the plaintiff. She alleges that while the policy was yet in force a dwelling house upon the premises of not less than $2,000.00 in value burned, and that it was the duty of the plaintiff to use diligence in the collection of the insurance for the loss thereby sustained, and that the plaintiff neglected to take any steps toward the collection of the said insurance and the application thereof to the indebtedness and, in fact, at the request of the insurance company, surrendered the insurance policy for cancellation. She alleges that by reason of the failure of the plaintiff to use due diligence in the collection of the said insurance, and its voluntary surrender of the policy for cancellation, plaintiff has become liable for the loss so sustained, and asks that the amount which should have been collected upon the insurance be credited upon the mortgage indebtedness before any foreclosure is permitted.

In an amended answer or cross action, joined in by Mrs. Foster, administratrix of W. H. Foster, and P. E. Brown, it is alleged that the plaintiff and the Farmers Mutual Fire Insurance Association, while the policy of fire insurance on defendant's property was still in force and after liability therefor had accrued, agreed together, for the purpose of defeating the defendant's rights, to cancel the policy of insurance, and the allegations as to damages, and the counterclaim, are reiterated.

The plaintiff replied, admitting that the policy of fire insurance mentioned in defendant's pleading had been issued and that it contained a mortgage clause with loss payable to the plaintiff, as its interest might appear.

The evidence tended to show that the policy of insurance referred to was delivered to the plaintiff when it was taken out, and it is admitted that the buildings were burned on 14 April, 1931, and that the buildings were worth at least $1,000.00.

The evidence is conflicting as to whether the policy of insurance had been actually canceled. The testimony of H. F. Ledford is to the effect that the policy of insurance had been delivered up by the plaintiff for cancellation at the request of the insurance company in 1935.

T. R. Bryan, who succeeded the witness Ferguson as secretary-treasurer of the Farmers Mutual Fire Insurance Association, and who was at the time of trial in charge of the company, testified that he had investigated the records of the company and found no evidence of the cancellation of this policy.

The evidence tends to show that the Land Bank, after the date of the fire, independently procured other insurance upon the property, claiming as its authority to do so failure of the defendant Foster to keep the insurance up, according to the mortgage contract. The amount of the premiums of this insurance, with the taxes paid upon the property, constitute the claim represented by the second issue.

The evidence is silent as to occupation of the property at the date of the fire. However, it appears from the record that service of publication as to W. H. Foster and Mrs. Foster was ordered, and that subsequently Mrs. Foster was found to be in Greensboro, Guilford County.

The trial judge submitted two issues to the jury, one as to the amount which the plaintiff was entitled to recover upon the main indebtedness and one as to the amount which it was entitled to recover for money advanced by way of taxes and insurance premiums. He declined to submit any issue as to the insurance policy or as to the liability of the plaintiff thereupon. On the first issue he instructed the jury "that if you believe the evidence and find the facts to be as shown by the admissions and the documentary evidence introduced in this case that you will answer that first issue $1,713.21, with interest from July 1, 1933." On the second issue he instructed the jury "that if you believe the evidence and find the facts to be as shown by the witnesses, the testimony of the witnesses, the admissions, and the documentary evidence introduced, that you will answer the issue $144.34." The jury answered the issues accordingly and judgment ensued for the amount so found, and a foreclosure sale of the premises was ordered.

The judgment undertook to marshal the liens upon the property and order the sale of the lands described in the P. E. Brown mortgage deed first, and provided that if this did not bring enough to settle the debt, then the lands described in the mortgage deed to Coy Eller, or so much thereof as was necessary to pay the remainder of the judgment and costs of the action and sale, be sold. Defendants appealed.

Folger & Folger and Arch T. Allen for plaintiff, appellee.
Whicker & Whicker and Jones & Brown for defendants, appellants.

SEAWELL, J. The insurance policy, in the respects here considered, conforms to the requirements of the North Carolina act on the subject establishing a standard fire insurance policy. Michie's Code, section 6437. Where loss or damage is made payable in whole or in part to the mortgagee, it is provided: "Upon failure of the insured to render proof of loss, such mortgagee shall, as if named as insured hereunder, but within sixty days after such failure, render proof of loss and be subject to the provisions hereof as to appraisal and time of payment." As to the original insured, it is provided that "the insured shall within sixty days after the fire, unless such time is extended in writing by this company, render to this company a proof of loss, signed and sworn to by the insured," etc. But the rights of the parties after the policy has been issued must be ascertained and determined in accordance with the terms and provisions of the contract and derive no extra validity by reason of the fact that the form is prescribed by law. *Lancaster v. Ins. Co.*, 153 N. C., 285, 69 S. E., 214; *Midkiff v. Ins. Co.*, 197 N. C., 139, 141, 147 S. E., 812.

The assignment of an insurance policy is governed by rules pertaining to other assignments as to requisites, validity, operation, and effect. *Hobbs v. Memphis Ins. Co.*, 1 Smeed (Tenn.), 444; *Ward v. Rutland, etc., Mutual Fire Insurance Co.*, 31 Vt., 552. The theory that insurance is a personal contract and, therefore, limits the assignability, has no bearing here, since the insurance company consented to its transfer and recognized it by the attachment of the standard New York mortgage clause which, indeed, is in some aspects a contract between the insurance company and the mortgagee. No inference can be drawn from that theory that the proof of loss should preferentially be made by the owner, since the question of personnel is one which applies to the risk involved in issuing the policy. The effect of an assignment upon the insurance contract is, therefore, controlled by the terms and the circumstances of the contract of assignment itself; *Cleveland v. Clapp*, 5 Mass., 201; *Ainsworth v. Backus*, 5 Hun. (N. Y.), 414; and we think this holds true where the mortgage contract requires the policy to be taken out for the

benefit of the mortgagee and delivered up to him, although some question might be raised as to whether this would constitute a technical assignment.

The mortgage contract between the plaintiff and the defendants Foster required the latter to take out insurance upon the mortgaged property, the loss, if any, payable to the mortgagee, as its interest might appear, and further required that the insurance policy so obtained should be delivered into the possession of the plaintiff, which was done. Whether the defendants kept up the premiums on the policy, as they had agreed, or did not, does not appear in the record. It does appear, however, that some time in 1935 the mortgagee independently took out other insurance, although the dwelling had been destroyed by fire in 1931. This remarkable fact, bearing alike on the Land Bank and the insurance company which issued the policy on nonexistent property, seems to indicate an unjustifiable want of business prudence on the part of both parties to the transaction and the lack of easily obtainable knowledge of the conditions existing with respect to the property. The mortgagee meanwhile delivered up the policy of insurance taken out by Foster upon the mere request of the insurance company and a statement from them that it had been canceled, and without any investigation whatever.

In some respects the duty of the land bank toward the mortgagor with respect to the collection of the insurance on the loss which occurred by the burning of the property 12 April, 1931, is a matter of first impression with us. The precise point involved in this case does not appear to have been decided here.

That the mortgagee had the right to sue in the premises—especially since it had been accepted as payee by the insurance company—cannot be questioned. *Peterson v. Mechanics T. Ins. Co.*, 168 La., 850, 123 So., 596. And upon the evidence in this case it is clear that the amount of insurance was not sufficient to pay off the mortgaged debt, and the mortgagor, therefore, had no equity in the proceeds. It might well follow, since our statute requires suits to be brought by the party at interest—C. S., 446—that the plaintiff mortgagee alone could bring such a suit. 26 C. J., p. 484, and cases cited.

If any other sort of security had been lost by the negligence or misconduct of the plaintiff, it would have been liable therefor. The question here is whether or not the plaintiff, with the policy of insurance in its possession, with the right to sue, and virtually the owner of the proceeds to be recovered, did not owe the duty to the mortgagor to proceed to its collection and application.

We think the contract between the mortgagor and the mortgagee, considered as it affected their obligations and duties to each other, was a virtual assignment of the insurance contract. This, accompanied by delivery of the policy, in a measure substituted the mortgagee for the

mortgagor, certainly as beneficiary under the immediate contract, since it and it alone was entitled to receive the payment from the insurance company. It is not unreasonable to assume that it was the duty of the Land Bank to carry out that part of the contract which related to this interest, that is, the collection of the proceeds and the performance of those things which were necessary and incidental thereto. A reservation was made in the mortgage contract as to the duties to be performed with reference to the insurance contract by the mortgagor, the defendant Foster; that is to say, that he should pay the insurance premiums. We consider it the better reasoning, and so hold, that it was the duty of the Land Bank to exercise due diligence in collecting the insurance, and that this involves due diligence also in giving notice and making proof of claim, a duty which did not devolve entirely on the defendant mortgagor from the simple fact that the responsible officers of the Land Bank had never heard of the fire. It is quite possible, under the facts as we have above outlined them, that the defendant Foster also was in ignorance of the fire. The question is one of due diligence.

We consider the possession of the policy itself by the plaintiff as a strong circumstance in placing upon it the duty of proceeding with the collection. This was considered controlling in *Whiting v. Lane,* 193 Appellate Division, 964, 184 N. Y. S., 793; Annotations, A. L. R., 1289. See, also, *Charter Oak Life Ins. Co. v. Smith,* 43 Wis., 329, as to duty to collect.

There is the further circumstance, with which we do not think the court was competent to deal as a matter of law, that the plaintiff surrendered the policy of insurance for cancellation after (as the evidence tended to show) a liability for loss by fire had accrued upon it. The fire had happened some years before, it is true, and no proof of loss or demand had been made—a circumstance we have considered—but it was not for the plaintiff to determine what defense the insurance company might make against the claim, if any at all. Certainly the failure to file proof and make demand on the part of either the mortgagor or mortgagee would not, under all circumstances, defeat the claim, although it might determine the time within which suit might be brought; *Gerringer v. Ins. Co.,* 133 N. C., 407, 45 S. E., 773; and there are many circumstances which might excuse delay in filing proof of claim, and one of them, it has been held, is absence. 26 C. J., page 375; *Carpenter v. German American Ins. Co.,* 135 N. Y., 298, 31 N. E., 1015; *Oakland Home Ins. Co. v. Davis* (Texas Civil Appeals), 33 S. W., 587.

Indeed, where the New York standard mortgage clause is incorporated into the contract, containing the provision that no failure or misconduct on the part of the mortgagor shall defeat the rights of the mortgagee—and that clause is in this policy—it is generally held that the mortgagee

may bring suit without filing proof of claim at all. At least under this contract of insurance there was nothing which the mortgagor could do to defeat the collection of this security on the part of the mortgagee, and little he could do to advance it. (As noted, the standard policy necessary under the North Carolina Insurance Laws requires the affected mortgagee to make proof of claim within sixty days after a failure on the part of the original insured to do so.)

We are not considering any question of estoppel on the part of the intestate Foster, if there should be any estoppel involved in his conduct. That, at least, cannot be inferred as a matter of law from the evidence.

We think, and so hold, that the question of reasonable diligence in the collection of the item should have been left to the jury upon the issues submitted by the defendant, or other appropriate issues, with proper instruction by the court, and the failure to do so was error.

Under the circumstances of this case it was error also to instruct the jury that if they should believe the facts to be as testified by the witnesses, and as the admissions and documentary evidence tended to show, that they should find the second issue for the plaintiff. Plaintiff had no right to charge defendant's intestate with premiums upon insurance voluntarily taken out upon nonexistent property, and no right to charge for insurance taken out upon any property without proof, which this evidence does not disclose, that said intestate had failed to pay premiums as required by the mortgage.

It is not necessary to review the judgment as to the order in which the property is required to be sold, since the defendant is entitled to have the amount due ascertained before such foreclosure takes place.

For the errors pointed out, there must be a

New trial.

STELLA BARBER v. B. GEORGE BARBER.

(Filed 10 April, 1940.)

1. Divorce § 14—Wife may have amount of alimony due under prior orders determined by the court upon motion in the cause.

In the wife's suit for alimony without divorce, judgment was entered upon answer of the issues by the jury in the wife's favor, awarding her a certain sum per month. Thereafter upon application of the husband, the amount of the monthly payments was reduced. The wife subsequently filed a petition and motion in the cause stating that the husband was in arrears in the payment of the alimony ordered, and prayed that the amount of the arrears be determined by the court, and judgment entered in her favor for the amount. Defendant demurred on the ground that

the petition alleged a personal action in debt, and sought to recover a new judgment in debt, and that the relief could not be had by motion in the cause. *Held:* The judgment awarding alimony directed the payment of money, and the husband became indebted to his wife for such alimony as it became due, and the husband, being a party to the action for divorce without alimony, is bound by the decree, and having been given due notice of the motion, is in court for the purpose of such orders as, upon motion, are appropriate and customary, and the court therefore has jurisdiction to determine the amount of alimony in arrears and render judgment in plaintiff's favor for the amount, and defendant's demurrer was properly overruled.

2. Divorce § 15—

An order for the payment of alimony is *res judicata* between the parties, but is not a final judgment, since the court has the power, upon application of either party, to modify the orders for changed condition of the parties.

APPEAL by defendant from *Warlick, J.*, at January Term, 1940, of BUNCOMBE. Affirmed.

This is a motion in the cause made by plaintiff to recover of defendant arrearage of alimony allowed her in a former suit. In the year 1920, the plaintiff herein instituted a suit against the defendant in the Superior Court of Buncombe County asking for alimony, without divorce, for the maintenance and support of herself and three minor children born of the union of plaintiff and defendant. The defendant filed answer and set up a cross bill asking for divorce from plaintiff from bed and board. Upon the trial of the action, the jury found in favor of the plaintiff and against the defendant. The issues at June Term, 1921, of the Superior Court, from which no appeal was taken, were as follows:

"1. Were the plaintiff and defendant married, as alleged? Ans.: 'Yes.'

"2. Has the defendant, B. George Barber, separated himself from his wife and failed to provide her and the children of their marriage the necessary subsistence, according to his means and condition in life? Ans.: 'Yes.'

"3. Did the plaintiff, Stella P. Barber, maliciously turn the defendant out of doors? Ans.: 'No.'

"4. Has the plaintiff, Stella P. Barber, by cruel and barbarous treatment, endangered the life of the defendant? Ans.: 'No.'

"5. Has the plaintiff, Stella P. Barber, offered such indignities to the person of the defendant, B. George Barber, as to render his condition intolerable and his life burdensome? Ans.: 'No.'

"6. Has the plaintiff been a resident of the State of North Carolina for two years next preceding the commencement of this action? Ans.: 'Yes.'

"7. Has the defendant been a resident of the State of North Carolina

for two years next preceding the commencement of this action? Ans.: 'Yes.'"

Judgment was entered awarding the plaintiff the sum of $200.01 per month for herself and children, payable on or before the 4th day of each month.

On 15 October (October Term, 1929, of the Superior Court of Buncombe County), a hearing was had before Thos. L. Johnson, judge presiding, and a judgment was entered modifying the original order and allowance and ordering the defendant to pay to plaintiff the sum of $160.00 a month for the support of herself and minor children. This amount of monthly allowance to plaintiff was entered after a full hearing upon the establishment of defendant of a so-called "trust estate" for the benefit of plaintiff and her children and an examination into the personal income of defendant derived from sources other than those constituting the so-called "trust estate."

On 7 March, 1939, the plaintiff filed her present petition and motion in the cause, the petition being a long, detailed statement. She alleges that defendant instituted a suit against her for divorce in Fulton County, Ga., of which she had no notice and defendant had a final decree of divorce on 1 April, 1929, and asked that this alleged divorce be declared a nullity. She alleges that the defendant defaulted in the payments as set out in the judgment rendered at the October Term, 1929, the said default being a partial one from 5 August, 1931, and a total default from 5 August, 1932; that she recover of the defendant a judgment in the sum of $16,428.50, due her under the former judgment. That defendant is now a nonresident of the State. Defendant thereupon entered a special appearance and moved to dismiss the petition of plaintiff for want of jurisdiction and lack of service upon defendant. The special appearance and motion to dismiss filed by the defendant was overruled by his Honor, J. Will Pless, Jr., on 24 March, 1939, and upon appeal to this Court, the said judgment was affirmed in the case of *Barber v. Barber,* 216 N. C., 232.

Following the decision of this Court in *Barber v. Barber, supra,* the defendant herein then entered a general appearance and demurrer to the plaintiff's petition, which is as follows:

"1. The court has no jurisdiction of the subject matter alleged in the petition, nor the relief sought thereby, for that: (a) As appears upon the face of the petition, plaintiff has attempted, by way of motion in the cause, to institute a personal action against the defendant sounding in debt for installments alleged to be past due and unpaid on a judgment, which matter cannot be heard on summary motion in the cause. (b) That as appears upon the face of the plaintiff's petition, plaintiff seeks to recover a new judgment against this defendant sounding in debt in

the amount of $16,428.50, which relief cannot be had on motion in the cause. (c) Under section 1667 of the Consolidated Statutes, upon which this action is founded, the court is without jurisdiction to enter judgment prayed for in the petition of plaintiff.

"2. The plaintiff fails to allege in said petition facts sufficient to entitle her to the relief sought therein with respect to the divorce decree alleged to have been rendered by the court of Georgia, for that: (a) There are no facts alleged in said petition of plaintiff by which it appears that plaintiff's rights in this cause of action are in any way affected by said decree. (b) It appears upon the face of said petition that the validity of said decree, or decrees, is immaterial to this cause of action."

The matter was heard by his Honor, Wilson Warlick, at the January Term, 1940, of Buncombe County Superior Court, and judgment entered as follows: "This cause coming on to be heard and being heard before the undersigned judge at the Regular January Term, 1940, of the Superior Court of Buncombe County, upon the demurrer filed by the defendant to the petition of the plaintiff in this cause, and the court being of the opinion and so holding that the petitioner cannot attack the validity of the Georgia divorce set out in the petition in this cause: Now, therefore, it is ordered that the demurrer filed by the defendant be, and the same hereby is, sustained as to that portion of the petition and the prayer for relief which seeks to have the Georgia divorce described in the petition declared a nullity. It is further ordered that the demurrer be, and the same hereby is, overruled as to all matters set forth in said demurrer, with the exception of the Georgia divorce: And it is further ordered that defendant shall have thirty days from the filing of this order within which to file such pleadings as he may deem advisable. This the 19th day of January, 1940. Wilson Warlick, Judge Superior Court."

From this judgment, the defendant excepted, assigned error and appealed to the Supreme Court.

Jordan & Horner for plaintiff.
Weaver & Miller for defendant.

CLARKSON, J. The question involved: Has the Superior Court power, by motion in the original cause in a suit instituted for alimony without divorce, to determine the amount owed by the defendant to the plaintiff under the former judgments of the court and to enter its decree judicially determining the amount so due and in arrears? We think so.

Where the pleadings for alimony without divorce (under sec. 1567, ch. 31 of Revisal, Laws of 1871-2, ch. 193, sec. 39) raises an issue of fact, it is for the jury to determine. *Crews v. Crews,* 175 N. C., 168.

In the present action the issues of fact were settled by the jury at June Term, 1920, from which defendant took no appeal. The court below, in its sound discretion, fixed the amount of alimony which defendant was to pay the plaintiff at $200.01 a month. No appeal was taken from this judgment. At October Term, 1929, upon petition of defendant, judgment was entered modifying the original order of allowance to $160.00 a month, from which no appeal was taken. The gravamen of the present petition in the cause made by plaintiff is to ascertain the balance due on the original judgment and render judgment therefor.

Under the old law, as it was in the *Crews case, supra,* there was no provision whereby the wife could obtain alimony during the determination of the issues involved in her suit. In 1919 an amendment was added whereby the wife might apply for an allowance for her subsistence during the pendency of her main action. Laws of 1919, ch. 24. It may be noted that two distinct remedies are therein provided: first, the action for alimony without divorce; second, the application for an allowance for subsistence *pendente lite.* Chapter 52, Laws of 1923, amended this section by allowing the husband to plead the adultery of the wife in bar of her right to such alimony. The jury passed on the issues of fact in this action before the amendments above set forth were added.

In *Walton v. Walton,* 178 N. C., 73 (75), it is written: "The question presented is the right of the plaintiff to a warrant of attachment as an ancillary remedy to her cause of action. Chapter 24, Laws 1919, prescribes that the wife abandoned by her husband is entitled 'to have a reasonable subsistence allotted and paid or secured to her from the estate or earnings of her husband.' This gives the wife who has been abandoned a remedy both *in personam* and *in rem.* The attachment is to secure the property so that it may be held to satisfy the judgment when rendered and also as a basis for publication of the summons. The wife has always had the remedy of garnisheeing the salary or wages of her husband in such cases, and she is entitled to an attachment of the property for the same reason. Otherwise the defendant, pending litigation, can sell or convey his property, or creditors may attach it for debt or obtain prior liens by judgment. The defendant contends that an attachment does not lie under Rev., 758, unless there is a breach of contract, express or implied. We are of opinion that the husband is under an implied contract, for he is primarily liable for the support and maintenance of his wife. *Levi v. Marsha,* 122 N. C., 567."

Speaking to the subject in *Anderson v. Anderson,* 183 N. C., 139 (143), it is said: "In *Crews v. Crews,* 175 N. C., 173, cited by the defendant, the definition of the word 'estate' is not restricted to 'income,' but is enlarged so as to embrace income whether arising from permanent property or earnings, for that it is clearly said that alimony could be

assigned from both tangible and intangible property (*Reid v. Neal,* 182 N. C., 199); and in *White v. White,* 179 N. C., 592, it was held that the court may declare alimony a lien upon the husband's lands, even in the absence of notice to him that his wife had instituted a proceeding for that purpose. . . . The defendant's obligation to support the plaintiff during the existence of the marital relation is not a 'debt' within the meaning of Art. X, secs. 1 and 2, of the Constitution. . . . (144) This duty is not a mere incident of contract, but it arises out of the very nature and purpose of the marriage relation; and this relation civilized mankind regard as the only stable foundation of our social and civil institutions. Hence, both law and society demand that the marriage relation be recognized, respected, and maintained, and that the husband's duty to support his wife and their offspring be awarded higher sanction than the strait contractural obligation to pay value for a yoke of oxen or a piece of land. The defendant, therefore, cannot escape the performance of his duty to support the plaintiff on the ground that he sustains toward her the relation of a mere debtor. Rodgers on Domestic Relations, sec. 2, *et seq.*" *Holton v. Holton,* 186 N. C., 355; *Kiser v. Kiser,* 203 N. C., 428; *Walker v. Walker,* 204 N. C., 210; *Tiedemann v. Tiedemann,* 204 N. C., 682.

A judgment awarding alimony is a judgment directing the payment of money by a defendant to plaintiff and, by such judgment, the defendant thereupon becomes indebted to the plaintiff for such alimony as it becomes due, and when the defendant is in arrears in the payment of alimony the court may, on application of plaintiff, judicially determine the amount then due and enter its decree accordingly. The defendant, being a party to the action and having been given due notice of the motion, is bound by such decree, and the plaintiff is entitled to all the remedies provided by law for the enforcement thereof. *Vaughan v. Vaughan,* 211 N. C., 354 (361).

This Court has held that the allowance of alimony is higher than the "strait contractual obligation." It is a claim that the Homestead Exemption cannot be called on to defeat; the failure to pay is the breach of an implied contract and attachment will lie; the court may declare it a lien on the husband's property; the property, both real and personal, can be held and appropriated to pay it. The motion in the cause can be dealt with only as a petition for the ascertainment of the alimony due the plaintiff under former orders of the court, looking toward enforcement against the defendant by appropriate proceeding. It is not a final judgment in the action, since both the plaintiff and the defendant may apply for other orders and for modifications of orders already made, which the court will allow as the ends of justice require, according to the changed conditions of the parties. The orders made from time to time

are, of course, *res judicata* between the parties, subject to this power of the court to modify them. The consolidation of the amounts due, when ascertained in one order or decree, does not invest any of these orders with any other character than that which they originally had. If the defendant is in court only by reason of the original service of summons, he is in court only for such orders as, upon motion, are appropriate and customary in the proceeding thus instituted. There is no reason why a judgment should not be rendered on an allowance for alimony, which is a debt—and more than an ordinary one. The court below, in its sound discretion, which is not ordinarily reviewable by this Court, under the motion of plaintiff in this cause can hear the facts, change of conditions of the parties, the present needs of support of any of the children and, in its sound discretion, render judgment for what defendant owes under the former judgment and failed to pay and see to it that such judgment is given to protect plaintiff, and "give diligence to make her (your) calling and election sure."

For the reasons given, we see no error in the judgment of the court below overruling the demurrer. The judgment is

Affirmed.

R. A. MORRIS v. LAUGHLIN CHEVROLET COMPANY, EMPLOYER, AND LUMBER MUTUAL CASUALTY COMPANY, CARRIER.

(Filed 17 April, 1940.)

1. **Statutes § 5a—**

The cardinal rule in the construction of a statute is to effectuate the intent of the Legislature.

2. **Master and Servant § 37—**

The Workmen's Compensation Act will be construed as a whole to effectuate the intent of the General Assembly.

3. **Master and Servant § 41a—Medical and hospital expenses should not be included in computing the maximum compensation recoverable for any one injury.**

In computing the $6,000.00 maximum amount recoverable for any one injury under the Compensation Act, Michie's Code, 8081 (ww), the amount paid by the employer or insurance carrier for medical and surgical treatment and/or hospitalization or other treatment, including medical and surgical supplies, Michie's Code, 8081 (gg), should not be included, since the Compensation Act does not include such medical and hospital expense in defining the word "compensation" but defines compensation as the money allowance payable to an employee or his dependents, including funeral benefits provided by the act, Michie's Code, 8081 (i) (k).

APPEAL by defendants from *Ervin, Special Judge,* at February-March Civil Term, 1940, of CABARRUS. Affirmed.

This is an action brought by R. A. Morris, employee, against Laughlin Chevrolet Company, employer, and Lumber Mutual Casualty Company, carrier, for compensation for injuries, under the N. C. Workmen's Compensation Act, N. C. Code, 1939 (Michie), sec. 8081 (h), *et seq.* (Public Laws 1929, ch. 120, and amendments thereto).

It is alleged that the plaintiff, on 31 December, 1936, suffered an "injury by accident arising out of and in the course of the employment." Sec. 8081 (i) f. He was injured when working under a car in a sitting position directly under the gas tank. The car was hoisted by a chain fastened to a chain hoist. The chain was fastened around the bumper of the car and then hooked back to the chain. Movement of the car caused the hook to slip off the chain, letting the car fall on the back of plaintiff. The alleged injury resulted in total and permanent disability from paralysis. An agreement for the payment of compensation was entered into and an award issued thereon 26 January, 1937, and payments were made as a result of said award both to the plaintiff and for medical services to August, 1939. A hearing was held for the purpose of determining whether or not further hospitalization should be granted to plaintiff, and an award was entered ordering hospitalization stopped. The award was made by T. A. Wilson, hearing Commissioner, on 17 October, 1939.

The defendants contend that they have paid the sum of $2,376.00 directly to the employee at the rate of $18.00 per week, and $3,667.74 for medical, hospital, nursing, drugs, physicians and surgeons fees, which totals $43.74 more than $6,000.00.

The hearing Commissioner decided against defendants' contentions, and the defendants appealed to the Full Commission, which sustained the hearing Commissioner. The Full Commission, after setting forth its reasons, said: "The Full Commission, therefore, is definitely of the opinion that medical and hospital services rendered the injured employee by the defendants, as provided in the act, should not be considered a part of compensation as compensation is defined in said act and that, therefore, should not be rightfully included in the $6,000.00 limit placed upon the amount of compensation to be paid to an injured employee. The Full Commission affirms, approves and adopts as its own the findings of fact, conclusions of law and award as made by hearing Commissioner Wilson."

An appeal was taken by defendants to the Superior Court, and the following judgment was rendered: "This cause being heard upon appeal of the defendants from the conclusions of law and award of the North Carolina Industrial Commission, and the court being of the opinion and

finding that the findings of fact, conclusions of law and award of the Commission are correct: It is, therefore, ordered, adjudged and decreed that the findings of fact, conclusions of law and award of the North Carolina Industrial Commission be, and they are hereby in all respects affirmed. This the 6th day of March, 1940. S. J. Ervin, Jr., Judge Presiding."

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

Hartsell & Hartsell for plaintiff.
Sapp & Sapp for defendants.

CLARKSON, J. N. C. Code, 1939 (Michie), sec. 8081 (ww) (Public Laws 1929, ch. 120, sec. 41), is as follows: "The total compensation payable under this article (act) shall in no case exceed Six Thousand ($6,000) Dollars." Do the words "total compensation" include money paid by the employer or carrier for medical, hospitalization, doctors, nurses and drugs for the employee? We think not.

In *Arp v. Wood & Co.*, 207 N. C., 41, it is held: "The amount allowed by the Industrial Commission for serious facial or head disfigurement is to be included with other amounts allowed an injured employee in determining the total compensation allowed such employee, which in no case may exceed six thousand dollars. N. C. Code, 8081 (kk), 8081 (mm), 8081 (ww)."

In 8081 (i) definition (k) is as follows: "The term 'compensation' means the money allowance payable to an employee or to his dependents as provided for in this act, and includes funeral benefits provided herein."

"The object of all interpretation of statutes is to ascertain the meaning and intention of the Legislature, and to enforce it. The courts are not bound by the letter of the law, which has been denominated its 'body,' but may consider its spirit, which has been called its 'soul.' Nor can the courts, when the intention is once discovered, refuse to enforce it because the facts of some particular case present a seeming hardship. . . . 'In the construction, both of statutes and contracts, the intent of the framers and parties is to be sought, first of all, in the words employed, and if the words are free from ambiguity and doubt, and express plainly, clearly, and distinctly the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation.' Black Inter. Law, 37." *Kearney v. Vann,* 154 N. C., 311 (315); *Blassingame v. Asbestos Co., ante,* 223 (234-5).

We see no ambiguity or doubt in the statute. It sets forth in clear language "total compensation" shall in no case exceed $6,000, and the

statute is a definer. The term "compensation" means the money allowance payable to an employee or to his dependents, etc. The statute included funeral benefits, but omitted hospitals, doctors and nurses. Another section covers these, viz.: Section 8081 (gg), in part, is as follows: "Medical, surgical, hospital, and other treatment, including medical and surgical supplies as may reasonably be required, for a period not exceeding ten weeks from date of injury to effect a cure or give relief and for such additional time as in the judgment of the Commission will tend to lessen the period of disability, and in addition thereto such original artificial members as may be reasonably necessary to the end of the healing period shall be provided by the employer. In case of controversy arising between the employer and employee relative to the continuance of medical, surgical, hospital, or other treatment, the Industrial Commission may order such further treatment as may in the discretion of the Commission be necessary," etc.

In *Millwood v. Cotton Mills,* 215 N. C., 519 (523), we find: "As we read and construe the wording of the act it is plain that in order to effect a cure or give relief, medical, surgical, hospital or other treatment shall be provided by the employer for a period of ten weeks. But such treatment may not be required for additional time unless it 'will tend to lessen the period of disability.' Disability, as used in the act, means 'incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment. Public Laws 1929, ch. 120, sec. 2, subsec. (i). Whether additional hospital treatment will tend to lessen the period of disability is a question of fact to be ascertained by the Industrial Commission upon competent evidence. Until and unless such finding be made, the Commission is without jurisdiction to make an award for treatment for an additional period." In the present case further hospitalization was ordered stopped.

Sec. 8081 (z): "Compensation under this article shall be paid periodically, promptly and directly to the person entitled thereto unless otherwise specifically provided," etc.

Sec. 8081 (kk): "Where the incapacity for work resulting from the injury is total, the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employee during such total disability, a weekly compensation equal to 60 per centum of his average weekly wages, but not more than eighteen dollars, nor less than seven dollars, a week; and in no case shall the period covered by such compensation be greater than four hundred weeks, nor shall the total amount of all compensation exceed six thousand dollars. In case of death the total sum paid shall be six thousand dollars less any amount that may have been paid as partial compensation during the period of disability, payable in one sum to the personal representative of deceased," etc.

Construing the act as a whole to effectuate the intent and purpose of the General Assembly, the clear language means, we think, that the total compensation payable under the act shall in no case exceed $6,000. This does not include money paid by the employer or carrier to hospitals, doctors and nurses for hospitalization, etc. These expenses are provided to some extent to be paid (sec. 8081 [gg]), but not out of the $6,000.

From the act it seems that it was clearly the intention of the General Assembly, which passed the Compensation Act, that medical and other services rendered under sec. 25 (Public Laws 1929, ch. 120 [8081 (gg)]), should be in addition to the compensation to which he is entitled under the terms of the act.

This question has been decided adversely to defendants in the case of *Cardillo, Deputy Commissioner, v. Liberty Mutual Insurance Co.,* 101 (2nd Series), page 254, of Federal Reporter. This decision was under Longshoreman's and Harbor Workers' Compensation Act. ch. 18; Federal Code Annotated, Vol. 10, page 259; 33 U. S. C. A., secs. 901, *et seq.* (This act was made applicable to the District of Columbia.) In sec. 902 (12), under that act compensation is defined as follows: " 'Compensation' means money allowance payable to an employee or to his dependents as provided for in this act, and includes funeral benefits provided therein." Sec. 907 (a) of the act, in part, is as follows: "The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for such period as the nature of the injury or the process of recovery may require," etc. Also under that act, sec. 914 (m), reads: "The total compensation payable under this act for injury or death shall in no event exceed the sum of $7,500.00." It will be seen that sec. 902 (12), 907 (a), and 914 (m) are almost identical with the North Carolina Compensation Act, which seems to have been taken, in the main, from the Longshoremen's Act. The Court in this opinion said: "Section 2 of the act, 'Definitions,' states in paragraph (12) that: ' "Compensation" means the money allowance payable to an employee or to his dependents as provided for in this act, and includes funeral benefits provided therein.' This seems clearly to exclude the medical benefits of section 7. . . . We conclude that medical and similar benefits under section 7 are not to be counted in applying the $7,500 limit of 'total compensation' in section 14 (m). The same conclusion follows from the principle that compensation acts are to be 'construed liberally in furtherance of the purpose for which they were enacted.' *Baltimore & Philadelphia Steamboat Co. v. Norton,* 284 U. S., 408, 414, 52 S. Ct., 187, 189, 76 L. Ed., 366."

In *Thompson v. R. R.,* 216 N. C., 554, this Court declined to consider medical expenses as compensation under the statute.

For the reasons given the judgment of the court below is

Affirmed.

A. B. CLEGG v. LAURA CANADY AND HER HUSBAND, J. T. CANADY.

(Filed 17 April, 1940.)

1. Ejectment § 15—Plaintiff in ejectment has burden of proving good title in himself.

In an action in ejectment the burden of proof is upon plaintiff to establish his title and he may not rely upon the weakness of the title of defendant, and therefore where the parties agree that the controversy depends upon the location of the dividing line between their respective properties, an instruction that the burden is on plaintiff to establish the line as contended for by him is without error.

2. Boundaries § 2—A call for the line of adjacent lands is considered a natural boundary, and if there is a difference between the true and the reputed line, reputed line controls.

A call in a deed for the line of an adjoining tract, marked or unmarked, when known at the time of execution of the deed, is considered a natural boundary and controls courses and distances, and therefore if there is a difference between the true line of the adjoining boundary as established by courses and distances and such line as established by general reputation, the latter controls, and an instruction to the effect that the reputed line and the true line of the adjoining tract would be presumed the same in the absence of evidence to the contrary, but that if there were a difference the reputed line would control, and that evidence of such difference would be competent, is without error.

3. Boundaries § 1—

What constitutes the dividing line between the lands of the respective parties is a question of law for the court, but where this line is located is a question of fact for the jury, and where the jury locates the line upon conflicting evidence under correct instructions from the court, the finding of the jury is conclusive.

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

STACY, C. J., dissents.

APPEAL by plaintiff from *Bone, J.*, at September Term, 1939, of LEE. No error.

K. R. Hoyle for plaintiff, appellant.
Gavin, Jackson & Gavin for defendants, appellees.

SCHENCK, J. This is an action in ejectment. Admittedly the plaintiff owns the land west and north of the land of the defendants—in truth, owns the land described in the complaint. The defendants, however, deny that they are trespassing on any part of the plaintiff's land. The plaintiff alleges and contends that the defendants are trespassing on some two to three acres of his land lying north of his southern line,

defendants' northern line, the same being a division line running practically east and west between the lands of the plaintiff and of the defendants. The decision of this case must turn upon the location of this division line, since an agreement was entered into between the parties that if the jury found the division line to be located as contended for by the plaintiff, judgment should be entered for the plaintiff, but if the jury failed to so find that judgment should be entered for the defendants.

The plaintiff contends that the division line began at a point known as Gilmore's corner and ran thence N. 86¼° W. to and through a point 126 feet south of a forked pine claimed by the defendants as a corner.

The defendants contend that the division line began at the point known as Gilmore's corner and ran thence N. 83° 15′ W. 1,784 feet to a forked pine, a corner.

The following issue was submitted to and answered by the jury in the negative: "Does the plaintiff's south line begin at an iron stake, now called the Gilmore corner, and run thence N. 86¼ deg. W. to and through a point 126 feet south of the forked pine claimed by defendants as the corner as surveyed by Hancock on January 27th and 28th, 1938?"

From judgment predicated on the verdict the plaintiff appealed, assigning errors.

The description in the deed to plaintiff from E. F. Watkins and wife, dated 1 September, 1923, through which he claims title, is as follows: "Lying on the south side of Deep River. Beginning at a white oak on the river bank, just below Harden's branch; thence S. 11 W. 150 poles to a stake; thence with the land of J. E. Bryan ..... poles to a stake in the land of Strickland heirs, corner of Churchill and Strickland heirs' land; thence with J. H. Churchill line in a northernly direction to the S. A. L. right of way ..... poles; thence with said right of way ..... poles to the bank of Deep River; thence with the meanderings of said river ..... poles to the beginning, containing 197 acres, more or less."

The line the location of which is in controversy is the second call in the deed: "thence with the land of J. E. Bryan ..... poles to a stake, in the land of Strickland heirs, corner of Churchill and Strickland heirs' land."

The location of Gilmore's corner was agreed to be at the end of the first call, and the question involved is whether the J. E. Bryan line ran from Gilmore's corner N. 86¼° W. through a point 126 feet south of the forked pine, or from Gilmore's corner N. 83° 15′ W. to the forked pine.

The plaintiff offered in evidence deeds, testimony of witnesses and plats tending to show that the J. E. Bryan line was coincident with the line formerly known as the I. N. Clegg line, and that the I. N. Clegg line ran "thence west to and with the line of the Jones or Mill tract 291 poles

to a pine," and that the Jones or Mill tract line was located by running a straight line west, with proper variation of the compass, from the Gilmore corner to what was known as the George Dickens corner, and that this straight line was N. 86¼° W. and ran through a point 126 feet south of the forked pine.

The defendant offered in evidence deeds, testimony of witnesses and plats tending to show that the J. E. Bryan line was coincident with the Jones or Mill tract line, and that this line ran west to a forked pine, at what was Strickland heirs' northeast corner, now W. B. Moore's northeast corner, the course being N. 83° 15′ W.

His Honor charged the jury that the burden of proof was upon the plaintiff to establish his contention by the greater weight of the evidence—that is, to so establish that the J. E. Bryan line ran as he, the plaintiff, contended it ran. The plaintiff assigns this charge as error, and contends that he was entitled to a directed verdict, as a matter of law, upon the admissions and undisputed facts. The assignment cannot be sustained. The evidence was conflicting and the burden of proof in an action in ejectment is upon the plaintiff to establish his title, he must rely upon the strength of his own title and not the weakness of that of his adversary. *Mobley v. Griffin,* 104 N. C., 112; *Rumbough v. Sackett,* 141 N. C., 495; *Millikin v. Sessoms,* 173 N. C., 723; *Singleton v. Roebuck,* 178 N. C., 201; *Carstarphen v. Carstarphen,* 193 N. C., 541.

The appellant assigns as error the following excerpt from the charge of the Court: "Now, his (plaintiff's) call in his deed calls for the line of J. E. Bryan. The Supreme Court has said that the call for another's line is considered as a natural boundary, but the call for another's line is not necessarily a call for his true line; it means the line bearing that appellation and is reputed to be such. Of course, in the absence of proof tending to show a difference between the true and reputed lines, they will be presumed to be the same, but they may be shown to be different." This assignment cannot be sustained.

The call for another's line is considered a natural boundary, and, when known at the time of the execution of the deed, will control a call for course and distance. *Corn v. McCrary,* 48 N. C., 496; *Bowen v. Gaylord,* 122 N. C., 816; *Whitaker v. Cover,* 140 N. C., 280; *Power Co. v. Savage,* 170 N. C., 625.

The charge that "a call for another's line is not necessarily a call for his true line; it means the line bearing that appellation and reputed to be such," was consonant with the principle that a line in an adjoining tract is considered a natural boundary and controls course and distance. A line "bearing that appellation and reputed to be such," if established, is a natural boundary, whether marked or unmarked, and controls course and distance called for in the deed, when there is a difference between

reputed or established line, that is, established by reputation, and the true line, that is, the line delineated in the deed by course and distances. It logically follows if there be a difference between the true line and the reputed line, and the latter controls, it would be competent to show such difference, as charged by the court.

"It will be noted that in order to the proper application of this principle (that the call in a deed for the line of another tract of land is to be considered and dealt with as a natural object), the line called for must be 'identified, fixed and established,' or the position does not govern; but when the conditions exist which call for its application, it is then not a question of whether the writer of the deed or the parties to it intended to take in so much land or to extend the line of the principal deed to so great a length, but, in the language of *Henderson, J.*, in *Tatem v. Sawyer, supra* (11 N. C., 64), 'Where there is a call for natural objects, and course and distance are also given, the former are the termini and the latter merely points or guides to it.' And if the line is properly fixed and established pursuant to recognized rules it makes no difference whether it was marked or unmarked." *Lumber Co. v. Bernhardt,* 162 N. C., 460.

This case, as has been aforeobserved, presents but one question, namely, the location of the J. E. Bryan line, it being admitted that this line, wherever located, forms the southern boundary of the plaintiff's land and the northern boundary of the defendants' land. In this respect the case took on the aspects of a processioning proceeding.

There was much evidence, oral and documentary, offered by the parties, plaintiff and defendants, tending to establish their respective contentions. The appellant makes 133 exceptive assignments of error to the court's rulings upon the admission and exclusion of evidence, each of which we have examined and find among them no prejudicial error. There are 39 exceptive assignments of error made to the refusal of the court to give special instructions prayed for and to the giving of certain instructions contained in the charge. These assignments we have likewise carefully examined and find no prejudicial error.

The single question raised, the location of the division line between the parties, was clearly and impartially presented to the jury, and while there is evidence that would have sustained an affirmative answer to the issue submitted, there is likewise evidence sufficient to sustain the negative answer made thereto. What constituted the division line was a question of law for the court, but where this line was located was a question of fact for the jury. The court correctly instructed the jury as to what constituted the division line, and the jury by their answer to the issue failed to find that this line was located as contended by the plaintiff.

The answering of the first issue in the negative rendered the consideration of the subsequent issues, which related to the alleged trespass by the defendants and resultant damages therefrom, unnecessary.

In the record we find

No error.

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

STACY, C. J., dissents.

JESSE HILL v. LINDSAY SNIDER.

(Filed 17 April, 1940.)

1. Fraud §§ 1, 8—

The elements of actionable fraud are a misrepresentation of material fact, made with knowledge of its falsity or in culpable ignorance of its truth, with intent that it should be relied upon, and which is relied upon by the other party to his damage, and a complaint which fails to allege that the misrepresentation was made with the intent to deceive plaintiff is insufficient to state a cause of action for fraud.

2. Courts § 1a—Complaint held to allege cause of action for breach of warranty in amount less than the minimum within the jurisdiction of the Superior Court.

The complaint alleged in substance that plaintiff purchased a mare from defendant, that the defendant warranted the mare to be sound, that in fact the mare had defective eyesight, which was known to defendant, that plaintiff relied upon the representation that the mare was sound, and that plaintiff was damaged in the sum of $125.00, and, as a second cause of action, alleged that as a result of the said wrongful act of defendant, plaintiff had been obliged to feed a worthless mare to his damage in the sum of $100.00. *Held:* The complaint fails to state a cause of action for fraud in that it fails to allege *scienter*, but states a cause of action for breach of warranty in the sum of $125.00, which is within the exclusive original jurisdiction of a justice of the peace, C. S., 1473, the sum claimed for feeding the mare not being within the rule for the determination of the jurisdictional amount, and therefore defendant's demurrer to the action instituted in the Superior Court was properly sustained.

APPEAL by plaintiff from *Grady, J.*, at October Term, 1939, of RANDOLPH.

Civil action instituted in Superior Court for recovery of damages for alleged deceit and false warranty.

Plaintiff in his complaint alleges these facts briefly stated: That on 11 May, 1938, plaintiff purchased a mare from defendant for the price

of $125.00, on the representation of defendant, upon which he relied, that she was all right in every way; that said representation was false, and known by defendant to be false, in that there was something wrong with the eyes of the mare; that "as plaintiff is informed and believes, she was mooneyed and when she got in the condition that she could not see well, that she was blind and affected with something like fits—would run and jump, and was unsafe and dangerous to work"; that plaintiff was deceived by said false representation; that said representation "was a warranty" on the part of defendant that said mare was all right, and that she was sound and her qualities were good; that there was a breach of warranty for that the mare was not all right and her qualities were not good in that her eyesight was bad at certain times, and when her eyesight became bad she was affected with nervousness to such degree that she almost had fits, and was unsafe and dangerous to work, and could not see where she was going; "that the plaintiff was deceived by the defendant as aforesaid, and the defendant warranted said horse"; that the mare is worthless and plaintiff is damaged in sum of $125.00.

Plaintiff further alleges that by reason of the wrongful acts of defendant, plaintiff has had to feed a worthless horse to his damage in the sum of $100.00.

Plaintiff, therefore, prays judgment in sum of $225.00.

While defendant in his answer admits the sale of the mare to plaintiff at $125.00, he denies all other material allegations, and pleads counterclaim of $25.00 balance due on purchase price of the mare.

It is recited in judgment below that when the case came on for hearing, defendant demurred *ore tenus* to both the alleged causes of action set forth in the complaint filed by the plaintiff on the ground that the second alleged cause of action does not state facts sufficient to constitute a cause of action, and that the Superior Court does not have jurisdiction in the first cause of action, in that the action is for an alleged breach of warranty and the amount sought to recover is less than $200.00. The court being of the opinion that the demurrer is well founded, sustained the same. Thereupon, plaintiff's action is dismissed, and, upon motion of plaintiff, the counterclaim of defendant is dismissed.

From the judgment dismissing his action, plaintiff appeals to Supreme Court and assigns error.

J. A. Spence for plaintiff, appellant.
J. V. Wilson for defendant, appellee.

WINBORNE, J. Counsel for appellant, in brief filed in this Court, states that: "At the hearing the defendant demurred *ore tenus* to one cause of action on the ground that the complaint does not state facts

sufficient to constitute a cause of action, and in the other to the jurisdiction of the court. His Honor sustained the demurrer and signed a judgment dismissing the action in which he called the first cause of action second, and the second the first." Considering the rulings of the court as set forth in judgment below, in the light of the pleadings, it is patent that the ruling with respect to failure to state facts sufficient to constitute a cause of action relates to allegations of fraud termed by the court "first alleged cause of action," and that as to lack of jurisdiction, relates to those bearing on breach of warranty referred to as "second alleged cause of action."

These questions then arise as determinative of this appeal:

(1) If the action be in tort for deceit or actionable fraud and false warranty, are the allegations of the complaint sufficient to constitute a cause of action?

(2) If not, and the action be on contract for breach of warranty, are the allegations sufficient to state a cause of action which is within the jurisdiction of the Superior Court?

We hold that the answer to each is "No."

1. "The essential elements of actionable fraud or deceit are the representation, its falsity, *scienter,* deception, and injury. The representation must be definite and specific; it must be materially false; it must be made with knowledge of its falsity or in culpable ignorance of its truth; it must be made with fraudulent intent; it must be reasonably relied upon by the other party; and he must be deceived and caused to suffer loss." *Adams, J.,* in *Electric Co. v. Morrison,* 194 N. C., 316, 139 S. E., 455. See, also, *Berwer v. Ins. Co.,* 214 N. C., 554, 200 S. E., 1, and cases there cited.

If the present action be in tort, there is no allegation that the alleged false representation was made with intent to deceive the plaintiff. This is an essential element of actionable fraud. *Stafford v. Newsom,* 31 N. C., 507; *Colt v. Kimball,* 190 N. C., 169, 129 S. E., 406; *Stone v. Milling Co.,* 192 N. C., 585, 135 S. E., 449; *Ebbs v. Trust Co.,* 199 N. C., 242, 151 S. E., 263. In *Stone v. Milling Co., supra,* reference is made to the case of *Farrar v. Alston,* 12 N. C., 69, where "a complaint which failed to allege that the fraud charged against defendant was intended to injure plaintiff, was held defective." The Court further said: "A complaint which contains no allegation of a fraudulent intent, or facts from which it may reasonably be inferred, fails to state a cause of action for deceit, and such defect may be taken advantage of by demurrer," citing authority.

In case of warranty, the plaintiff may sue in tort for deceit, adding a count for false warranty. In such event the *scienter* is material. But if the plaintiff sue in contract for breach of warranty growing out of

the same state of facts, the *scienter* is not material. *Ashe v. Gray,* 88 N. C., 190; *S. c.,* 90 N. C., 137; *Long v. Fields,* 104 N. C., 221, 10 S. E., 253; *Robertson v. Halton,* 156 N. C., 215, 72 S. E., 316; 37 L. R. A. (N. S.), 298.

2. If, on the other hand, the theory of the present action be in contract for breach of warranty, the sum demanded, exclusive of the item of $100.00 claimed for feeding the mare, is less than two hundred dollars and, hence, is within the exclusive original jurisdiction of justice of peace. C. S., 1473; *Sewing Machine Co. v. Burger,* 181 N. C., 241, 107 S. E., 14.

Under the allegations in the complaint relative thereto, the amount claimed for feeding is manifestly not within the rule for admeasurement of damages in such cases, *Lunn v. Shermer,* 93 N. C., 164, and may not be taken into consideration in ascertaining the amount demanded for jurisdictional purposes.

The judgment below is

Affirmed.

ALBERT H. CLARKE v. WILLIAM MARTIN.

(Filed 17 April, 1940.)

1. Automobiles §§ 14, 18a—

Evidence that defendant parked his truck before daylight on the right-hand side of the highway without proper signal lights in the rear thereof, and that plaintiff ran his automobile into the rear of the truck, resulting in injury to his person and damage to his car, *is held* sufficient to be submitted to the jury on the issue of negligence.

2. Automobiles §§ 12a, 18c—Motorist must be able to stop car within distance he can see an obstacle, and speed in excess thereof is negligence.

It is negligence for a person to drive an automobile at a speed rendering it impossible for him to stop his car within the distance he is able to see an obstruction under the conditions existing, and in plaintiff's action to recover damages sustained when his car struck the rear of defendant's truck, which was parked on a highway before daylight without proper signal lights, it is error for the court to refuse to give, in substance at least, a requested instruction, supported by the evidence, that if plaintiff was driving at a speed of about 20 or 25 miles per hour and that because of the darkness, fog, and ice on his windshield, plaintiff's vision was restricted to 10 or 15 feet in front of his machine, and that at that speed a greater distance than 15 feet would be required to stop his machine, plaintiff would be guilty of negligence which, if the proximate cause or one of the proximate causes of the accident, would constitute contributory negligence barring recovery.

3. Trial § 32—

It is error for the court to refuse to give in substance, at least, a requested instruction on a material phase of the case arising on the evidence.

APPEAL by defendant from *Cowper, Special Judge,* at January Special Term, 1940, of CALDWELL.

James C. Farthing and Hal B. Adams for plaintiff, appellee.
Hunter Martin for defendant, appellant.

SCHENCK, J. This is an action to recover damages for injury to person and property alleged to have been caused by the negligence of the defendant.

We hold that the motion for judgment as in case of nonsuit lodged when the plaintiff had introduced his evidence and rested his case, and renewed at the close of all of the evidence was properly denied.

There was evidence tending to prove that in the early morning of 30 December, 1937, before daybreak, the defendant had parked his truck on the right-hand side of the State Highway without proper signal lights in the rear thereof, and that the plaintiff, approaching from the rear of the truck, ran his automobile into it, thereby causing injury to his person and his automobile. There was further evidence tending to show that the morning was dark and foggy and plaintiff was dependent upon his lights to see the road, that the weather was cold and caused the fog to freeze upon the windshield of the plaintiff's automobile and obscured his sight to such an extent as to limit the scope of his vision to not more than 10 or 15 feet ahead, that the plaintiff was driving at a speed of 20 to 25 miles per hour, and that at that speed it required more than 10 or 15 feet in which to stop the automobile, that the first thing plaintiff saw was a light on the cab of the truck, but he didn't see this light until he "rammed in the back of the truck," and after seeing the light he "didn't have time to stop or anything until he hit it."

Upon the second issue, relating to contributory negligence, the defendant, in apt time in writing, requested the court to give the following instruction:

"If you find from the evidence, and by its greater weight, the burden being upon the defendant, that the plaintiff, Albert H. Clarke, was driving his automobile at the time of the accident at a speed of about 20 or 25 miles per hour on a dark, foggy and cold morning, when he had to rely on the lights of his machine, and that the said Albert H. Clarke had allowed fog, freezing fog, or ice to accumulate on the windshield of his machine to such an extent that his vision was obstructed or impaired and that the said Albert H. Clarke could see only 10 or 15

feet in front of his machine and that a much greater distance than 15 feet would be required to stop his machine, then and in that event the plaintiff would be guilty of negligence, and if you further find from the evidence, and by its greater weight, the burden being on the defendant, that such negligence was either the proximate cause or one of the proximate causes of plaintiff's injury, then and in that event the plaintiff would be guilty of contributory negligence, and it would be your duty to answer the second issue 'Yes.'"

The court refused to give the instruction requested and the defendant preserved exception. The requested instruction, we think, was a correct one, and as neither it nor its substance was given in the general charge its refusal must be held for error. C. S., 565; *Brink v. Black,* 77 N. C., 59; *Lloyd v. Bowen,* 170 N. C., 216.

In *Weston v. R. R.,* 194 N. C., 210, *Brogden, J.,* in a well considered opinion, quotes with approval from Huddy on Automobiles, 7 Ed., 1924, sec. 396, as follows: "It was negligence for the driver of the automobile to propel it in a dark place in which he had to rely on the lights of his machine at a rate faster than enabled him to stop or avoid any obstruction within the radius of his light, or within the distance to which his lights would disclose the existence of obstructions. . . . If the lights on the automobile would disclose obstructions only ten yards away it was the duty of the driver to so regulate the speed of his machine that he could at all times avoid obstructions within that distance. If the lights on the machine would disclose objects further away than ten yards, and the driver failed to see the object in time, then he would be conclusively presumed to be guilty of negligence, because it was his duty to see what could have been seen."

The principle here enunciated is applicable to the case at bar. There was evidence tending to show, as stated in the *Weston case, supra,* that the defendant "was out-running his headlights" in disregard of his duty not to run at a speed requiring a greater distance than he could see in which to stop, and the plaintiff was entitled to have this phase of the case presented to the jury when request therefor was duly made.

For the error assigned there must be a

New trial.

MRS. ELSIE ALBERTS v. BENJAMIN ALBERTS.

(Filed 17 April, 1940.)

1. Process § 8—

A nonresident wife living with her husband in another state may serve summons on him by service on the Commissioner of Revenue under the provision of Michie's Code, 491 (a) (b), in her action instituted in a county in this State, Michie's Code, 469, to recover for injuries sustained in an automobile accident which occurred in this State and which resulted from his alleged negligence.

2. Husband and Wife § 6—

In this jurisdiction a wife has the right to bring an action for actionable negligence against her husband.

3. Courts § 1a—

A nonresident plaintiff may sue a nonresident defendant upon a transitory cause of action in the courts of this State.

APPEAL by defendant from *Frizzelle, J.*, upon defendant's motion to strike out service of summons, 28 November, 1939. From WAKE. Affirmed.

This is an action instituted by plaintiff, Mrs. Elsie Alberts, of Middleboro, Massachusetts, against her husband, Benjamin Alberts, with whom she resides in Middleboro, Massachusetts. The plaintiff and her husband were riding together en route from Massachusetts to Florida and while traveling through North Carolina the automobile in which Mr. and Mrs. Alberts were riding overturned and Mrs. Alberts was seriously injured. The plaintiff alleged that her injury was the direct and proximate result of the negligence of defendant, setting same forth in detail. After their return to Massachusetts and while still residing with her husband, Mrs. Alberts instituted this action in the Superior Court of Wake County and caused to be served upon A. J. Maxwell, Commissioner of Revenue, summons under the provisions of N. C. Code, 1939 (Michie), sections 491 (a) and 491 (b). A copy of the summons and complaint, together with other statutory notices, were mailed by Mr. Maxwell, Commissioner of Revenue, to the defendant. Thereafter, the defendant, through counsel, entered a special appearance and filed a motion to strike out the service of summons. The court below overruled the motion and defendant excepted, assigned error and appealed to the Supreme Court.

Clem B. Holding for plaintiff.

J. M. Broughton and W. H. Yarborough, Jr., for defendant.

CLARKSON, J. Is service of summons valid where service is obtained under the provision of N. C. Code, 1939 (Michie), sections 491 (a) and 491 (b) (Public Laws 1929, ch. 75), providing for service of process upon the Commissioner of Revenue as agent for nonresident motorists where the plaintiff and the defendant are nonresidents of North Carolina and are residents of the same state and are husband and wife? We think so.

The law applicable in reference to the controversy, N. C. Code, *supra*, section 469, in part, is as follows: "In all other cases the action must be tried in the county in which the plaintiff or the defendants or any of them reside at its commencement; . . . and if none of the parties reside in the State then the action may be tried in any county which the plaintiff designates in his summons and complaint."

Section 491 (a), *supra:* "All summons or other lawful process in any action or proceeding . . . 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 such public highway of this State and said acceptance or operation shall be a signification of his agreement that *any* such process against him shall be of the same legal force and vitality as if served on him personally."

The constitutionality of the above law (sec. 491 [a], *supra*) was upheld in *Ashley v. Brown,* 198 N. C., 369; *Bigham v. Foor,* 201 N. C., 14; *Smith v. Haughton,* 206 N. C., 587 (591); *Dowling v. Winters,* 208 N. C., 521.

In *York v. York,* 212 N. C., 695 (699), it was said: "In this jurisdiction a wife has the right to bring an action for actionable negligence against her husband. *Roberts v. Roberts,* 185 N. C., 566 (567); *Shirley v. Ayers,* 201 N. C., 51 (55); *Jernigan v. Jernigan,* 207 N. C., 831."

We think that although plaintiff is a nonresident and the action transitory, the doors of the courts of this State are open to her to determine her rights. *Howard v. Howard,* 200 N. C., 574; *Steele v. Telegraph Co.,* 206 N. C., 220; *Ingle v. Cassady,* 208 N. C., 497 (498).

In *Hoagland v. Dolan,* 259 Ky., 1, 81 S. W. (2nd), 869, it is said: "No express limitation is made by the language of the act as to who may avail themselves of its provisions by becoming plaintiffs in bringing actions thereunder by substituted service of process. . . . Are there any good or valid reasons which should influence us in construing the act as limiting its provisions to resident plaintiffs only? The exact question was, under similar statutes and upon similar facts, presented and denied by the Supreme Court of Wisconsin in the case of *State Ex Rel. Rusk v. Circuit Court,* 209 Wis., 246, 244 N. W., 766. . . . We find ourselves in harmony with the conclusion and reasoning ex-

pressed in this well considered opinion (the Wisconsin case) interpreting and construing the act, as extending the right of its convenient redress to a nonresident plaintiff to sue under its provisions." *Sobeck v. Koellmer,* 265 N. Y. Supp., 778; *Garon v. Poivier* (New Hamp.), 164 Atl., 765; *Peeples v. Ramspacher,* 29 Fed. Supp., 632; *Hess v. Pawloski,* 274 U. S., 352; *Malak v. Upton,* 3 N. Y. Supp. (2nd), 248; *Fine v. Wencke,* 117 Conn., 683 (169 Atl., 58).

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

Affirmed.

STATE v. HOMER McMANUS.

(Filed 17 April, 1940.)

1. Homicide §§ 10, 27a—Instruction on question of intoxication as affecting premeditation and deliberation held for error.

The court charged the jury to the effect that if defendant formed a fixed design to kill and then got drunk and executed such intent while in a drunken condition, defendant would be guilty of murder in the first degree. The court refused to give defendant's request for instructions, supported by defendant's testimony, that if defendant did not form any previous design to kill, and killed deceased while in such a drunken condition that he was incapable of premeditation and deliberation, defendant would not be guilty of murder in the first degree. *Held:* While the instruction of the court was correct as far as it went, it was error for the court, even in the absence of a request, to fail to charge the jury upon the material aspect of the case arising upon the evidence.

2. Homicide § 30—

Error in the instructions on the question of premeditation and deliberation cannot be held harmless on the ground that the homicide was committed in the perpetration of a robbery, rendering the question of premeditation and deliberation immaterial, when, even conceding there was evidence of robbery, there is no evidence that the homicide was committed in the perpetration or attempt to perpetrate the robbery.

APPEAL by defendant from *Phillips, J.,* at January Term, 1940, of CABARRUS.

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

Hartsell & Hartsell for defendant, appellant.

SCHENCK, J. The defendant was convicted of murder in the first degree of Jennings Mullis, and is an appellant from a sentence of death.

Exception No. 5 is that "the court failed to charge the jury that a

person who commits a murder when so drunk as to be incapable of forming a deliberate and premeditated design to kill would not be guilty of murder in the first degree but murder in the second degree or a lesser degree of homicide." We think, and so hold, that such exception is well taken.

The defendant's testimony was to the effect that he and the deceased, who were at the time of the alleged homicide roommates and bedfellows, bought a half gallon of whiskey on the afternoon of Friday, 7 August, 1937, and that they went to their room about 10 or 10:30 o'clock that night, after having drunk some of the whiskey, that they drank more whiskey after reaching their room, and that he remembers nothing more that happened that night. His testimony is further to the effect that when he waked up early on the morning of Saturday, 8 August, 1937, he found the deceased beside him on the bed, dead, with his head bloody; that he removed the body to another place in the room and left later in the day Saturday because he feared he would be suspected of the homicide; that he did not remember or have any knowledge whatsoever of how the deceased came to his death, that he did not know whether he shot or killed the deceased, and that he did not plan or intend to kill the deceased.

The court charged the jury in substance that if the defendant formed the intent to kill the deceased and then took intoxicants to steel or fortify himself in the commission of the homicide, and became intoxicated to whatever extent and killed the deceased he would be guilty of murder in the first degree, which charge was a correct statement of the law. *S. v. Miller,* 197 N. C., 445, and cases there cited. But the defendant complains that the court failed to charge the jury as to what the legal result would have been if the jury should have found that the defendant, without previously having formed the intent to kill, became intoxicated to the extent of not knowing what he was doing, and in that state of intoxication killed the deceased. Under such findings by the jury the verdict could not have been guilty of murder in the first degree, and could, at most, have been guilty of murder in the second degree, and under the defendant's testimony he was entitled, without special prayer therefor, to an instruction to that effect, since it was a substantial and essential feature of the case arising on the evidence. *S. v. Merrick,* 171 N. C., 788; *S. v. Thomas,* 184 N. C., 757, and cases there cited.

We have scrutinized the charge closely and we find nowhere therein presented the legal result of the finding of the facts relating to intoxication being as testified by the defendant. The court's charge upon the legal result of intoxication, in so far as it went, was in accord with the authorities, but the exception that it omitted to present a substantial and

essential feature of the case arising on the evidence was well founded. C. S., 564.

While in the brief of the State it is stated that "it could be argued from the record" that the defendant killed the deceased in the perpetration of a robbery, and that the defendant was therefore guilty of murder in the first degree, we think, even conceding that there be evidence of robbery, it is questionable if there is any evidence that the homicide was committed in the perpetration or attempted perpetration thereof. The State produced no eye-witness to the homicide, and nothing in the alleged confession of the defendant related to robbery.

For the error assigned there must be a

New trial.

JOHN HABIT v. J. C. STEPHENSON, SHERIFF.

(Filed 17 April, 1940.)

1. Forfeiture § 3: Chattel Mortgages § 11: Nuisances § 11—

An innocent mortgagee without knowledge that the property was being used by the mortgagor in operating a nuisance contrary to law and in violation of provisions in the conditional sales contract, may institute action to recover the property after it has been seized by the sheriff but before it has been sold under the provision of C. S., 3184.

2. Same—Where mortgagor's equity is nil, mortgagee without knowledge that property was used in operation of nuisance, is entitled to recover same.

Where movable personal property sold under a conditional sales contract is used by the mortgagor in the operation of a nuisance and is seized by the sheriff and held for sale under the provision of C. S., 3184, the innocent mortgagee is entitled to recover same from the sheriff when the value of the property is less than the debt and there is no equity above the mortgage, since C. S., 3184, provides that the property should be sold in the same manner as is provided for sales of chattels under execution and C. S., 677, provides only for the sale of the equity of redemption of the judgment debtor in pledged or mortgaged property. The registration of the conditional sales contract is immaterial on the question of forfeiture.

APPEAL by plaintiff from *Burgwyn, Special Judge,* at August Term, 1939, of NORTHAMPTON.

Civil action in claim and delivery.

The facts are these:

1. On 22 June, 1937, the Quinn Furniture Company sold to Ray Weston of Northampton County a General Electric beverage cooler, taking note in the sum of $172.13 and title-retained contract as security

therefor. The purchaser stipulated in the contract that the property "will not be used for any purpose in violation of any State or Federal statute." The note and contract were subsequently assigned to the plaintiff, for value, and are in default. They have not been registered.

2. Weston's place of business was closed in a proceeding under C. S., 3180-3187, inclusive, for maintaining a nuisance, and the cooler in question was ordered seized and sold along with the other equipment in the defendant's filling station. The sheriff seized the property pursuant to this order, but before the cooler could be sold, the plaintiff brought this action to recover its possession under the title-retained contract.

3. Neither the plaintiff nor his assignor had any knowledge of or participated in the nuisance. Nor were they parties to or had any notice of the proceeding in which the property was ordered seized and sold.

4. The value of the cooler at the time of the seizure by the sheriff was $125.00.

The trial court ruled that as the property had been used in the maintenance of a nuisance, the defendant was entitled to retain possession. Plaintiff appeals, assigning error.

W. D. Pruden for plaintiff, appellant.
E. B. Grant for defendant, appellee.

STACY, C. J. The question for decision is whether movable personal property found to be used by a mortgagor in conducting a nuisance, without the knowledge or consent of the mortgagee and in violation of a covenant against such use, can be held under an order of seizure and sale when it appears that the mortgagor's equity of redemption is *nil,* and that the mortgagee had no knowledge of and did not participate in the nuisance and was not a party to and had no notice of the proceeding in which the property was ordered seized and sold.

Speaking to the question of procedure in *Daniels v. Homer,* 139 N. C., 219, 51 S. E., 992, it was said that an innocent owner of property, thus sought to be forfeited and sold, might assert any rights which he has in an action to recover the property before sale. This the plaintiff seeks to do here.

It will be observed that the movable property which is established as having been used in conducting a nuisance, is to be sold "in the manner provided for the sale of chattels under execution." C. S., 3184. The manner provided for the sale of chattels under execution applies only to the property of the judgment debtor and is set out in C. S., 677, as follows: "The property of the judgment debtor, not exempt from sale under the Constitution and laws of this State, may be levied on and sold under execution as hereinafter prescribed: 1. Goods, chattels . . .

belonging to him. . . . 3. Equitable and legal rights of redemption in personal and real property pledged or mortgaged by him. But when the equity of redemption in personal property is sold under execution, notice of the time and place of said sale shall be given the mortgagee."

The sole purpose in requiring that notice of the time and place of such sale be given the mortgagee is to afford him an opportunity to protect his rights in the property. *S. v. Johnson,* 181 N. C., 638, 107 S. E., 433; *Skinner v. Thomas,* 171 N. C., 98, 87 S. E., 976. Here, the equity of redemption of the execution debtor in the property directed to be sold is *nil,* hence there is nothing to be sold "in the manner provided for the sale of chattels under execution." It results, therefore, that the plaintiff is entitled to the property.

The registration of the instrument under which plaintiff claims is not material on the question of forfeiture. *Motor Co. v. Jackson,* 184 N. C., 328, 114 S. E., 478.

The right to abate the nuisance is not questioned. *Carpenter, Solicitor, v. Boyles,* 213 N. C., 432, 196 S. E., 850.

Reversed.

J. W. McGUINN ET AL. v. CITY OF HIGH POINT ET AL.

(Filed 17 April, 1940.)

1. Appeal and Error §§ 37c, 37e—Where, on final hearing in injunction proceedings, entire controversy is submitted to court by agreement, its findings are conclusive.

Where the parties waive a jury trial and agree to submit the entire controversy to the court for final determination, the findings of the court have the force and effect of a verdict and are conclusive on appeal, and this rule applies to facts found by the court by agreement upon the final hearing in injunction proceedings, except in cases submitted upon written or documentary proofs, although facts found upon the preliminary hearing are reviewable, since they are made only for the purpose of the interlocutory order and are found by the court without waiver or consent of the parties.

2. Municipal Corporations § 8—In absence of legislative authority a municipality may not agree to submit to control and regulation of Federal Power Commission in development of hydroelectric generating system.

Defendant municipality obtained license from the Federal Power Commission and proposed to proceed thereunder in the construction and operation of a municipal hydroelectric generating plant. The said license provided that the undertaking should be under the control of the Federal Power Commission in its construction, maintenance and operation, including all policies of management, financing, and accounting, and should be subject to the rules and regulations of the Secretary of War in the inter-

est of navigation and of the Secretary of Commerce for the protection of fish life. *Held:* In the absence of legislative sanction the municipality is without authority to accept and proceed under the Federal license, which obligates it to perform acts relating primarily to purposes of national concern, and further, in view of the findings of the trial court that the river at the point proposed for the erection of the dam is non-navigable and that the dam would in no way effect commercial navigation, it would seem that the Federal Power Commission is without jurisdiction in the premises, but it not being a party, the validity of its license is not in issue.

3. Same: Appeal and Error § 22—Ordinarily an appeal is controlled by the record.

Where a municipality accepts and proposes to proceed under a Federal license in the construction and operation of a municipal hydroelectric generating plant, it may not contend that if the court should hold that the Federal license obligated it to perform acts beyond the scope of its powers, the Federal license should be treated as a nullity as being void *ab initio*, and therefore it should not be enjoined from proceeding in the construction of the hydroelectric system, is untenable, the municipality being bound by the allegations in its answer that it had made application to the Federal Power Commission for the license, that it had a right to proceed thereunder, and that it intends to do so, there being no disclaimer of the obligations assumed under the Federal license in the record.

4. Taxation § 3b: Contracts § 8—

The provisions of a public law under which municipal bonds are issued enter into and become a part of the contractual obligation.

5. Taxation § 3b—Bonds for construction of municipal hydroelectric system, payable solely out of revenues therefrom, held not to constitute a general indebtedness of the city.

Defendant municipality proposed to issue bonds to obtain funds for the construction of a municipal hydroelectric generating plant. The city owned and operated its own electric distributing system, and the proposed generating system was to be operated separate and apart therefrom. The resolution of the city authorizing the issuance of the bonds provided that they should be payable solely out of the revenues of the system and the bonds themselves are to contain like provision. *Held:* The bonds are not a general indebtedness of the municipality and its taxing power may not be invoked to provide for their payment, chapter 2, Public Laws, Extra Session, 1938; chapter 473, Public Laws of 1935, and the provision that the city would purchase electricity for resale through its distributing system solely from the proposed generating system so long as energy therefrom is available is in aid of the special-fund doctrine, and the further provision that the city, if it should voluntarily elect to take energy from its generating system for its own uses, should pay the cost of furnishing the energy so taken, which in no event should exceed a fair and reasonable charge therefor, does not indirectly provide for the invocating of the taxing power for the payment of the bonds.

6. Appeal and Error § 22—

The rule that the appeal is controlled by the record does not preclude consideration of matters *dehors* the record which disclose that the question sought to be presented has become moot or academic.

7. Taxation § 3b—Municipality held not to have obligated itself to use general funds to finance construction of electric generating plant.

The finding by the court that the proposed grant and loan from the Federal Government for the construction of a municipal electric generating plant were insufficient to pay the entire cost, and that the city had obligated itself to the Federal Government to complete the said plant by a specified date, and that therefore its obligation to complete the plant entailed a general liability, is rendered moot by a subsequent resolution adopted by the city and accepted by the Federal Government providing that the city assumed no obligation to expend funds in excess of the amounts received by way of loan and grant from the Federal Government.

8. Municipal Corporations § 8: Utilities Commission § 2—Certificate of convenience from Utilities Commissioner held necessary to construction of municipal electric generating plant.

It is necessary for a city to obtain a certificate of convenience from the Public Utilities Commissioner in order to construct a hydroelectric generating system under the provision of the Revenue Bond Act of 1938, chapter 2, Public Laws, Extra Session, 1938, and the contention of defendant municipality that it came within the proviso of that act since its resolution for the issuance of bonds for this purpose was passed prior to the act under authorization of chapter 473, Public Laws of 1935, is untenable when it appears that the resolution was amended and supplemented by a resolution passed subsequent to the act of 1938 which made substantial changes and supplied essential requirements lacking in the original resolution.

APPEAL by defendants from *Sink, J.*, at April Term, 1939, of GUILFORD.

Civil action to restrain the defendants from constructing a municipal hydroelectric plant, fully described in the pleadings, and from issuing revenue bonds to finance a part of the cost.

Following the decision in *Williamson v. High Point,* 213 N. C., 96, 195 S. E., 90, wherein it was held that the hydroelectric system there contemplated was in excess of the defendant's authority, the council of the city of High Point, on 27 April, 1938, adopted another resolution designed to delimit the undertaking to the periphery of its powers. (This resolution was the subject of a second appeal, reported in 214 N. C., 693, 200 S. E., 388.)

Thereafter, on 2 May, 1938, the present action was instituted by J. W. McGuinn, on behalf of himself and other taxpayers, to restrain the project as extra-legal. Later, on 18 May, 1938, the Duke Power Company, as taxpayer and holder and user of nonexclusive electric franchise in the city, was permitted to intervene, and to file a separate complaint, which it did.

Then, on 20 March, 1939, the council of the city of High Point adopted an amendatory and supplemental resolution with a view to meeting the requirements of the Federal Emergency Administration of Public

Works for obtaining a Federal grant to defray a part of the costs of the project, and providing for the issuance of revenue bonds, "payable solely out of the revenues of the system," to cover the balance. By further resolution adopted on the same day, the council accepted from the Federal Power Commission license for the construction and operation of the project and agreed "to abide by all the provisions and conditions of the Federal Power Act and all the conditions imposed in the said license." Following the adoption of these resolutions, the Duke Power Company, by leave of court, filed an amended complaint challenging the right of the defendants to proceed in accordance with the resolutions and license.

On 11 April, 1939, a group of plaintiffs designated as "Adams-Millis Corporation and others," users and consumers of electric power in the city of High Point, instituted a separate action to enjoin the defendants from proceeding with the project, which action was later consolidated with the suit *sub judice* and treated as an intervention herein.

On the hearing, it was agreed by all the parties that a jury trial should be waived, and that the whole matter should be submitted to the court for final determination, both as to the law and the facts.

In summary, the essential determinations and conclusions of the court follow:

1. That the plaintiffs and interveners are taxpayers in the city of High Point with combined taxable properties situate therein of approximately $7,000,000; that the Duke Power Company is the owner and user of a nonexclusive electric franchise under which it has been doing business for a number of years, furnishing the entire electric requirements of the defendant city, its residents and industrial enterprises.

2. That the defendant city of High Point is a municipal corporation, duly chartered under the laws of the State of North Carolina, and now owns and operates within its limits an electric distribution system, through which it distributes to the users within the city, at a large annual profit, electric current which it purchases at wholesale from the Duke Power Company, and that the remaining defendants constitute the city council and the board of power commissioners of the defendant city.

3. That the city of High Point is preparing to construct an electric power plant and system which will comprise: (a) a dam, storage reservoir and generating plant on the Yadkin River at or in the vicinity of Styer's dam site, about 25 miles from High Point, which generating plant would have three generating units with a total capacity of 21,000 kilowatts; (b) a substation at the generating plant, and a substation in the city of High Point; (c) transmission lines extending from the generating plant through the counties of Guilford, Forsyth and Davidson to the city of High Point; (d) a distribution system in the city of High

Point, and (e) other structures and facilities incidental to the foregoing.

4. That the output of the proposed plant would furnish electricity to the city of High Point for municipal uses, and to consumers within the city for domestic, commercial and industrial purposes. It is to be deemed and treated as separate and distinct from the present electric distribution system of the city, and the city is to purchase its electric current from the system for resale and distribution over its present electric distribution system.

5. That the plant and system is to be built and operated by the city of High Point under a Federal power license issued 10 March, 1939, by the Federal Power Commission in which the Commission retains complete control over the entire plant and system, including its construction, maintenance and operation, and extending to every facility directly or indirectly connected with the project, to all policies of management, financing, accounting, rate of return on the net investment after the first twenty years, etc.; that the city is to pay to the United States, as reimbursement for the costs of administration, an annual charge based upon capacity and kilowatt hours of energy generated, obligates itself to maintain the project in a condition of repair adequate for purposes of navigation and under such rules and regulations as the Secretary of War may prescribe in the interest of navigation and such as the Secretary of Commerce may prescribe for the protection of fish life, and agrees to assume all liability for damages occasioned to the property of others by the construction, operation or maintenance of the project; that the license is to run for a period of fifty years, at the expiration of which the United States is to have the optional right to take over the enterprise at a price to be fixed by the Federal Power Commission, or to transfer it to a new licensee, in either of which events the city is to make good any defect in title to any rights of user and to discharge all liens arising subsequent to the issuance of the license.

6. That the order of the Federal Power Commission granting the license is based upon its findings and conclusions that "The Yadkin River is a part of the Yadkin-Pee Dee River, an interstate waterway used and suitable for use for the transportation of persons and property in interstate or foreign commerce"; that "The interest of interstate or foreign commerce will be affected by such proposed construction"; that "The project, including the maps, plans, and specifications supplemented and revised as hereinafter provided, is best adapted to a comprehensive plan for improving or developing the Yadkin-Pee Dee River for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development and for other beneficial public uses, including recreation purposes"; and that "The project is desirable and justified in the public interest for the purposes of improv-

ing or developing the Yadkin-Pee Dee River for the use or benefit of interstate or foreign commerce." The license recites that the Yadkin River is "A stream over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several states."

7. That the city of High Point has voluntarily consented to the findings and conclusions of the Federal Power Commission and has agreed "to abide by all the provisions and conditions of the Federal Power Act and all the conditions imposed in said license."

8. That the defendants hope to finance the construction of the proposed plant and system in part by a grant to be made by the Federal Emergency Administrator of Public Works in an amount not to exceed the sum of $2,921,600, and in part by the proceeds of bonds to be issued by the city under the resolution of the city council adopted 27 April, 1938, as amended by the resolution adopted 20 March, 1939, which bonds in an amount not to exceed $3,571,000 will be purchased by the Federal Emergency Administration of Public Works pursuant to the offer of 7 February, 1939, and accepted by resolution of the city council adopted 13 February, 1939.

9. That the proposed plant would be located on the Yadkin River approximately 313 miles upstream from the mouth of the Yadkin-Pee Dee River, and approximately 137 miles upstream from the North Carolina-South Carolina line, the distance in each case being measured as the river flows; and that there are now located on the Yadkin-Pee Dee River in North Carolina and between the site of the proposed plant and the North Carolina-South Carolina state line the following power plants: the High Rock plant; with a head of 60 feet and a storage of 232,000 acre feet; the Narrows plant, with a head of 179 feet and a storage of 155,000 acre feet; the Falls plant, with a head of approximately 49 feet and a storage of 3,900 acre feet; the Norwood (Tillery) plant, with a head of 70 feet and a storage of 96,000 acre feet; and the Blewett plant, with a head of 50 feet and a storage of 22,000 acre feet.

10. That the Yadkin-Pee Dee River in North Carolina is not now, and never has been, either by itself or by uniting with other waters, capable of navigation for the movement of trade and traffic in interstate or foreign commerce; that in its natural condition and in its present condition it is now, and always has been, a nonnavigable river of the State of North Carolina.

11. That the total cost of the undertaking will exceed by a million dollars the aggregate amount of the Federal grant and the proceeds of the revenue bonds authorized by the resolution of 27 April, 1938, as amended by the resolution of 20 March, 1939, which excess may not be expended without approval of the voters of High Point; and that the

city has agreed to complete the project not later than 15 June, 1940, under an agreement constituting an unqualified obligation.

[NOTE: By resolution of the board of power commissioners of the city of High Point (successors to the city council in the premises, ch. 600, Public-Local Laws 1939), adopted 7 November, 1939, at the instance of the Federal Works Administrator following an offer of the United States to amend the loan and grant agreement, the city agrees to complete the project within fifteen months after the resumption of construction following this litigation, with the proviso that "it assumes no obligation to expend in the construction of the project any funds except funds received by way of loan and grant under this offer."]

12. That the construction, maintenance and operation of the proposed plant and system would not materially or appreciably affect the navigable capacity of any part of the Yadkin-Pee Dee River, which is in fact navigable or capable of navigation, for the movement of interstate or foreign trade and traffic, and would not affect the interest of interstate or foreign commerce.

13. That the city of High Point has not obtained from the Public Utilities Commission of North Carolina a certificate of convenience and necessity for the construction and operation of the proposed plant and system.

Upon these findings, the court concluded (1) that the city of High Point exceeded its authority in applying for and accepting the license from the Federal Power Commission; (2) that the proposed revenue bonds would constitute a general indebtedness of the city; (3) that the agreement to complete the project within a given time creates a binding obligation "at least to the extent that the cost of constructing and completing said plant and system will exceed the amount of said grant and bonds"; (4) that the city cannot lawfully proceed with the undertaking without first obtaining a certificate of convenience and necessity from the Public Utilities Commissioner of the State of North Carolina. Whereupon, injunction was granted in accordance with the prayer of the plaintiffs and interveners. The defendants duly noted exceptions, and from the judgment entered, they appeal.

Carter Dalton and John A. Myers for Adams-Millis Corporation et al., plaintiffs.

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

G. H. Jones and Roy L. Deal for defendants, appellants.

Reed, Hoyt, Washburn & Clay of counsel.

STACY, C. J. At the threshold of the case, it may be well to recall that a municipality is limited in its authority to venture upon an enterprise such as here contemplated. Its powers are different from those usually granted to a public-service corporation, for it serves a single community while the latter may serve many. Nevertheless, the authority of a municipality is generally ample for its own purposes. *Lutterloh v. Fayetteville,* 149 N. C., 65, 62 S. E., 758; *George v. Asheville,* 80 Fed. (2d), 50, 103 A. L. R., 568.

Further, by way of preliminary observation, it may be noted that where the parties agree to waive a jury trial and submit the whole controversy to the court for final determination, both as to the law and the facts, the findings of fact made by the court pursuant to such agreement have the force and effect of a verdict, and they are conclusive on appeal if supported by any competent evidence. *Cobb v. Cobb,* 211 N. C., 146, 189 S. E., 479; *Crews v. Crews,* 210 N. C., 217, 186 S. E., 156; *Marshall v. Bank,* 206 N. C., 466, 174 S. E., 314; *Roebuck v. Surety Co.,* 200 N. C., 196, 156 S. E., 531. The correctness of the findings may be challenged in the same way as the verdict of a jury. *Assurance Society v. Lazarus,* 207 N. C., 63, 175 S. E., 705. The rule is applicable on the final hearing in injunction proceedings. *Power Co. v. Power Co.,* 171 N. C., 248, 88 S. E., 349. The only modification or departure from this practice will be found in those cases, formerly cognizable exclusively in equity, which are submitted on written and documentary proofs. *Worthy v. Shields,* 90 N. C., 192. The trial court determines the facts upon contradictory evidence or upon evidence permitting different inferences, as we are not authorized to find the facts in such cases. *White v. White,* 179 N. C., 592, 103 S. E., 216. The rule is otherwise in injunction proceedings when the appeal is from the preliminary hearing, for the findings then are only for the purpose of the interlocutory order, and they are made by the judge without any waiver or consent of the parties. *Mewborn v. Kinston,* 199 N. C., 72, 154 S. E., 76.

First. The initial question for decision is whether the city of High Point exceeded its authority in agreeing to abide by all the conditions imposed in the license issued by the Federal Power Commission for the construction, operation and maintenance of the hydroelectric project here challenged. The record would seem to require an affirmative answer.

It is the position of the plaintiffs that the functions of the Federal Power Commission and those of the city of High Point are not only separate and distinct, but that they are also different in scope and purpose, if not in character and kind; that the one derives its authority from the Congress; the other from the State Legislature; that the one deals with national issues; the other with local matters. And while in certain instances, it is conceded the activities of the latter may properly

complement those of the former, it is asserted that on the present record, a case of complete domination and control on the part of the Federal Power Commission is presented. The plaintiffs challenge the right of a municipality to assume such a role of subjectivity in the absence of legislative sanction, express or implied. *Madry v. Scotland Neck,* 214 N. C., 461, 199 S. E., 618; *Coburn v. Comrs.,* 191 N. C., 68, 131 S. E., 372; *Henderson v. Wilmington, ib.,* 269, 132 S. E., 25; *Weith v. Wilmington,* 68 N. C., 24. They say that the city of High Point is clothed with no authority and charged with no duty in connection with interstate or foreign commerce, *City of Chicago v. Law,* 144 Ill., 569, 33 N. E., 855; that it is not primarily interested in the promotion of navigation or in the protection of fish life in the waters of the Yadkin River, desirable as these may be; that its obligations are exclusively to the residents, citizens and taxpayers of High Point, and that therefore the acceptance of the Federal license goes beyond the reach of the defendant's authority and may even be incompatible with its duties as a municipality. *Johnson v. Comrs.,* 192 N. C., 561, 135 S. E., 618; *Asbury v. Albemarle,* 162 N. C., 247, 78 S. E., 146; *Trenton v. New Jersey,* 262 U. S., 182; *Northern B. & L. Assn. v. Cleary,* 296 U. S., 315, 100 A. L. R., 1403; *Worchester v. Worchester Street Ry. Co.,* 196 U. S., 539; *Becker v. La Crosse,* 99 Wis., 414, 67 Am. St. Rep., 874.

The cases of *Klein v. City of Louisville,* 6 S. W. (2d), 1104, and *Haeussler v. City of St. Louis,* 205 Mo., 656, 103 S. W., 1034, cited and relied upon by the defendants, are sought to be distinguished on the ground that there specific or implied legislative authority for what was done—bridges constructed over navigable streams forming state boundaries—while no such authority appears here. Likewise, it is pointed out that in *State ex rel. Gummer v. Pace,* 164 So. (Fla.), 723, cited by the defendants, there was legislation with reference to the navigable waters there involved.

The arguments of the plaintiffs prevailed in the court below and they have been pressed with vigor here. They appear to be sound and worthy of acceptation. *Kennerly v. Dallas,* 215 N. C., 532, 2 S. E. (2d), 538. A municipality is not permitted to travel beyond the scope of its charter or in excess of the powers granted to it by the General Assembly.

In this view of the matter, the navigability or nonnavigability of the Yadkin-Pee Dee River may be put aside as an incidental issue in the case. *Ashwander v. Valley Authority,* 297 U. S., 288. However, it appears from the determinations made by the trial court that the Yadkin-Pee Dee River is a nonnavigable stream in North Carolina, and that the construction, maintenance and operation of the proposed hydroelectric plant and system would not materially or appreciably affect navigation or the movement of interstate or foreign commerce. Upon these findings,

which are amply supported by the evidence and predicated upon a number of prior adjudications, it would seem that the Federal Power Commission is without jurisdiction in the premises, and that its license should be regarded as gratuitous, especially in the extent to which it goes. *Smith v. Ingram,* 29 N. C., 175; *S. v. Glen,* 52 N. C., 321; *Cornelius v. Glen, ib.,* 512; *Dunlap v. Light Co.,* 212 N. C., 814, 195 S. E., 43; *U. S. v. Rio Grande Irr. Co.,* 174 U. S., 690; *U. S. v. Appalachian Electric Power Co.,* 107 F. (2d), 769.

In this latter circumstance, the defendants say on brief that the license of the Federal Power Commission should be treated as a nullity, being void *ab initio,* and that they should be permitted to proceed as if the license had not been issued. The record fails to present such a case. It is alleged in the answer that application was duly made to the Federal Power Commission for the license in question; that the city has a right to proceed under it, and that it intends to do so. Upon this theory the case was heard in the court below. Indeed, without questioning the authority of the Federal Power Commission, the defendants have apparently agreed to make its license an integral part of the undertaking as presently contemplated. *U. S. v. Butler,* 297 U. S., 1. The record contains no disclaimer of its obligations on the part of the defendants, but rather an insistence upon their legality and a determination to abide by them. The case is controlled by the transcript on appeal, *S. v. Dee,* 214 N. C., 509, 199 S. E., 730, except in situations similar to the one hereafter considered in section three. *Berrier v. Comrs. of Davidson County,* 186 N. C., 564, 120 S. E., 328.

Moreover, the Federal Power Commission is not a party to the proceeding, and the validity of its license is not an issue in the case. The inquiry goes only to the authority of the city of High Point to agree to abide by its terms and conditions, and thus to embark upon the enterprise practically as an adjunct of the Federal agency and primarily for purposes of national concern. On the record as presented, the project and the Federal license are inseparably connected. *Covington v. Threadgill,* 88 N. C., 186; *Hazelton v. Sheckels,* 202 U. S., 71; *McMullen v. Hoffman,* 174 U. S., 639. A municipality is confined to the circumference of its powers. *Briggs v. Raleigh,* 195 N. C., 223, 141 S. E., 597.

Second. The next question is whether the proposed revenue bonds would constitute a general indebtedness of the city of High Point. This was the subject of considerable discussion on the first appeal in the *Williamson case,* 213 N. C., 96, 195 S. E., 90, which need not be repeated here.

Since that decision, the General Assembly has by general enactment, ch. 2, Public Laws, Extra Session, 1938, authorized the municipalities of the State to construct, improve and extend "revenue-producing under-

takings" of various kinds, including hydroelectric plants or systems, and to finance them with funds derived from the sale of revenue bonds, payable solely out of the revenues of the undertaking. The statute is denominated the "Revenue Bond Act of 1938," and it sets out in detail the terms and conditions under which such revenue bonds may be issued and prescribes the remedies afforded the bondholders. Compulsory exercise of the taxing power is specifically withheld as a means of enforcing liability on any covenant or bond of the municipality given or issued in connection with the undertaking. The remedies of *mandamus,* mandatory injunction and receivership are alone designated as available to the creditors. *George v. Asheville, supra.* This act *ex proprio vigore* enters into and becomes a part of the bonds issued under its provisions. *Bank v. Bryson City,* 213 N. C., 165, 195 S. E., 398. The power to borrow money or to deliver bonds under the act is prohibited after 31 December, 1940, except in furtherance of a contract or agreement theretofore entered into by the municipality.

In addition to the benefits of this act, it is the contention of the defendants that by resolution of the city council embodying similar provisions, revenue bonds of like character may be issued under the city charter or the Revenue Bond Act of 1935, ch. 473, Public Laws 1935, and that the bonds here challenged come within the authorization of either or both statutes. We had occasion to consider the limitations of the Revenue Bond Act of 1935 in the *Williamson case, supra.*

One of the ends sought to be accomplished by the amendatory and supplemental resolution of 20 March, 1939, as we understand it, was to make sure the terms and conditions of the bonds proposed to be issued by the city of High Point would not exceed the provisions approved in *Brockenbrough v. Comrs.,* 134 N. C., 1, 46 S. E., 28, as coming within the special-fund doctrine and to remove them, beyond all peradventure, from the category of general indebtedness. In this endeavor the defendants have called to their aid provisions of the Revenue Bond Act of 1938. Taken in connection with the further resolution of the board of power commissioners adopted 7 November, 1939, it would seem that as the bonds are to be "payable solely out of the revenues of the system," they might well be held as coming within the special-fund doctrine, and not as general obligations of the municipality importing liability to taxation. *Gill v. Charlotte,* 213 N. C., 160, 195 S. E., 368; *Hall v. Redd,* 196 N. C., 622, 146 S. E., 583. See 16 N. C. L., 346. The bonds themselves are to contain specific provision to this effect, and, hence, the bondholders will be put on notice that they have no right to compel the levy of any tax to enforce payment of principal or interest. *Ward v. City of Chicago,* 342 Ill., 167.

The stipulation that the city will not purchase, for resale through its

presently owned electric distribution system, electric energy from any source other than the proposed system, when and so long as energy from the system is available, comes well within the special-fund doctrine, for the energy so taken and used is to be paid for solely out of the gross revenues of the presently owned electric distribution system and is to be considered simply as an expense of operating this latter system. *Holmes v. Fayetteville,* 197 N. C., 740, 150 S. E., 624; *Plant Food Co. v. Charlotte,* 214 N. C., 518, 199 S. E., 712; *Allison v. Chester,* 72 S. E. (W. Va.), 472.

The further stipulation that if the city shall, from time to time, voluntarily elect to take electric energy from the system for its own use, it will pay to the special account an amount equal to the cost of furnishing the electric energy so taken—in no event to exceed a fair and reasonable amount for such energy—is not a covenant importing liability to taxation available to the bondholders, but rather an assurance or undertaking on the part of the city to pay for such energy as a necessary municipal expense out of current revenues, for the service rendered, and is not to be regarded as payment on the cost of the enterprise. *Walla Walla v. Walla Walla Water Co.,* 172 U. S., 1; *Pennington v. Town of Sumner,* 222 Iowa, 1005, 270 N. W., 629; *Reconstruction Finance Corp. v. City of Richmond,* 249 Ky., 787; Annotation, 103 A. L. R., 1160. The provision is not that the city shall pay for such energy, if, as and when taken, at the regular rate so as perhaps to include a profit, but the amount to be paid into the special account is limited to an amount equal to the cost of furnishing the electric energy so taken, and in no event to exceed a fair and reasonable amount for such energy. The stipulation is specifically authorized by the Revenue Bond Act of 1938. *Wells v. Housing Authority,* 213 N. C., 744, 197 S. E., 693. Its purpose is to guard against any outlet for "free service." *Georgia v. Regents of University System,* 179 Ga., 210, 175 S. E., 567; *Keller v. State Board of Education,* 236 Ala., 400, 183 So., 268.

The authorities from other jurisdictions cited by plaintiffs, which in tendency seem to point in another direction, are grounded on different factual bases and are therefore distinguishable. To point out these differences in detail, however, would require an unnecessary amount of differentiation with no commensurate benefit to be derived from the undertaking. Suffice it to say they are not controlling.

It should be observed that what is here said in respect of the liability arising from the issuance of the proposed revenue bonds has no reference to the obligations sought to be assumed by the city in agreeing to abide by all the conditions imposed in the license issued by the Federal Power Commission. These obligations arise out of matters *dehors* the revenue bond resolutions and hence they stand on a different footing. Being

ultra vires, or beyond the city's reach, they have been disregarded in the consideration of the second question presented by the appeal.

Third. The questions arising from the court's determination that the costs of the undertaking will exceed the aggregate amount of the Federal grant and the proceeds of the revenue bonds and that the city's agreement to complete the project within a given time constitutes a binding obligation importing general liability, apparently have been rendered moot by the resolution of the board of power commissioners adopted 7 November, 1939, in which it is provided that the city "assumes no obligation to expend in the construction of the project any funds except funds received by way of loan and grant" from the Federal Government. The terms of this resolution have been accepted and approved by the Federal Emergency Administration of Public Works. See *Gulf, Col. & S. F. Ry. v. Dennis,* 224 U. S., 503, and *Patterson v. Alabama,* 294 U. S., 600; *Wilson v. Comrs.,* 193 N. C., 386; 137 S. E., 151.

Fourth. The question that remains is whether the city of High Point can lawfully proceed with the undertaking without first obtaining a certificate of convenience and necessity from the Public Utilities Commissioner of the State of North Carolina. The trial court answered in the negative and we approve.

It is provided by the Revenue Bond Act of 1938 (ratified 13 August, 1938) that no municipality, "proceeding under this act," shall construct any gas or electric system without having first obtained a certificate of convenience and necessity from the Public Utilities Commissioner, "except that this requirement for a certificate of convenience and necessity shall not apply to any such undertaking defined in this proviso which has been authorized, or the bonds for which have been authorized, by any general, special or local law heretofore enacted."

It is the position of the defendants that they come within the exception to the proviso, above quoted, because the undertaking here challenged was authorized by the resolution of the council of the city of High Point on 27 April, 1938, which was more than three months prior to the ratification of the Revenue Bond Act of 1938. Conceding some attenuate ground for the contention, it is not believed the defendants would want to risk the success of their undertaking alone upon the resolution of 27 April, 1938. They deemed it "advisable to amend and supplement said resolution" by the resolutions of 20 March, 1939, which have been regarded as essential to the project. Indeed, these later resolutions apparently wrought substantial changes in the enterprise. It is not thought that the exception to the proviso in the statute was intended to cover a situation similar to the one here presented. The reason for the requirement, as well as the applicable rule of strict construction, *Piedmont and Northern Ry. Co. v. U. S.,* 30 Fed. (2d), 421, would seem to suggest a

contrary intent on the part of the lawmaking body. In this respect, we agree with the ruling of the trial court. *Alabama Power Co. v. City of Scottsboro,* 190 So. (Ala.), 412.

It results, therefore, from what is said above, that with the modifications suggested, the judgment should be upheld. On the facts established by the record, the correct conclusion seems to have been reached.

Modified and affirmed.

YADKIN COUNTY v. CITY OF HIGH POINT ET AL.

(Filed 17 April, 1940.)

1. Eminent Domain § 1—Ordinarily, property used for public purposes may not be condemned for another public purpose without legislative authority.

Ordinarily, the power of eminent domain extends only to the right to condemn private property for public use, and property already in use for a public purpose cannot be condemned for another public purpose in the absence of legislative authority, express or necessarily implied, and a general authorization to exercise the power of eminent domain will not suffice, especially when the property in use for a public purpose is owned by an instrumentality of the State, but the general rule is subject to possible exception when the property sought to be condemned is not in actual public use or is not vital to such purpose, or where the additional easement would not seriously interfere with the first use.

2. Appeal and Error § 37e—

Where the entire controversy, both as to questions of law and issues of fact, is submitted to the court by agreement, the court's findings of fact have the force and effect of a verdict of a jury, and the parties are bound thereby.

3. Eminent Domain § 1—Municipality held without authority to condemn for public purpose part of lands used for County Home site.

Plaintiff county instituted this action against defendant municipality to restrain the municipality from constructing a dam for a municipal hydro-electric generating system, and the entire controversy was submitted to the court by agreement. The court found as a fact that the proposed dam would flood approximately 25 acres of the 159-acre County Home site and that the taking of the 25 acres would be for a purpose wholly inconsistent with the public use to which it is now devoted. Defendant municipality cited no statutory authority specifically authorizing it to condemn the land in question. *Held:* The municipality has no authority to condemn the land already in use for a public purpose and owned by a political subdivision of the State, and its contentions that the condemnation would not materially interfere with the prior public use and that it was authorized by the Legislature to condemn the said land by necessary

implication from the power granted by general law to construct the hydroelectric generating plant, are unavailing in view of the contrary findings of the trial court, which are binding upon the municipality.

4. Same—Municipality held without authority to condemn for public purpose portions of county highways.

Plaintiff county instituted this action to restrain defendant municipality from constructing a dam for a municipal hydroelectric generating system, and the entire controversy was submitted to the court by agreement. The trial court found that the proposed dam would flood county highways at a number of places and submerge various bridges on these county roads, necessitating the abandonment of the highways and resulting in rendering inaccessible large areas in which are located homes, schools and churches. *Held:* The municipality is without authority to condemn the portions of the county highways, since no express authority had been granted it to do so, and since legislative authority cannot be implied by necessary implication from the general power granted it to construct the hydroelectric generating system, nor from the provisions of C. S., 2791, 2792, which grant general power of condemnation only, nor from chapter 117, Public Laws of 1939, which purports to validate bonds theretofore issued by local units for PWA projects, without any reference to the power of eminent domain.

APPEAL by defendants from *Sink, J.*, at Special June Term, 1939, of YADKIN.

Civil action to restrain the defendants from constructing dam and reservoir on Yadkin River for use in operation of hydroelectric plant.

Due to the issues involved, the Attorney-General of the State petitioned the court and was allowed to appear in the case as *amicus curiæ*.

On the hearing, it was agreed by all the parties that a jury trial should be waived, and that the whole matter should be submitted to the court for final determination, both as to the law and the facts. It was further stipulated that the issues involving the authority of the defendant city to proceed with the project should be heard and determined on the evidence taken in the case of "J. W. McGuinn *et al. v.* City of High Point," pending in the Superior Court of Guilford County.

At the conclusion of plaintiff's evidence, a nonsuit was entered on the allegations of loss which might result to the plaintiff by reason of the removal from the tax books of the county large taxable assets in the event the proposed hydroelectric plant was constructed. The plaintiff noted an exception to this ruling, but has not appealed.

In summary, the essential determinations and conclusions of the court follow:

1. That Yadkin County is a municipal corporation and political subdivision of the State.

2. That the city of High Point is a duly chartered municipal corporation of the State, and the other defendants constitute the city council and the board of power commissioners of the defendant city.

3. That the dam for the hydroelectric plant which the defendants propose to construct on the Yadkin River is designed to impound "231,000 acre feet of water covering approximately 14,750 acres of land and adversely affecting approximately a similar acreage," which reservoir area lies within the counties of Davie, Yadkin and Forsyth with a total shore line of about 290 miles.

4. That the dam, if built as designed, would submerge and render totally impracticable for the public use to which it is now appropriated approximately 25 acres of the Yadkin County Home site which for many years has been devoted to a public use, *i.e.*, the care and protection of the indigent of the county, and is the only lowland on the 159 acres in the tract. The taking of this property by the defendants would be for a purpose wholly inconsistent with the public use to which it is now devoted.

5. That the proposed project, if constructed as designed, would inundate the county highways of Yadkin County at fifteen places, ranging from one-tenth of a mile to a mile and a tenth, necessitating their abandonment; that it would also submerge various bridges on these county roads, and make inaccessible large areas containing sites now used for homes, schools and churches.

6. That the Commissioners of Yadkin County have not consented to the abandonment, sale or surrender either of the county highways in question or that portion of the County Home site proposed to be flooded.

(The findings in respect of the navigability of the Yadkin River in North Carolina and as bearing upon the acceptance by the city of a license from the Federal Power Commission are presently omitted for reasons hereafter to appear.)

7. That the proposed plant and system cannot be operated for the maximum benefit of the taxpayers of the city of High Point, and, at the same time, in keeping with the license issued by the Federal Power Commission under which the defendants propose to operate it because the terms and conditions of this license are incapable of being carried out except to the detriment and diminuation of the power production of the plant.

Upon these findings, the court concluded (1) that the city of High Point is without authority to condemn any part of the Yadkin County Home site or any of the Yadkin County highways in question; (2) that the city is likewise without authority to accede to the terms and conditions of the license issued by the Federal Power Commission for the construction, maintenance and operation of the proposed project. Whereupon, injunction was granted in accordance with the prayer of the plaintiff, from which the defendants appeal, assigning errors.

D. L. Kelly, B. S. Womble and W. P. Sandridge for plaintiff, appellee.
G. H. Jones and Roy L. Deal for defendants, appellants.
Attorney-General McMullan and Assistant Attorney-General Bruton, amici curiæ.

STACY, C. J. We are here dealing with the same project that was the subject of consideration in the companion case of *McGuinn v. High Point, ante,* 449. What is there said in respect of the determinations pertaining to the navigability of the Yadkin River in North Carolina and the authority of the city of High Point to accede to the terms and conditions of the license issued by the Federal Power Commission will suffice for the similar determinations made in the instant case.

The present record contains the further specific finding of incompatibility between the obligations assumed by the city of High Point in agreeing to abide by all the conditions imposed in the license issued by the Federal Power Commission and its duties as a municipality.

The remaining question, then, and the principal one here, is whether the city of High Point can lawfully condemn (1) a portion of the County Home site and (2) the fifteen sections of the county highways of Yadkin County in the circumstances as shown by the record. The trial court answered in the negative and we cannot say there is error in the ruling.

First. The defendants concede that their right to condemn the 25 acres of lowland on the Yadkin County Home site may be doubtful. They cite no statutory authority for the right, either express or implied. However, they claim it as a matter of necessity or as not materially interfering with a prior right. See *Penn. Railroad Co.'s Appeal,* 93 Pa., 150, on the doctrine of necessity; also *Easthampton v. County Comrs.,* 154 Mass., 424, on the defendants' suggestion of "balancing conveniences."

The power of eminent domain, as generally understood, extends only to the right to condemn private property for public uses. *Wissler v. Power Co.,* 158 N. C., 465, 74 S. E., 460; *Jeffress v. Greenville,* 154 N. C., 490, 70 S. E., 919. It is for the General Assembly to say whether in the particular case or under certain conditions, the power shall be enlarged to embrace public property and property devoted to a public use as well as private property. 10 R. C. L., 198. The authorities are to the effect that a general authorization to exercise the power of eminent domain will not suffice in a case where property already dedicated to a public use is sought to be condemned for another public use which is totally inconsistent with the first or former use. *R. R. v. R. R.,* 83 N. C., 489; 20 C. J., 602. In such a case a specific legislative grant or one of unmistakable intent is required. *Vermont Hydroelectric Corp. v.*

Dunn et al., 95 Vt., 144, 112 Atl., 223, 12 A. L. R., 1495; *Minnesota Power & Light Co. v. State,* 177 Minn., 343, 225 N. W., 164; *City of Albuquerque v. Garcia,* 17 N. Mex., 445, 130 Pac., 118; *Village of Ridgewood v. Glen Rock,* 15 N. J. Misc., 65, 188 Atl., 698. Especially insistent are the cases where the property sought to be condemned for a second public use is owned by an agency of the Government, or a subdivision thereof, and by it devoted to a state purpose. *City of St. Louis v. Moore,* 269 Mo., 430, 190 S. W., 867.

It will be noted that the county property here sought to be condemned is already devoted to a public use. Its condemnation for a second inconsistent public use, which is necessarily destructive of the first, may not be accomplished except under legislative authority given in express terms or by necessary implication. *Fayetteville Street Ry. v. R. R.,* 142 N. C., 423, 55 S. E., 345. Admittedly, the city of High Point is without such authority here. *Selma v. Nobles,* 183 N. C., 322, 111 S. E., 543.

The precise question was before the Supreme Court of Pennsylvania in Appeal of Tyrone Township School District, 1 Monag. (Pa.), 20, 15 Atl., 667. There the board of directors of a school district undertook to condemn three-fourths of an acre of land on a farm consisting of 172 acres, belonging to the county and used for the care and support of the poor of the county, under a statute authorizing the board to condemn not more than an acre of land for school purposes. It was held that the terms of the statute were not sufficient to authorize the taking of property already appropriated to another public use.

To like effect is the decision in *City of Edwardsville v. Madison County,* 251 Ill., 265, 96 N. E., 238, where the city of Edwardsville sought to open a street within its corporate limits through the Madison County poor farm. It was held that the municipality under its general grant of power had no authority to condemn for such a use the property of the county already appropriated to another public purpose.

There are, of course, variant circumstances which could easily tip the "nodding beam" in another direction. For example, where the property is not in actual public use or is not vital to such purpose, or where the additional easement would not seriously interfere with the first use. *Fayetteville Street Ry. v. R. R., supra; R. R. v. R. R., supra;* Annotation, 12 A. L. R., 1502. And further as bearing upon the flexibility of the rule, a distinction is made in some of the cases between property owned by an instrumentality of the State and devoted to a public use, when the rule is strictly observed, and property owned by a public-service corporation and likewise devoted to a public use, when the rule is somewhat relaxed, the reason being that in the former the public interest alone is supposed to prevail while in the latter the idea of private enterprise also plays a part. *City of St. Louis v. Moore, supra.* What is

here said should be understood as having reference to the facts of the instant case as found by the trial court. *Yarborough v. Park Commission,* 196 N. C., 284, 145 S. E., 563.

The rule as generally applied is stated with clarity by *Folger, J.,* in *The Matter of City of Buffalo,* 68 N. Y., 167: "In determining whether a power generally given, is meant to have operation upon lands already devoted by legislative authority to a public purpose, it is proper to consider the nature of the prior public work, the public use to which it is applied, the extent to which that use would be impaired or diminished by the taking of such part of the land as may be demanded for the subsequent public use. If both uses may not stand together, with some tolerable interference which may be compensated for by damages paid; if the latter use, when exercised, must supersede the former; it is not to be implied from a general power given, without having in view a then existing and particular need therefor, that the Legislature meant to subject lands devoted to a public use already in exercise, to one which might thereafter arise. A legislative intent that there should be such an effect will not be inferred from a gift of power made in general terms. To defeat the attainment of an important public purpose to which lands have already been subjected, the legislative intent must unequivocally appear. If an implication is to be relied upon, it must appear from the face of the enactment, or from the application of it to the particular subject matter of it, so that by reasonable intendment, some especial object sought to be attained by the exercise of the power granted could not be reached in any other place or manner."

In this view of the matter, the defendants stressfully insisted upon a favorable finding in the court below, but the determination was against them, and they are bound by it on appeal. *Power Co. v. Power Co.,* 171 N. C., 248, 88 S. E., 349.

Second. What has been said in respect of the County Home site applies *a fortiori,* or at least with equal force, to the sections of the county highways which are sought to be flooded or taken.

In the case of *In re Southwestern State Normal School,* 213 Pa., 244, 62 Atl., 908, the State Normal School purchased a number of lots for use as a campus and undertook to condemn the streets and alleys running through them and adjoining them on the north and south. Speaking to the question here under consideration, the Court said: "What the appellant seeks to do is, not to take land belonging to and in the use of a private owner, but is to condemn property already dedicated to public use and used by the public as public highways, and to devote the same to what it claims to be another public use. Property already devoted to public use, including franchises, is subject to eminent domain, and may be taken for other public uses; but, while this is true, it cannot be

so taken without legislative authority expressly conferred or arising by necessary implication."

Likewise, in *City of St. Louis v. Moore et al., supra,* the city of St. Louis sought to condemn for street purposes land used as a playground in connection with a public school. In denying the right to condemn, the Court cites a long list of cases in support of the proposition that property devoted to a public use, more strictly speaking for state purposes, may not be condemned for a second public use without authority expressly granted or which necessarily proceeds as an inference from such a grant.

The suggestion is advanced by the defendants that the city of High Point has by necessary implication legislative authority to condemn the highways in question. As tending to support this position, they point out that sections 2791 and 2792 of the Consolidated Statutes are made available to the city of High Point by express provision in the city charter, and that the present undertaking has been specifically approved by the Validating Act of 1939, ch. 117, Public Laws 1939. We find nothing in these statutes of sufficient definiteness to warrant the suggested inference. The designated sections of the Consolidated Statutes deal only with the general power of condemnation, and the Validating Act of 1939, which took effect on 16 March, 1939 (four days prior to the amendatory and supplemental bond resolution of the defendant city) purports to validate bonds theretofore issued by local units for the purpose of financing or aiding in the financing of PWA projects, including all proceedings for the authorization and issuance of bonds, and for their sale, execution and delivery. It contains nothing in reference to the power of eminent domain.

Upon the findings of the trial court, which have the force and effect of a verdict, we cannot say there is error in the judgment rendered thereon.

Affirmed.

COLIE W. SMITH, EMPLOYEE, v. CABARRUS CREAMERY COMPANY, INC., EMPLOYER, AND CASUALTY RECIPROCAL EXCHANGE, CARRIER.

(Filed 17 April, 1940.)

1. Master and Servant § 40d—

An "accident" within the contemplation of the Workmen's Compensation Act is an unusual and unexpected or fortuitous occurrence, there being no indication that the Legislature intended to put upon the usual definition of this term any further refinements.

2. Master and Servant § 40a—

An injury, in order to be compensable under the Workmen's Compensation Act, must result from an accident, and injuries which are not the result of any fortuitous occurrence but are the natural and probable result of the employment are not compensable.

3. Master and Servant § 40c—Evidence held sufficient to sustain finding that hernia resulted from accident.

The evidence tended to show that the injured employee was employed to deliver milk, that in delivering milk to a cafe in the regular course of his employment he attempted to lift a box containing chipped ice, and weighing from 125 to 150 pounds, out of a larger box in order to place the milk he was delivering beneath it, that while lifting the box he felt a sharp pain and that it was later determined that he had suffered a hernia. *Held:* The evidence is sufficient to sustain the finding of the Industrial Commission that the injury resulted from an accident, since it resulted from an unusual and fortuitous occurrence happening within the body of the employee, which was not a natural and probable result of his employment. *Slade v. Hosiery Mills*, 209 N. C., 823; *Neely v. Statesville*, 212 N. C., 365, cited and distinguished in that the injury in those cases was the natural and probable result of the work being done.

APPEAL by defendants from *Ervin, Jr., J.*, at December Term, 1939, of CABARRUS. Affirmed.

The record contains the following succinct statement of the history of the case:

"This case was originally a claim before the Industrial Commission. The claim for compensation was filed with the Industrial Commission on March 7, 1939. The defendants denied liability for compensation and the claim was heard after due notice to all parties by Chairman T. A. Wilson in Concord on July 19, 1939. The hearing Commissioner on July 27, 1939, issued an award for compensation. The defendant appealed from the award of the hearing Commissioner to the Full Commission. The appeal was heard by the Full Commission on October 6, 1939. On October 9, 1939, the Full Commission affirmed the award of the hearing Commissioner. The defendants appealed from the award of the Full Commission to the Superior Court of Cabarrus County. The appeal to the Superior Court was duly docketed on November 3, 1939, and was heard by Judge S. J. Ervin, Jr., in Concord, on December 5, 1939. The Superior Court affirmed the award of the Full Commission by a judgment entered on December 5, 1939. The defendants now prosecute this appeal to the Supreme Court from the judgment of the Superior Court affirming the award of the Full Commission."

It is admitted that the plaintiff was an employee of the defendant, Cabarrus Creamery Company, Inc., at a salary of $25.00 per week, at the time of his injury, and that all parties are subject to the Workmen's Compensation Act.

Plaintiff's evidence was substantially as follows: The plaintiff was delivering milk to a cafe in his regular employment, and on the day of his injury had "checked the box" in the cafe in which he was to place the milk, went back, and returned with the milk. This had to be placed in a large box which contained a smaller box of chipped ice weighing from 125 to 150 pounds. It was necessary to lift this smaller box in order to place the milk beneath it. The smaller box was "down in the corner." In lifting it was necessary to bring the box "straight up," as it did not have "a half inch play." The plaintiff got into position, leaning over the edge of the big box which, as he said, "hits me exactly to that place to the inch. Where I had the rupture, the big box where I lean over, that is right where it hits me." The plaintiff reached over into the big box, got the smaller box, and lifted it straight up. When he "went to come up with it" there was a sharp pain when he had gotten it about half way up, and plaintiff got sick. He rubbed the spot, waited a little, and felt better. He continued his duties until about twelve o'clock, when he went to the office and told Miss Burrage that he had hurt or strained his side. He thought he was ruptured, but was not sure.

Dr. Howard examined him, plaintiff says, and told him he did not think he was ruptured, that he had strained himself but did not think it had "tore through." Three or four days afterward he went back to Dr. Howard, and the rupture then "showed up as big as a hen egg," and Dr. Howard advised an operation.

After some interval he went to a Government hospital at Kecoughton, Va., underwent an operation for hernia, and stayed there from 3 March to 14 April. All of his hospital expenses and transportation were paid by the United States Government, and he now seeks compensation only for loss of earnings during the period he was unable to work.

Dr. Howard corroborated the witness as to the result of his examinations, stating that in about ten days from his first examination the plaintiff showed to be ruptured, and that the hernia was bulging so you could see it through the right inguinal ring.

The defendants introduced in evidence a prior sworn statement of the plaintiff, the part relevant to defendants' present contention being as follows: "The ice box I was lifting at the time I felt the pain weighed from 125 to 150 pounds. I think the strain of reaching down into the big box and lifting out the little box is what caused my trouble. My foot did not slip and I do not know of anything of that kind that happened. I just lifted the box up like I usually did every day when I delivered the milk."

The plaintiff had had a hernia on the left side four or five years previously. The present hernia is on the right side.

Upon the evidence, the Full Commission approved the previous findings of the hearing Commissioner and made an award. Defendants appealed and the award was affirmed in the Superior Court, from which defendants again appealed to this Court.

Hartsell & Hartsell for plaintiff, appellee.
Gover & Covington and Hugh L. Lobdell for defendants, appellants.

SEAWELL, J. We consider it necessary to consider only the defendants' contentions that plaintiff's injury was not caused by accident within the meaning of section 2.f of the Workmen's Compensation Act, ch. 120, Public Laws of 1929. Upon the evidence there can be no contention that whatever it was did not arise out of and in the course of the employment.

There is no definition of the term "by accident," or of the word "accident" in the act. In the section and subsection cited, injury is defined as meaning only "injury by accident, arising out of and in the course of employment."

Briefly stated, the contention of the defendants is that the term "by accident" necessarily means by an accident taking place entirely outside the body of the person injured, as the result of which, and through the application of external force, the injury is produced. Therefore, they contend that no fortuitous, unusual or unexpected happening within the body, such as a sudden rupture under the strain of lifting while the employee is doing the work in the usual way, is to be considered in determining whether the injury is by accident. They think they are aided in this view by the phraseology employed in the statute—"injury by accident"—instead of "accidental injury," as used in some similar statutes.

In this connection, they point out that the plaintiff was lifting a box, as he must have done many times before in the same service; that he admitted "my foot did not slip and I do not know of anything of that kind that happened. I just lifted the box up like I usually did every day when I delivered the milk." This, they contend, excludes the theory of external causation.

In *Moore v. Sales Co.*, 214 N. C., 424, 199 S. E., 605—also a hernia case—the same question was raised, but was not decided, because the Court thought that the essentials of external accident were present under the facts of the case. And this case might be disposed of in a similar way if the Court thought it could, with any further propriety, evade an issue which is squarely laid before us, and is likely to arise again and again, especially in hernia cases. In that event, decision would depend on the following phase of the evidence: The plaintiff testified that he

leaned over the big box, which "hit" him, or shall we say, in terms of measurement and correlation, came to within an inch of the point of his abdominal injury. There is a reasonable inference that he was in contact with this box at the time of the lifting in a constrained position, and that this aided the rupture or traumatic enlargement of the inguinal rings, under the tension already brought about by the efforts to lift the box.

It is contended by the defendants that this Court has adopted the view taken by them in *Slade v. Hosiery Mills,* 209 N. C., 823, 184 S. E., 844, and *Neely v. Statesville,* 212 N. C., 365, 193 S. E., 664. But on a fair interpretation of these cases the Court did not go that far. In the cited cases there was an absence of unusualness or unexpectedness in both the external facts and the internal conditions with which the opinions deal. A sudden rupture producing hernia is not a natural and probable consequence of the work the plaintiff was doing, but only an accidental result.

This Court has never attempted definitely to align itself with the minority view that a sudden disruption or breaking of the bones or tissues of the body under the strain of strenuous labor, such as lifting, wholly unusual and unexpected, may not be considered as an element of accident leading to compensable injury.

An accident, although tangible things are involved, is largely intangible. If the influences, often complex and minute, which brings it about were capable of exact analysis, it would lose its character as accident. As judicially defined, unusualness and unexpectedness are its essence. It is defined in *Love v. Lumberton,* 215 N. C., 28, 1 S. E. (2d), 121, as "an unlooked for and untoward event which is not expected or designed by the injured employee." This is near the definitions given in the dictionaries. Century Dictionary has it: "A casual or undesigned occurrence; a fortuitous event." Webster: "An unexpected or unforeseen event, generally unfortunate." There is no sound reason to believe that the Legislature intended to put upon it other refinements.

If the plaintiff had burst a blood vessel or broken a leg or pulled a tendon under the strain, there would be little argument. The injury he suffered is no different in principle.

We do not, of course, hold that hernia, or any other condition not classed in the act as an occupational disease, is compensable unless caused by accident. Hernia is not so classed, and yet we know that the vast majority of hernias are produced by the strain of lifting. To adopt the theory presented by the defendants would relieve industry from liability for most of the hernia injuries it causes. This we do not believe to be within the contemplation of the statute, liberally construed. *West v. Fertilizer Co.,* 201 N. C., 556, 160 S. E., 765; *Johnson v. Hosiery Co.,* 199 N. C., 38, 154 S. E., 66; *Stacy Brothers Gas Construction Com-*

pany v. Massey, 92 Ind. App., 348, 175 N. E., 664; *Empire Health & Accident Ins. Co. v. Purcell,* 76 Ind. App., 551, 132 N. E., 664; *Ind. Com. v. Sodec,* 55 Ohio App., 177, 177 S. E., 292, 293. These cases are pertinent with respect to the interpretation we shall put on the covering clause of the act.

The Court certainly does not intend to say that compensation may be awarded for an injury which is not the result of fortuitous circumstances or for an injury which is but the natural and probable result of the employment. We only go so far as to hold that in considering the constituent elements of "accident" it is competent to take into consideration the sudden and unexpected rupture of the parts supporting the viscera, as happened to the plaintiff, under the strain of lifting, as a part of the fortuitous circumstances making up the accident. It was not, as in *Slade v. Hosiery Mills, supra,* and *Neely v. Statesville, supra,* a natural and probable result of the work being done, and the facts of the case justified the finding on the part of the Commission, as affirmed by the court, that plaintiff sustained his injury by accident arising out of and in the course of his employment.

There is sufficient evidence of injury by accident to sustain the award of the Industrial Commission, and the judgment is

Affirmed.

T. E. HOLDING v. B. P. DANIEL.

(Filed 17 April, 1940.)

Appeal and Error § 6b—

A general exception to the judgment does not present for review errors in the trial of the cause, and the Supreme Court, upon such exception, cannot grant a new trial upon appellant's contention that the court, notwithstanding that it did not submit to the jury any issue relating to defendant's counterclaim, rendered judgment in defendant's favor upon his counterclaim.

APPEAL by plaintiff from *Stevens, J.,* at May Term, 1939, of WAKE. No error.

The plaintiff brought this action to recover one Dodge automobile which he alleged was his property and wrongfully detained by the defendant. The defendant denied the ownership of the plaintiff and alleged that his possession of the automobile was lawful by reason of the fact that he had loaned to a partnership, composed of T. E. Holding and H. S. Satterwhite, $300.00, for which Satterwhite, the partner and business manager, had executed and delivered to the defendant a promissory

note, and had executed a chattel mortgage on the Dodge coupe in question, and delivered the automobile into the possession of the defendant, authorizing and instructing him to retain possession thereof, which possession was continued until the time it was seized by the plaintiff in this action under claim and delivery proceedings.

The defendant further set up as a counterclaim the said debt and interest thereon, which he alleged the plaintiff had repeatedly acknowledged and promised to pay.

The plaintiff replied to the answer, denying that there was any partnership between himself and Satterwhite and admitting only that Satterwhite was the business manager, with authority to buy, trade, and sell automobiles, and to pay for automobiles out of proceeds of sale and capital furnished by the plaintiff, and denying that Satterwhite had any other authority, and specifically averring that he had no authority to execute notes or chattel mortgages, or to pledge or mortgage the property of the plaintiff.

The defendant filed an amended answer, in which he admitted that Satterwhite was only the agent and general manager in charge of the automobile business owned and operated by the plaintiff, but reaffirming the statement that as such manager he had borrowed the money, executed the promissory note—evidence of the loan—and executed and delivered a chattel mortgage on the automobile sought to be recovered by the plaintiff; further alleging that the money was, in fact, used in the business of the plaintiff and that plaintiff had ratified the actions of the defendant.

Holding testified that the automobile was his, and that after he had obtained title and possession to it, it was driven out on the road by Mr. Satterwhite and left there, and Mr. Daniel "pulled it in to his house," thus acquiring possession of it. He further testified that Satterwhite was only manager of his business, without authority to sign any notes and papers, and more specifically without any authority to manage any of his property or sign a mortgage therefor.

The evidence tends to show further that Satterwhite had drawn a check for $650.00 to pay the balance due the Sales Company on a car, which check was returned unpaid by the bank; that he secured time from the local bank to get up money to take up the check, which he borrowed from the defendant Daniel and another person, executing to Daniel the chattel mortgage on the car referred to. Later, Satterwhite drove the car out on the road and disappeared.

Satterwhite testified: "It was in December when I wrote this $650.00 check, and the business went on until January 4, 1938, about two weeks later. On January 4, 1938, I left Wake Forest, and went to Richmond. I left on a Dodge coupe, the one which is the subject of this action. I

drove it out in the country about 3½ miles on the highway, and I left the car on the side of the highway going out to Bunn from Wake Forest. I locked it and took the switch key with me; I did not lock the door."

"I got out of the car and walked two or three hundred yards; I didn't know where I had started—I just got out of the car and walked down the road, woods on either side, and I didn't know where I was going nor where I had started, and I didn't have any arrangements for anyone to pick me up, nor any arrangements for anyone to pull the car in."

The witness further stated that he had written to Nash-Steele that he had lost so much money for Mr. Holding that he didn't have the nerve to go to him; that he didn't try to find Mr. Holding to ask him if he might sign the mortgages and notes. He stated, however: "The conditional sales agreements that went through the credit company were signed by Mr. Holding—he signed all of them. They are the same as mortgages. When we went into business he told me to sign all of the titles and said, 'I want to sign the papers going to the credit company.'"

The plaintiff denied that he had ever ratified the transactions had between Satterwhite and Daniel, the defendant, or had ever promised to pay him anything on his claim.

At the close of plaintiff's evidence, and again at the close of all the evidence, the plaintiff moved for judgment of nonsuit as to defendant's cross action, and in each instance the motion was overruled, and plaintiff excepted.

Upon issues submitted to the jury, they found that Satterwhite was authorized to execute and deliver the chattel mortgage upon the car, as contended by the defendant; that the plaintiff was not the owner and entitled to the possession of the car, and that the value of the automobile was $500.00. No issue was tendered or submitted covering defendant's cross action. Judgment followed, reciting the issues and answer, and in the judgment the court undertook to take cognizance of defendant's counterclaim as follows: "NOW, THEREFORE, it is hereupon ORDERED, ADJUDGED AND DECREED that the plaintiff recover nothing in this action, *and that the defendant have and recover on his cross action herein, of the plaintiff and his surety on the claim and delivery of bond herein, the sum of $300.00, with interest thereon at the rate of six per cent per annum from the 23d day of December, 1937, until paid.*"

The judgment further provides that if the $300.00 and interest is not paid in full in "fifteen days from and after the 20th day of May, 1939," the automobile, the subject of the action, shall be sold as provided in the chattel mortgage.

Plaintiff appealed, assigning errors.

John G. Mills, Sr., and Clem B. Holding for plaintiff, appellant.
Jones & Brassfield for defendant, appellee.

PER CURIAM. This case presents many anomalies due to the method of trial. The defendant seems to have gotten his counterclaim allowed without the intervention of a jury. The general objection and exception to the judgment does not put us in a position to render the plaintiff any aid in this respect since, standing alone, it does not justify a review of the trial, and we find no exception in the record pertinent to that phase of the case. We do not regard the exceptions to the evidence nor to the motion of judgment as of nonsuit meritorious.

We find

No error.

N. C. GUTHRIE v. ANTHONY J. GOCKING, TRADING AS A. J. GOCKING COMPANY, AND J. E. THOMPSON.

(Filed 1 May, 1940.)

1. Automobiles § 13—Motorist is not under duty to give warning to drivers of vehicles in his rear that car is approaching from opposite direction.

The duty of a motorist to give warning before materially decreasing his speed or turning to the right or left is for the benefit of drivers of vehicles which might be endangered by such action, and it is not incumbent upon a driver to give warning to the drivers of vehicles in his rear that a car is approaching from the opposite direction and his failure to give such warning cannot be held a proximate cause of a collision between the car in his rear and the car approaching from the opposite direction.

2. Automobiles § 9a—

A motorist has no duty to drive off of the hard surface of the highway onto the shoulder of the road on his right in order to let the driver of a car in his rear see a car approaching on the wrong side of the highway from the opposite direction.

3. Same: Automobiles § 18d—Held: Even conceding defendant was negligent, negligence of driver of third car intervened and was sole proximate cause of accident.

Plaintiff's evidence tended to show that the car owned by one defendant was driven by the other defendant on the highway in front of plaintiff's car, both cars being driven in the same direction, that another car approached from the opposite direction on the wrong side of the highway, that defendant driver materially slackened speed or stopped his car without giving any warning or signal, that the third car "side-swiped" defendant's car and hit plaintiff's car head-on. There was no evidence that defendant driver was operating the car driven by him at excessive speed or in a reckless manner and no evidence that he knew or should have known that the driver of the third car was in a helpless or unconscious

condition. *Held:* Defendant driver's failure to signal that he was going to slacken speed or stop was not the proximate cause of the accident between plaintiff's car and the third automobile, and even conceding that defendant driver should have driven off of the hard surface portion of the highway to his right under the circumstances, the evidence discloses that the gross and palpable negligence of the driver of the third car constituted the efficient proximate cause of plaintiff's injuries and completely exculpates defendants.

CLARKSON, J., dissents.

APPEAL by defendants from *Johnston, J.*, at October Extra Term, 1939, of MECKLENBURG. Reversed.

Civil action to recover damages for personal injuries caused by a collision between the automobile of plaintiff and a third party.

Plaintiff alleges and offered evidence tending to show that the automobile of the defendant Gocking was being operated by the defendant Thompson, going in an easterly direction between Albemarle and Troy; that plaintiff was operating his automobile just behind defendant's automobile and going in the same direction; that an automobile going in the opposite direction cut to its left, side-swiped the Thompson automobile and then ran head-on into plaintiff's automobile; and that as a result thereof the plaintiff suffered serious personal injuries.

There was a verdict and judgment for the plaintiff and defendants appealed.

G. T. Carswell and Joe W. Ervin for plaintiff, appellee.

J. Laurence Jones for defendants, appellants.

BARNHILL, J. This case was here at the Fall Term, 1938, on an appeal by plaintiff from judgment sustaining a demurrer to the complaint. *Guthrie v. Gocking,* 214 N. C., 513, 199 S. E., 707. After final judgment therein the plaintiff instituted this action.

The complaint in this cause contains the affirmative allegation that the appearance of the driver of the west-bound automobile clearly indicated that he was in a helpless condition; that he was leaning over his steering wheel in a slumped-over position; and that his face and his eyes and his entire appearance showed that he was so drunk or doped that he was unconscious, and that although the defendant Thompson saw, or by the exercise of ordinary care should have observed, that such driver was unconscious of the danger, he negligently failed to turn to his extreme right side of the road in ample time to avoid the collision. It likewise contains an allegation that there was 9 feet 4 inches of additional road immediately to Thompson's right which was level and in good condition and onto which he could have driven his automobile.

The plaintiff alleges, in substance, that Thompson was negligent in that (a) he operated his automobile in a reckless and careless manner and at an excessive and dangerous rate of speed; (b) he failed to keep a proper lookout for the safety of the plaintiff; (c) he failed to apply brakes at the proper time or to give the plaintiff any signal, sign or warning; (d) he failed to exercise ordinary care to avoid a collision between his automobile and the oncoming car; (e) he failed to drive his automobile to the extreme right after he observed, or by the exercise of ordinary care should have observed, that the driver of the oncoming car was unconscious of the impending danger; (f) he failed to sound his horn or give any other signal which would have warned the plaintiff that someone was approaching; and (g) he failed to drive his car onto the shoulder of the road so as to afford the plaintiff the opportunity to see the driver of the third automobile and his car.

The record fails to disclose any evidence tending to show that Thompson was operating his automobile in a reckless or careless manner or at an excessive and dangerous rate of speed, or that he failed to keep a proper lookout. Nor is there evidence that the driver of the west-bound car was drunk or helpless or unconscious of impending danger and that Thompson observed, or by the exercise of ordinary care should have observed, such condition. *Taylor v. Rierson,* 210 N. C., 185, 185 S. E., 627, is not in point. On the contrary, there is evidence from the plaintiff that Thompson materially decreased the speed of his automobile and was driving on his right-hand portion of the hard surface of the highway. It further appears that just prior to the time the oncoming car struck Thompson's automobile Thompson cut or "jerked" his automobile to the right.

There is evidence that Thompson did not blow his horn or give any hand signal indicating his intention to stop. A motorist is required, when reasonably necessary, to blow his horn to give warning to travelers ahead, and to those approaching from a side road and to persons in or near the line of travel whose safety may be endangered by the approaching automobile. No duty rests on him to give such signal to warn a car in the rear that there is an automobile approaching going in the opposite direction. Nor does any duty rest on the motorist to drive his automobile on the shoulder of the road so as to enable an automobile to his rear to observe a car approaching from the opposite direction.

Conceding that it was the duty of the defendant to give plaintiff a hand signal of his intention to stop or to materially decrease the speed of his automobile, such signal is to warn the traveler in the rear to enable him to avoid colliding with the car ahead. The plaintiff took note of the fact that the car of the defendant was materially decreasing its speed and there was no collision between his car and the car of the defendant.

The failure to give a hand signal cannot be said to be the proximate cause of the collision between the automobile of the plaintiff and the west-bound car.

At the time of the collision it was raining and the shoulder of the road was wet. Was it the duty of Thompson, as the plaintiff contends, to drive his automobile off the hard surface onto the shoulder in an effort to avoid a collision with the west-bound car? Certainly, under some conditions, it would have been his duty so to do. However, we do not conceive that any reasonable degree of prevision would have caused him to apprehend that his failure to do so would result in injury and damage to the driver of the car to his rear. Omniscience is not required.

But let us assume that it was the duty of Thompson, in the exercise of ordinary care, to drive his automobile completely off of the hard surface onto the wet, slippery shoulder of the road. Even so, it affirmatively appears that the plaintiff suffered his injuries as the proximate result of the gross and palpable negligence of the driver of the west-bound car. His conduct constitutes an efficient, intervening, insulating act of negligence which was the proximate cause of the plaintiff's injuries and completely exculpates the defendants. *Butner v. Spease, ante,* 82, and cases there cited.

We are of the opinion that the record is devoid of any evidence of actionable negligence on the part of the defendants and that the motion for judgment of nonsuit should have been sustained.

Reversed.

CLARKSON, J., dissents.

R. L. VAUGHN v. H. C. BOOKER AND JACK BOOKER.

(Filed 1 May, 1940.)

1. Automobiles § 25—

A father cannot be held liable for the negligent operation of his car by his son under the family purpose doctrine when the accident occurs in a locality in which the son is expressly forbidden to drive, there being no liability on the part of the father merely by reason of the relationship, his liability under the family car doctrine being the liability of a principal.

2. Appeal and Error § 6g—

Appellant may not maintain an exception to the charge on the ground that it contained an expression of opinion by the court in violation of C. S., 564, when the alleged error is in favor of appellant and is therefore harmless as to him.

VAUGHN *v.* BOOKER

APPEAL by plaintiff from *Frizzelle, J.*, at September Term, 1939, of WAKE.

Douglass & Douglass and Thomas W. Ruffin for plaintiff, appellant.
Smith, Leach & Anderson and John E. Lawrence for defendant, appellee.

SCHENCK, J. This is an action to recover damages resulting from personal injuries alleged to have been negligently inflicted in an automobile collision in the city of Raleigh.

Verdict was rendered to the effect that the plaintiff was injured by the negligence of the defendant Jack Booker and damages were assessed. The second issue, "Was the plaintiff injured by the negligence of the defendant H. C. Booker, as alleged in the complaint," was answered in the negative. From judgment that the plaintiff recover the amount assessed of the defendant Jack Booker, and recover nothing of the defendant H. C. Booker, the plaintiff appealed, assigning errors.

In this action as it relates to the defendant H. C. Booker the plaintiff sought to invoke the family purpose car doctrine, and the assignments of error chiefly relied upon are to the charge relative to a single question presented in the application of this doctrine, namely, may the owner of an automobile, maintained and used as a family car and driven by his minor children who lived with him, for their convenience and pleasure, limit the use of such car to given localities, or prohibit its use in a certain locality, and thereby defeat liability for injuries negligently inflicted by his minor son while driving the automobile in the prohibited locality?

The family purpose car doctrine is clearly stated by *Hoke, J.*, in *Robertson v. Aldridge,* 185 N. C., 292, in these words: "True, it is the recognized principle that a parent is not ordinarily responsible for the torts of a minor child, solely by reason of the relationship, and that generally liability will only be imputed on some principle of agency or employment. *Brittingham v. Stadiem,* 151 N. C., 299. Accordingly, it has been directly held with us in case of injury caused by negligent use of automobiles that no recovery can be sustained when it is made to appear that the machine was being operated by the minor at the time for his own convenience or pleasure, contrary to the parent's orders or without authority from the parent, either express or implied, *Linville v. Nissen,* 162 N. C., 96; *Bilyeu v. Beck,* 178 N. C., 481. But it is also held in our opinions by the great weight of authority that where a parent owns a car for the convenience and pleasure of the family, a minor child who is a member of the family, though using the car at the time for his own purposes with the parent's consent and approval, will be regarded as

representing the parent in such use, and the question of liability for negligent injury may be considered and determined in that aspect. *Clark v. Sweaney,* 176 N. C., 529; *S. c.,* 175 N. C., 280; *Griffin v. Russell,* 144 Ga., 275; *Hutchins v. Haffner,* 63 Col., 365; *Stowe v. Morris,* 147 Ky., 386; *McNeal v. McKain,* 33 Okla., 449; *Birch v. Abercrombie,* 74 Washington, 486."

In the case at bar the defendant H. C. Booker admitted that he was the owner of the automobile and that it was used and driven by the members of his family, including his son Jack, with his consent for their convenience and pleasure, but testified that while at the time of the collision under consideration his son had his permission and consent to drive the automobile, he was expressly forbidden by him to drive it in the city of Raleigh. This testimony was corroborated by other evidence.

The court charged the jury: "I charge you further, if you are satisfied upon the evidence that Jack Booker took that car from his father under an express and specific instruction that he could not drive it to Raleigh and thereafter he did drive it to Raleigh in violation of that instruction then he could not have been operating within the family purpose doctrine and it would be your duty to answer the (second) issue 'No.'" This instruction together with other instructions of similar import are made the bases of exceptive assignments of error.

It will be noted that the very genesis of the family purpose car doctrine is agency, and that the question here presented is governed by the rules of principal and agent and of master and servant.

It was held by this Court in *Linville v. Nissen,* 162 N. C., 96, that a parent is not liable for torts of his minor son done without his knowledge and consent; and where under such circumstances the son has taken an automobile owned by his father, and by his negligent or reckless driving has caused damages, the father is not responsible therefor by reason of the relationship; and to make him so it must appear that the son was in some way acting in a representative capacity, such as would make the master responsible for the servant's tort.

It would seem to logically follow that if the lack of consent of the father to the son to operate the car at all would defeat liability of the father for the torts of the son in driving the car anywhere, that the lack of such consent, or the prohibition, to drive the car in a certain locality would defeat liability for torts committed in the prohibited locality. In *Watts v. Lefler,* 190 N. C., 722, *Clarkson, J.,* says: "The father—the owner of the automobile and the head of the family—has the authority to say by whom, when and *where* his automobile shall be driven, or he can forbid the use altogether."

We have held that where there is a substantial deviation by the driver from the purpose for which authority to operate an automobile is given,

the liability of the owner of the automobile for the torts of the driver committed during such deviation is defeated. In speaking to this principle as it applies to the relationship of master and servant, which is but a species of agency, *Winborne, J.*, in *Parrott v. Kantor,* 216 N. C., 584, says: "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 & Practice, section 3029. . . . The trend of judicial decision, 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."

We conclude, therefore, that H. C. Booker, as owner of the car and principal, had the legal right to prohibit his son Jack, as driver and agent, to operate his car in the city of Raleigh, and that the driving of his car in a locality so prohibited would be a deviation from the authority conferred and beyond the scope of his agency; and that torts committed by the driver while operating the car in a locality in disobedience of instructions from the owner would not be imputed to the owner. Concluding as we do, it follows that the assignments of error relating to this phase of the case cannot be sustained.

The other exceptive assignment of error assails the statement of his Honor in his charge that the defendant "frankly stated on the witness chair that he was the owner of the car being operated that evening by Jack Booker and that it was a family purpose car, etc.," as being an expression of opinion by the court in violation of C. S., 564. However this may be, the facts referred to were alleged and sought to be proven by the plaintiff, and if the statute was violated the error was in favor of the appellant, and therefore harmless. The assignment cannot be sustained.

On the record we can find

No error.

STATE v. J. D. REDMAN.

(Filed 1 May, 1940.)

1. Homicide § 16—Testimony by defendant that he shot deceased does not constitute admission that he inflicted fatal injury.

Where defendant enters a plea of not guilty and does not withdraw or modify this plea or make formal plea of self-defense, defendant's testimony that he shot deceased and testimony by the State that he had made similar statements prior to the trial, do not amount to an admission that he killed deceased, since it does not necessarily follow from the admission that he inflicted a fatal wound, and the burden remains upon the State throughout the trial to prove that the wound inflicted by defendant was fatal.

2. Homicide § 27b: Criminal Law §§ 53g, 81c—Failure to bring misstatement of admissions to court's attention does not waive exception when error affects burden of proof.

Defendant testified that he shot deceased, and the State introduced testimony of statements to like effect made by him prior to the trial, but it nowhere appeared that defendant admitted that the wound inflicted was fatal. The trial court instructed the jury that defendant admitted that he killed deceased with a deadly weapon, which admission, nothing else appearing, would make defendant guilty of murder in the second degree. The court nowhere charged that the burden was upon the State to prove that deceased came to his death as the proximate result of the pistol shot wound inflicted by defendant. *Held:* The failure of the defendant to call to the court's attention in apt time the error in the statement of defendant's admissions does not constitute a waiver of defendant's objection thereto, since under the facts of this case the court's misconception of defendant's testimony resulted in the failure of the court to properly charge the jury in respect to the burden of proof.

3. Criminal Law § 77d—

The statement of the court in regard to the argument of counsel and the admissions made by them therein is conclusive, since it is for the court to say what occurred during the trial.

4. Criminal Law § 34e—

An admission of counsel during the argument when the defendant has no opportunity to protest or deny the admission is not binding upon defendant.

CLARKSON, J., dissents.

APPEAL by defendant from *Phillips, J.*, at January Term, 1940, of CABARRUS. New trial.

Criminal prosecution tried on a bill of indictment which charged the defendant with the murder of one Carl Smith.

There is evidence tending to show that the deceased went to the place of business of the defendant about 1 a.m. on 4 October, 1939, after the

defendant had closed his filling station and while he was working on his books. The defendant admitted the deceased, who asked the defendant to call a taxi. Some difficulty arose during which each assaulted the other. They apparently became reconciled and they started out of the building. While the defendant was locking the door to his building he was struck by the deceased and during the resulting scuffle defendant shot the deceased. The defendant testified that, at the time he shot, the deceased had him on the ground and was choking him. There was likewise evidence tending to show that the deceased was shot in the abdomen and that he died two days later as a result thereof.

The solicitor elected to waive the first degree murder charge and place the defendant on trial for murder in the second degree. The jury returned a verdict of guilty of murder in the second degree. From judgment pronounced thereon defendant appealed.

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

Hayden Clement and L. T. Hartsell for defendant, appellant.

BARNHILL, J. The court in its charge to the jury made the following statement:

"Now the defendant in this case, Gentlemen of the Jury, admits the killing with a deadly weapon and attempts to justify the killing by his plea of self-defense and evidence which he insists and contends should satisfy you that he killed the deceased, not with malice and not unlawfully, but killed the deceased in the proper self-defense of his life and person; therefore, the Court will give you certain rules of law applicable to the plea of self-defense as entered in this case by the defendant."

And again later in the charge the court stated:

"Now, Gentlemen of the Jury, the defendant in this case while upon the stand testified in his own behalf, and his counsel have argued to you and admitted in their arguments to you, that the defendant killed the deceased with a deadly weapon to wit: a pistol, nothing else appearing that would make the defendant guilty of murder in the second degree."

These excerpts from the charge are made the subject of exceptive assignments of error.

The defendant entered a plea of not guilty and it does not appear from the record that this plea was thereafter withdrawn or modified by the defendant or his counsel. There was no formal plea of self-defense but the defendant did offer evidence for the purpose of showing that he did not shoot the deceased with malice and that he shot under circumstances which made his act excusable and not unlawful.

The defendant, while a witness in his own behalf, testified that he shot the deceased. The State likewise offered the evidence of two police officers who testified that the defendant made similar statements to them. However, we have searched the record in vain for any statement by the defendant while on or off the witness stand which would constitute an admission that he killed the deceased. *Non constat* it is admitted that the defendant shot the deceased, it does not follow of necessity that he inflicted a fatal wound. The burden of so showing rested upon and remained with the State throughout the trial.

We may concede that when the court below stated to the jury as a fact that the defendant had admitted that he killed the deceased and that his counsel in their argument to the jury had likewise admitted the killing, it was the duty of the defendant to call the court's attention to the erroneous statements and that the defendant's failure so to do, ordinarily, would constitute a waiver of the specific exceptions relied upon. *Royal v. Dodd,* 177 N. C., 206, 98 S. E., 599; *S. v. Lance,* 149 N. C., 551; *S. v. Davis,* 134 N. C., 633; *S. v. Tyson,* 133 N. C., 692; *S. v. Brown,* 100 N. C., 519.

Here it is apparent that the statement of the court as to the admission made by the defendant is based upon a misconstruction of his testimony to which the court referred in connection therewith. The error is harmful, therefore, for the reason that the court, acting under the misapprehension that the killing was admitted, failed to instruct the jury properly in respect to the burden of proof. The whole burden of the issues submitted to the jury was placed upon the defendant. At no time was the jury instructed that the State was required to show that the deceased came to his death as a proximate result of the pistol shot wound inflicted by the defendant. The existence of this fact was assumed. See *S. v. Maxwell,* 215 N. C., 32, 1 S. E. (2d), 125. Likewise, while there is sufficient evidence in the record to sustain a finding by the jury that the defendant killed the deceased with a deadly weapon, the jury has not been permitted to weigh and consider this evidence under instructions that the burden of so showing rested upon the State.

As the court stated to the jury that counsel for the defendant had argued that the defendant killed the deceased with a deadly weapon and there was no correction thereof at the time, we may assume that this argument was made. It is for the judge to say what occurred during the trial. *S. v. Lance, supra.* Even so, such admission made by counsel during the argument when the defendant had no opportunity to protest or deny the admission is not sufficient to justify the court in assuming that an unlawful killing with a deadly weapon is admitted by the defendant. Speaking to the subject in *Hicks v. Mfg. Co.,* 138 N. C., 319, *Hoke, J.,* says: "Admissions of fact by an attorney only bind a client

when they are distinct and formal and made for the express purpose of dispensing with proof of a fact on the trial."

For the failure of the court to properly instruct the jury on the burden of proof and its failure to require the jury to find beyond a reasonable doubt, upon the evidence offered, that the defendant killed the deceased with a deadly weapon, before casting any burden upon the defendant to go forward with proof tending to mitigate the killing or to excuse it altogether, there must be a

New trial.

CLARKSON, J., dissents.

TRAVIS T. BROWN v. ORVILLE Y. KIRKPATRICK AND LEONORA H. KIRKPATRICK.

(Filed 1 May, 1940.)

Mortgages § 36—

The provisions of ch. 36, Public Laws of 1933, are not available as a defense to an action on a purchase money note secured by a second mortgage when the land has been sold under the first mortgage for a sum sufficient to pay only the notes secured by the first mortgage.

APPEAL by defendants from *Johnston, Special Judge,* at October Term, 1939, of MECKLENBURG. Affirmed.

From judgment for plaintiff on agreed statement of facts, defendants appealed.

Stewart & Moore for plaintiff, appellee.

W. F. Wimberly and Cherry & Hollowell for defendants, appellants.

DEVIN, J. The question here presented is whether the statute prohibiting deficiency judgments (ch. 36, Public Laws 1933) has the effect of preventing judgment on a note secured by a second mortgage or deed of trust after foreclosure sale of the land under the first deed of trust, for an amount sufficient only to satisfy the first lien.

The case comes to us upon agreed statement of facts, the material portions of which may be stated as follows: Travis T. Brown, the plaintiff, the original owner of a lot in Charlotte, North Carolina, executed deed of trust thereon to secure money borrowed from the American

Trust Company in the sum of $6,500. Thereafter in 1936, plaintiff conveyed the lot to the defendants Kirkpatrick who took subject to this deed of trust, and in addition, at the same time, executed deed of trust to plaintiff Brown for the balance of the purchase price in the sum of $1,579.75. In 1937, defendants Kirkpatrick borrowed $7,800 from the Pilot Life Insurance Company and executed deed of trust on the lot to secure same. The money borrowed from the Life Insurance Company was used to pay off and cancel the American Trust Company's deed of trust, and to pay $1,200 credit on the Brown deed of trust, leaving a balance due Brown of $379.75. The Brown deed of trust was thereupon also canceled, making the Insurance Company's deed of trust a first lien on the property. As evidence of the balance of $379.75 the defendants executed a note therefor to Brown and at same time executed a second deed of trust on the lot to secure the same. This note was marked "balance purchase money." Thereafter defendants Kirkpatrick conveyed the lot to C. A. Dixon, Jr., who assumed payment of both the outstanding deeds of trust. Upon default on the part of C. A. Dixon, Jr., the Insurance Company's deed of trust was foreclosed in January, 1939, and the property sold for only enough to satisfy that deed of trust, leaving nothing for plaintiff Brown on his second deed of trust. Plaintiff Brown then instituted action on his note for $379.75. The defendants, admitting the execution of the note for the consideration named, pleaded the provisions of the statute and denied plaintiff's right to judgment on the note.

The note sued on having been executed by the defendants for a valuable consideration, admittedly they have no defense thereto unless judgment is prohibited by the statute cited. This statute, enacted in 1933, provides that "in all sales of real property by mortgagees or trustees under power of sale contained in any mortgage or deed of trust hereafter executed . . . the mortgagee, trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust or obligation secured by the same."

It is apparent that this statute does not by its terms prohibit the holder of a note, though secured by a second deed of trust, from obtaining judgment on the note when the property has been sold under another deed of trust having priority of lien. The statute applies only to the holders of notes "secured by such deed of trust," that is the deed of trust under which the security was foreclosed and the land sold. It refers to the "obligation secured by the same." The holder of the note secured by the first deed of trust upon foreclosure, presumably, will receive satisfaction of his note from the sale, or he can protect himself by purchase of

the land. But the holder of the note secured by the second deed of trust, who receives nothing, or an insufficient amount, from the sale, finds himself without security. In this situation the Court will not extend by judicial interpretation the provisions of the statute, and deny him the right to judgment for a valid debt. This view finds support in the decisions in other jurisdictions where similar statutes have been considered. *Alabama Mortgage & Securities Co. v. Chinery,* 237 Ala., 198, 186 Sou., 136; *Skeffington v. Rowland,* 52 Ga. App., 619, 184 S. E., 330; *Page v. Ford,* 65 Ore., 450; *Ladd & Tilton Bank v. Mitchell,* 93 Ore., 668, 184 Pac., 282, 6 A. L. R., 1420.

The judgment of the court below that under the facts agreed the plaintiff is entitled to judgment on his note is

Affirmed.

W. R. OATES v. ALGODON MANUFACTURING COMPANY ET AL.

(Filed 1 May, 1940.)

Nuisances § 5—Charge held for error in stating rule for permanent damage in action in which permanent damage was not recoverable.

In this action for damages resulting from the pollution of a stream running through plaintiff's land, the court held that plaintiff was not entitled to permanent damage, but instructed the jury that the measure of damage was the difference in the value of plaintiff's land immediately before and after the pollution of the stream plus resulting inconvenience and annoyance suffered by plaintiff from the date of the pollution of the stream to the date of trial. *Held:* Defendant appellant is entitled to a new trial for the inadvertent error of the court in including in the charge on the issue of damages the rule for the admeasurement of permanent damage.

APPEAL by defendant Algodon Manufacturing Company from *Phillips, J.,* at December Term, 1939, of GASTON.

Civil action to abate nuisance and for damages, originally instituted against the Algodon Manufacturing Company, a private textile manufacturing company, with the town of Bessemer City later being made party defendant.

The gravamen of the complaint is, that the defendants have wrongfully polluted the stream which flows through plaintiff's farm, thereby causing him great damage and injury.

The jury answered the issues in favor of the plaintiff, awarding damages against the Algodon Manufacturing Company, but none against

the town of Bessemer City. From judgment thereon, the Algodon Manufacturing Company appeals, assigning errors.

Cherry & Hollowell for plaintiff, appellee.

Emery B. Denny, George B. Mason, and Ernest R. Warren for defendant Manufacturing Company, appellant.

Henry L. Kiser and A. C. Jones for defendant, Bessemer City.

STACY, C. J. The court instructed the jury that the plaintiff was not entitled to recover permanent damages against the Algodon Manufacturing Company, but only such damages as had accrued from the beginning of the pollution of the stream up to the time of trial, *Webb v. Chemical Co.*, 170 N. C., 662, 87 S. E., 633, "and that damage would be the difference that you find between the value of his land immediately prior to the pollution of the stream, if you find it was polluted, and the reasonable market value of his land immediately after it was polluted and in addition thereto, any inconvenience and annoyance by way of odors suffered by him to his land, any damages by virtue of not being able to use the stream for the watering of his stock and any other usual use the stream could be put to during those dates." Exception.

The trial court inadvertently fell into error in stating that the measure of damages would be the difference between the reasonable market value of the land immediately before and after the injury. "In cases of this kind, when the damage is due to a cause that may be removed, or a nuisance that may be abated, the measure of damage is not the difference in the market value of the land before and after the injury, but is estimated by comparing its productiveness before and after the flooding. *Spilman v. Navigation Co.*, 74 N. C., 675; 16 A. & E., 984." *Adams v. R. R.*, 110 N. C., 325, 14 S. E., 857; *Jones v. Kramer*, 133 N. C., 446, 45 S. E., 827; *Garrett v. Comrs.*, 74 N. C., 388.

For the error, as indicated, the appellant is entitled to a new trial. It is so ordered.

New trial.

PURE OIL COMPANY OF THE CAROLINAS, INCORPORATED, v. DEWEY BASS AND HIS WIFE, LULA BASS.

(Filed 1 May, 1940.)

Landlord and Tenant § 26—Complaint in action to recover proportionate rents prepaid upon destruction of premises by fire held good as against demurrer.

The complaint alleged that plaintiff leased premises for use as a filling station for a term of ten years, at an agreed monthly rental, the period of the lease to start when plaintiff approved the station to be erected by

defendant lessors, that thereafter, by agreement, plaintiff paid defendants a lump sum in full satisfaction of rents for the unexpired portion of the term, and that subsequent to such payment the station was destroyed by fire and that defendant lessors refused to replace same as they were obligated to do under the terms of the lease and that plaintiff thereupon surrendered possession in accordance with the provisions of the lease, and demanded the return of the proportionate part of the rent for the unexpired term, which demand defendants refused. *Held:* The complaint sets up a modification of the lease, without showing whether such modification was written or verbal, and the complaint is good as against demurrer, the facts appearing being insufficient for the court to determine, as a matter of law, that plaintiff is not entitled to recover.

APPEAL by defendants from *Johnston, Special Judge,* at October Special Term, 1939, of MECKLENBURG. Affirmed.

The plaintiff, a corporation organized under the laws of North Carolina engaged in the business of selling oil and gasoline, complained that some time in June, 1935, they leased of the defendants certain premises in Alamance County to be used as a filling station for a term of ten years, upon a monthly rental of $35.00 for each month of the first five years, and $40.00 for each month of the second five years.

It was further provided in the lease that the lessors would erect a gasoline service station on the premises according to plans of the lessee, and that the ten-year term should begin when the lessee approved of the station so completed. The station was completed as required on 14 September, 1935, and the ten-year period began on said date and plaintiff began paying the monthly rent from that time.

In August, 1937, in order to advance the payment of all the rentals due for the ten-year period and pay the same in one lump sum instead of by installment, an agreement was reached between the parties and a supplemental rent agreement was entered into whereby the lessee paid to the defendants, as lessors, the sum of $2,250.00, in full satisfaction of all monthly installments of rent during the unexpired portion of the ten-year lease contract. This payment was made as of 1 August, 1937, and the residue of said unexpired term amounted to eight years, one month and fourteen days.

The plaintiff, as lessee, occupied the premises as a service station until 11 November, 1938, when the service station building erected under the contract was completely destroyed by fire and the premises rendered unfit for occupancy as a gasoline service station.

It was provided in the rental lease contract, dated 29 June, 1935: "It is mutually agreed between the parties: that in the event the premises herein described and leased shall be rendered unfit for occupancy by fire or storm or any other cause, the rental named in this lease to be paid shall cease until such time as the property is again put into satis-

factory condition for occupancy, which shall be done at the expense of lessor, and which said lessor agrees to do forthwith, after said premises have been rendered unfit for use or occupancy, as aforesaid. If, for any reason, the said premises are not fully and completely restored, and again ready for occupancy within ninety (90) days, lessee may, at its option, cancel this agreement and everything herein contained."

The plaintiff complains that more than ninety days have elapsed since the building was destroyed by fire and the defendants, although demand has been made upon them, have failed and neglected to reconstruct the building and refuse to do so, and, further, that the plaintiff has surrendered possession under the terms of the lease.

Plaintiff further alleges that it has demanded the return to it of the portion of monthly rents advanced which will be applicable to the unexpired portion of the lease contract remaining after 11 November, 1938, the date of the destruction of said premises by fire, and that the defendants have refused to return the same.

Plaintiff claims that by reason of the facts so alleged the defendants are indebted to it in the sum of $1,896.18, judgment for which, with interest and costs, it demands.

The defendants filed a demurrer to the complaint for the reason that it does not state sufficient facts to constitute a cause of action.

The demurrer was overruled and defendants appealed, assigning errors.

W. F. Wimberly and Cherry & Hollowell for plaintiff, appellee.
Thomas C. Carter for defendants, appellants.

SEAWELL, J. Without attempting to outline the future course of this action, we may say that the complaint sets up a modification of the original contract, whether oral or written does not appear, and the court is not now in possession of sufficient information to enable it to say with certainty, as a matter of law, that the plaintiff may not prevail in its action. *Blackmore v. Winders,* 144 N. C., 212, 216, 56 S. E., 874.

Whatever considerations led the defendants to demur at the present juncture may recur in the orderly development of the case under conditions which will enable the lower court, as well as this Court, to pass upon the matter with more precise information.

The judgment is

Affirmed.

W. J. PETTY v. J. T. LEMONS ET AL.

(Filed 1 May, 1940.)

1. Insurance § 48—Complaint held to allege indemnity contract under which no liability attaches to insurer prior to final judgment against insured.

In this action to recover for personal injuries alleged to have resulted from the negligent operation of a taxicab, the complaint alleged that defendant insurer had executed a public liability insurance policy covering the cab in question pursuant to the requirements of a municipal ordinance. The insurance policy was not made a part of the complaint but the city ordinance, which was made a part thereof, provides that the insurance or surety bond required in such instances should be conditioned for the payment of any final judgment rendered on account of property damage or personal injury caused by a taxicab. *Held:* Neither plaintiff's characterization of the bond as a "public liability bond" nor the contention that the statute authorizing the adoption of the ordinance required liability insurance, chapter 279, Public Laws of 1935, can prevail over the allegations that the bonds was executed under the provision of the ordinance which requires only an indemnity bond, and the facts alleged are insufficient to show liability on the part of the insurer prior to final judgment against insured, and defendant insurer's demurrer should have been sustained.

2. Appeal and Error § 22: Contracts § 21—

Where the contract sued on is not made a part of the complaint, the sufficiency of the complaint as against demurrer will be determined in accordance with the nature of the contract as disclosed by the facts alleged, and not by plaintiff's characterization of the contract, and plaintiff may not recover on a theory of liability not supported by the facts alleged.

3. Pleadings § 3a—

Plaintiff may not seek to recover on a theory of liability not supported by allegations of the complaint.

APPEAL by defendants from *Johnston, Special Judge,* at Special January Term, 1940, of MECKLENBURG.

Civil action to recover damages for personal injuries.

Plaintiff alleges that on 26 August, 1939, he was injured on West Trade Street in the city of Charlotte by the negligent operation of a taxicab, driven at the time by J. T. Lemons, as agent and employee of the defendant, George T. Bradley, trading as the White Star Taxicab Company. He further alleges that pursuant to an ordinance of the city of Charlotte requiring all taxicabs "to carry liability insurance" the operator obtained a policy of insurance from the Casualty Reciprocal Exchange of Kansas City, Missouri, through Bruce Dodson, its attorney

in fact, which policy is on file with the proper city authorities, etc., and covers the taxicab in which the plaintiff was injured. (The policy is not made a part of the complaint.)

The city ordinance is made a part of the complaint and provides: "Said insurance or surety bond (shall be) conditioned for the payment of any final judgment rendered on account of property damage or personal injury as aforesaid caused by any such vehicle or taxicab."

The Casualty Reciprocal Exchange and Bruce Dodson, attorney in fact, interposed demurrers on the ground (1) that the complaint does not state facts sufficient to constitute a cause of action against them, and (2) that, if a cause of action be stated, there is a misjoinder of parties and causes. The other defendants moved to strike from the complaint all references to casualty insurance.

The demurrers were overruled and the motions to strike denied. From these rulings, the defendants appeal, assigning errors.

O. M. Litaker and John A. McRae for plaintiff, appellee.
Guthrie, Pierce & Blakeney for defendants, appellants.

STACY, C. J. The merits of the case are not before us. It is alleged that the defendant Exchange, through its attorney in fact, executed a public liability bond pursuant to the terms of an ordinance which apparently requires only an indemnity bond. Annotation 96 A. L. R., 356. The bond itself is not a part of the complaint. We are unable to determine its character without seeing it. *Sossamon v. Cemetery, Inc.*, 212 N. C., 535, 193 S. E., 720.

Realizing that the characterization of the bond is only a conclusion of the pleader and that the rights of the parties ought not to be prejudiced by an adjudication upon merely interpretative allegations, the defendants have sought, by motion, to have certain portions of the bond made a part of the record on appeal. The plaintiff suggests that other portions of the bond are more favorable to his interpretation. The bond in its entirety is not here. *R. R. v. Robeson*, 27 N. C., 391.

The contention that the statute authorizing the adoption of the ordinance, ch. 279, Public Laws 1935, requires the bond "to be conditioned on such operator responding in damages for any liability incurred on account of any injury to persons or damage to property resulting from the operation of any such . . . taxicab or other motor vehicle," is met by the allegations of the complaint which make out a case of indemnity. It is essential that the allegations of the complaint conform to the theory upon which the plaintiff seeks to recover. *Horney v. Mills*, 189 N. C., 724, 128 S. E., 324.

In this state of the record, we are constrained to reverse the rulings on the demurrers, for insufficiency of the facts presently alleged to constitute a cause of action against the demurring defendants, *Clark v. Bonsal,* 157 N. C., 270, 72 S. E., 954, with the observation that plaintiff may apply to the court below, under C. S., 515, for leave to amend his complaint, if so advised. This might have been done in the first instance under 3 C. S., 513. *Ballinger v. Thomas,* 195 N. C., 517, 142 S. E., 761.

Reversed.

JENNIE MOSELEY MURRAY v. F. M. PLYLER ET AL.

(Filed 1 May, 1940.)

Insurance § 48—Complaint held to allege indemnity contract under which no liability attaches to insurer prior to final judgment against insured.

Where the complaint alleges that defendant insured's taxicab was covered by a policy obligating defendant insurer to pay any final judgment recovered against insured on account of injuries resulting from the operation of the cab, the facts alleged disclose that the insurance contract is an indemnity bond, notwithstanding plaintiff's characterization of the policy as a "liability contract," and no liability thereunder is imposed upon insurer prior to final judgment against insured, and defendant insurer's demurrer should have been sustained in plaintiff's action to establish liability for personal injuries sustained as the result of the alleged negligent operation of the cab.

APPEAL by defendants from *Johnston, Special Judge,* at Special Term, 8 January, 1940, of MECKLENBURG.

Civil action to recover damages for personal injuries.

Plaintiff alleges that on 12 August, 1939, while crossing West Trade Street in the city of Charlotte, she was injured by the negligent operation of a taxicab, driven at the time by F. M. Plyler as agent and employee of W. S. Croft, trading as White Hood Cab Company. She further alleges that pursuant to an ordinance of the city of Charlotte, the operator procured from the Pennsylvania Casualty Company "a policy of liability insurance" and duly deposited the same with the city clerk, "which said policy obligated the defendant, Pennsylvania Casualty Company, to pay any final judgment recovered against the defendant, W. S. Croft, . . . on account of injuries . . . resulting from the operation of the taxicab," etc.

The policy is not made a part of the complaint, while the city ordinance is.

The Pennsylvania Casualty Company interposed a demurrer on the ground (1) that the complaint does not state facts sufficient to constitute a cause of action against it, and (2) that, if a cause of action be stated, there is a misjoinder of parties and causes. The other defendants moved to strike from the complaint all references to casualty insurance. The demurrer was overruled and the motions to strike denied. From these rulings the defendant appeals, assigning errors.

McDougle & Ervin for plaintiff, appellee.
Gover & Covington and Hugh L. Lobdell for defendants, appellants.

STACY, C. J. As no final judgment has been recovered against the operator of the taxicab which injured the plaintiff, the obligation of the Pennsylvania Casualty Company "to pay any final judgment recovered against the defendant, W. S. Croft," etc., as alleged in the complaint, has not yet arisen. Hence, the ruling on the demurrer will be reversed on authority of *Petty v. Lemons, ante,* 492, with observation similar to the one there made that the plaintiff may apply to the court below under C. S., 515, for leave to amend her complaint, if so advised.

Reversed.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA v. CHARLES G. POWELL, CHAIRMAN; MRS. J. B. SPILMAN AND FORREST SHUFORD, MEMBERS; AND E. W. PRICE, DIRECTOR OF THE NORTH CAROLINA UNEMPLOYMENT COMPENSATION COMMISSION AND THE UNEMPLOYMENT COMPENSATION COMMISSION OF NORTH CAROLINA.

(Filed 1 May, 1940.)

1. State § 2a—

Where the purpose of an action is to control officers of a State agency in the performance of their official duties, the action is against the State, and the fact that the individual officers are joined does not affect this result.

2. State § 1: Master and Servant § 56—Unemployment Compensation Commission is a State agency.

The act creating the Unemployment Compensation Commission declares the legislative purpose to prevent the spread of unemployment and to lighten its burdens in the interest of the public welfare, provides for the collection of compulsory contributions from employers within the purview of the act, for the distribution of funds thus collected by State warrant, that the members of the Commission be appointed by and accountable to the Governor, that the Commission fully account to the State in the per-

formance of its duties, and that the act should create no vested private right but should be subject to amendment or repeal by the Legislature, and therefore the Commission is an agency created by statute for a public purpose and is an agency of the State.

3. Taxation § 13: Master and Servant § 59—

Contributions imposed on employers within the purview of the Unemployment Compensation Act are compulsory and therefore constitute a tax, and they are not rendered any less a tax by reason of the provision that they should be segregated in a special fund for distribution in furtherance of the purpose of the act.

4. State § 2a—

An action cannot be maintained against the State or an agency of the State unless it consents to be sued, and ordinarily express consent is prerequisite.

5. Declaratory Judgment Act § 1—

The purpose of the Declaratory Judgment Act is to provide a speedy remedy for the determination of questions of law, and although questions of fact necessary to the adjudication of the legal questions involved may be determined, the remedy is not available to present for determination issues of fact alone. Chapter 102, Public Laws of 1931.

6. Same: Master and Servant § 59—

An action to determine whether salaries paid certain employees should be included in computing the contributions to be paid by an employer under the Unemployment Compensation Act involves solely an issue of fact and does not involve any right, status or legal relation, and the employer may not maintain proceedings under the Declaratory Judgment Act to determine the question.

7. State § 2a: Master and Servant § 59—

An action against the Unemployment Compensation Commission seeking judgment that salaries paid to certain of plaintiff's employees should not be included in computing the amount of the contributions plaintiff should pay under the Unemployment Compensation Act is an action against a State agency and directly affects the State, since the amount of tax it is entitled to collect is involved, and the action is properly dismissed upon demurrer, since there is no statutory provision authorizing such action.

8. Master and Servant § 59: Taxation § 38b—Injunctive relief will not lie directly or indirectly to restrain collection of unemployment compensation tax.

A judgment that salaries paid to certain of plaintiff's employees should not be included in computing the amount of the contributions plaintiff should pay under the Unemployment Compensation Act would in effect enjoin the Commission from seeking further to collect the amount of contributions which it contends are justly due, and it being expressly provided in the act that injunction should not lie to restrain the collection of any tax or contribution levied under the act, sec. 10, ch. 27, Public Laws of 1939, the court is without jurisdiction of an action seeking such relief, since it may not do indirectly what it is prohibited from doing directly.

9. Taxation § 38b—

The statutory remedies and procedure provided a taxpayer before a State board must first be exhausted by him in the time and manner provided before resort to the courts, and where adequate remedies for judicial review are provided they are exclusive.

10. Same: Master and Servant § 59—Unemployment Compensation Act provides adequate remedies for determination of liability for contributions, and such remedies are exclusive.

The Unemployment Compensation Act provides for the determination of liability of an employer for contributions, in whole or in part, by hearing before the Commission, with right of appeal, for suit to recover compensation taxes paid under protest, and for the assertion of any valid defense by the employer in any civil action instituted by the Commission to collect delinquent contributions, and the remedies thus provided are adequate and preclude an employer from maintaining suit in the Superior Court seeking judgment that salaries paid certain of its employees should not be included in computing the amount of contributions it should pay.

APPEAL by plaintiff from *Williams, J.*, at February Term, 1940, of WAKE. Affirmed.

This is a proceeding under the North Carolina Declaratory Judgment Act, ch. 102, Public Laws 1931.

Plaintiff, admitting that it is an employer within the meaning of the North Carolina Unemployment Compensation Law, ch. 1, Public Laws, Extra Session 1936, alleges that there is a *bona fide* controversy between plaintiff and defendants as to its liability for contributions or taxes based upon sums paid to certain of its special agents which it contends are independent contractors. Plaintiff contends that the contracts with such special agents constitutes such special agents independent contractors, and it alleges in support thereof various facts in respect to the absence of control and the right of direction and the like.

The defendants answered and admitted that it claimed contributions based in part upon remuneration paid such special agents and other groups of agents employed by plaintiff. It further admitted the plaintiff is now paying contributions to the defendants upon the basis of remuneration paid to its managers, clerical assistants, and certain other employees. They further allege that on 19 May, 1938, the defendant Commission, at the request of the plaintiff, held and conducted a hearing for the purpose of determining whether the services performed by plaintiff's soliciting agents and special agents should be deemed to be employment subject to and covered by the Unemployment Compensation Law; that a hearing at which the plaintiff was represented by counsel was duly held; and that after the introduction of evidence and argument of counsel the Commission rendered an opinion that the services performed by such agents should be deemed to be employment.

When the cause came on to be heard in the court below, after the reading of the pleadings, the defendants demurred *ore tenus* to the complaint upon the grounds "that this proceeding is a proceeding against the State, and the court does not have jurisdiction to determine or hear this action or does not have jurisdiction of the parties or subject matter and, second, that the State has consented and provided a method by which the matters alleged may be adjudicated and has provided special statutory remedies.

First, under section 11-M of the Unemployment Compensation Law, found on page 29, whereby the Unemployment Compensation Commission may hear and determine the matters, status and all questions concerning said agents, and,

"Second, that another statutory remedy has been provided by the Legislature, the same being section 14-E of the Unemployment Compensation Law, providing, in substance, that petitioners in this cause have a right to pay the taxes claimed under protest and institute a regular action in the Superior Court to recover same from the Commission."

The court below, being of the opinion that the proceeding is in fact an action against an agency of the State and that the State has never consented to this form of proceeding against it and being further of the opinion that the Unemployment Compensation Law provides the plaintiff with adequate statutory remedies which are exclusive, sustained the demurrer and entered judgment dismissing the action. The plaintiff excepted and appealed.

Smith, Leach & Anderson for plaintiff, appellant.

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

BARNHILL, J. This appeal presents for determination the one question: Is the Unemployment Compensation Commission an agency of the State and is this proceeding in fact a proceeding against the State?

The determination of this question is not affected by the fact that individual officers of the Unemployment Compensation Commission are made parties defendant. Their acts in respect to which the plaintiff complains were performed and are being performed in their official capacity. If the Unemployment Compensation Commission is a State agency, then in essence the proceeding is against the State. 16 Am. Jur., 331; *N. C. v. Temple,* 134 U. S., 22; *S. v. Steel,* 134 U. S., 230; *Smith v. Reeves,* 178 U. S., 436; *Bell Telephone Co. v. Lewis,* 169 A. (Pa.), 571.

In sec. 2, ch. 1, Public Laws, Extra Session 1936, known as the Unemployment Compensation Law, the Legislature has declared that "Eco-

nomic insecurity due to unemployment is a serious menace to the health, morals and welfare of the people of this State. Involuntary unemployment is, therefore, a subject of general interest and concern which requires appropriate action by the Legislature to prevent its spread and to lighten its burden. . . . The achievement of social security requires protection against this greatest hazard of our economic life. . . . The Legislature, therefore, declares that in its considered judgment the public good and the general welfare of the citizens of this State require the enactment of this measure, under the police powers of the State, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own." The act then creates the Unemployment Compensation Commission and vests it with authority under the provisions of the act to accomplish the purpose thus declared, which purpose is of public interest and a proper subject matter for legislative action.

Provision is made for the assessment, levy and collection of compulsory contributions by employers as defined in the act. The moneys thus collected are paid into the Treasury of the State and are disbursed by the Treasurer of the State on warrants duly issued by the Auditor upon requisition of the Unemployment Commission, and detailed regulations are provided for the receipt, deposit, use, investment and disbursement of said fund thus created. The members of the Commission are appointed by and are accountable to the Governor and are required to file reports and otherwise account to the State in respect to the discharge of their duties under the law. It is likewise provided that there shall be no vested private right of any kind existing as against the power of the Legislature to amend or repeal the law and "all the rights, privileges or immunities conferred by this act or by acts done pursuant thereto shall exist subject to the power of the Legislature to amend or repeal this act at any time." It seems to us that the express provisions of the act itself, without further argument, are sufficient to clearly designate the Unemployment Compensation Commission an agency of the State.

The contributions, by whatever name designated, are not voluntary but are compulsory and constitute a tax. Nor does the fact that the Legislature has seen fit to segregate the funds derived from the collection of the contributions assessed in a special fund and for a special purpose alter this conclusion. It, in its discretion, has the power to so segregate and earmark revenues of the State. It has done so in other instances, signally in respect to the gasoline and automobile license tax revenue.

It is axiomatic that the sovereign cannot be sued in its own courts or in any other without its consent and permission. Except in a limited class of cases the State is immune against any suit unless and until it has expressly consented to such action. *Rotan v. State,* 195 N. C., 291,

141 S. E., 733; *Carpenter v. R. R.*, 184 N. C., 400, 114 S. E., 693; *Dredging Co. v. State*, 191 N. C., 243, 131 S. E., 665; *Moody v. State Prison*, 128 N. C., 12; *U. S. v. Lee*, 106 U. S., 196, 25 R. C. L., 412.

An action against a commission or board created by statute as an agency of the State where the interest or rights of the State are directly affected is in fact an action against the State. *Dredging Co. v. State, supra; Carpenter v. R. R., supra; Bell Telephone Co. v. Lewis, supra.*

The purpose of the Declaratory Judgment Act, ch. 102, Public Laws 1931, is to provide a speedy and simple method of determining the rights, status and other legal relations under written instruments, statutes, municipal ordinances, contracts or franchises and to afford relief from uncertainty and insecurity created by doubt as to rights, status or legal relations thereunder. *Walker v. Phelps*, 202 N. C., 344, 163 S. E., 726; *Light Co. v. Iseley*, 203 N. C., 811, 167 S. E., 56. Here the plaintiff admits its legal status—that of an employer—under the Unemployment Compensation Law, and it concedes its liability to assessment for contributions under that act. In its final analysis this proceeding is to determine whether certain persons rendering services to the plaintiff under contract are employees within the meaning of the act and whether compensation paid to them is to be taken into consideration in estimating the amount of the contribution or tax due by the plaintiff. This is essentially a question of fact. The purpose of the Declaratory Judgment Act is to provide a ready means of determining rights, status and other legal relations. These are questions of law. While, in some instances, it may be necessary to hear evidence in order to determine the legal questions presented in a proceeding under this act, proceedings may not be maintained under the act to present issues of fact only.

The plaintiff seeks to have the Court judicially determine whether certain of its special agents operating under contract are employees for the purpose of ascertaining its tax liability. Thus, the amount that the State is entitled to collect from the plaintiff, through the Unemployment Compensation Commission, is directly involved and the State is the real party in interest. It would be directly affected and prejudiced by a judgment favorable to the plaintiff.

While the plaintiff does not seek injunctive relief a judgment favorable to it would have, of necessity, the effect of restraining the defendant from proceeding further in its effort to collect from the plaintiff the contributions which defendants contend are justly due under the act, and it is expressly provided that "no injunction shall be granted by any court or judge to restrain the collection of any tax or contribution or any part thereof levied under the provisions of this act." Sec. 10, ch. 27, Public Laws 1939. The court may not do indirectly what it is prohibited from doing directly.

Where an administrative remedy is provided by statute for revision, against collection, or for recovery of taxes assessed or collected, the taxpayer must first exhaust the remedy thus provided before the administrative body, otherwise he cannot be heard by a judicial tribunal to assert its invalidity. *Distributing Corp. v. Maxwell,* 209 N. C., 47, 182 S. E., 724; *Hart v. Comrs.,* 192 N. C., 161, 134 S. E., 405; *Maxwell v. Hinsdale,* 207 N. C., 37. He must not only resort to the remedies that the Legislature has established but he must do so at the time and in the manner that the statute and proper regulations provide. *Mfg. Co. v. Comrs.,* 196 N. C., 747; *Pender County v. Garysburg Mfg. Co.,* 50 F. (2d), 747; *Gorham Mfg. Co. v. S. Tax Com. of N. Y.,* 266 U. S., 265; *Myers v. Bethlehem Shipbuilding Corp.,* 303 U. S., 41, 82 L. Ed., 638.

The Unemployment Compensation Law provides adequate remedies: (1) when liability is denied in whole or in part by an employer the Commission must have a hearing at which such employer is entitled to be present and to be heard. From an adverse ruling by the Commission such contestant may appeal. Sec. 8 (m), ch. 27, Public Laws 1939. It is not inappropriate to note in this connection that on appeal the cause must be entitled "State of North Carolina on relation of the Unemployment Compensation Commission *v.*" the employer; (2) the protesting employer may pay the tax and sue for its recovery, thereby presenting its claim of a valid defense against the enforcement of the tax for judicial determination; or (3) if the employer is in default the Commission may proceed to collect by civil action in which the employer may present any valid defense he may have. Sec. 14 (b), ch. 1, Public Laws, Extra Session 1936.

Incidentally, it is asserted in the answer of the defendants that a hearing has been had as provided under the act and that the tax liability of the plaintiff has been duly adjudicated by the Commission. If this be true, whether such adjudication is *res judicata* is not now presented for determination.

The Legislature has conferred upon the Unemployment Compensation Commission the right and power to determine the rights, status and liabilities of an employer under the terms of the act. Sec. 8 (m), ch. 27, Public Laws 1939. It would seem, therefore, that by express legislative mandate the Unemployment Compensation Commission is the proper forum for determining the very question the plaintiff here seeks to present. In certain respects the Unemployment Compensation Commission is a judicial tribunal and the Declaratory Judgment Act expressly provides that rights, status and other legal relations may be determined by the courts within their respective jurisdictions. Sec. 1, ch. 102, Public Laws 1931.

In any event, whether we consider the Unemployment Compensation Commission, in this respect, a judicial or an administrative body, plaintiff must assert its right and seek its remedy in accord with the express provisions of the statute.

For the reasons stated we are of the opinion that the court below properly sustained the demurrer.

Affirmed.

WACHOVIA BANK & TRUST COMPANY, ADMINISTRATOR C. T. A., D. B. N., OF THE ESTATE OF FLORENCE P. TUCKER, v. W. H. KING DRUG COMPANY.

(Filed 1 May, 1940.)

1. Executors and Administrators §§ 9, 12b—Ordinarily, administrator c. t. a. may exercise all powers of sale granted the executor by the will.

By provision of statute, C. S., 90, 4170, upon the death or removal of the executors named in the will, the administrator *c. t. a.* succeeds to all rights, powers and duties of the executors, and he may exercise all powers of sale granted the executors by the will regardless of whether they are given the executor *virtute officii* or *nominatim*, unless the language of the will definitely limits the exercise of the power of sale to the person named executor or unless the executor is made the donee of a special trust, given by reason only of peculiar or special confidence in him, and the mere appointment of an executor and the granting of power to him to sell real estate in his discretion, although evidencing confidence, does not necessarily constitute him the donee of a special trust so as to preclude the exercise of the power of sale by the administrator *c. t. a.*

2. Same—Held: Under facts of this case, the administrator c. t. a. has the authority to exercise the power of sale granted in the will.

Testatrix devised the residuum of her property to named executors to be held by them in trust, with direction to pay the income therefrom to named beneficiaries and upon their death and the termination of the trust to divide the property in accordance with directions set forth in the will. The will expressly empowered the executors to sell the realty for the purpose of settling the estate and dividing the property as directed. One of the executors died and the other was removed, and plaintiff was appointed administrator *c. t. a.* *Held:* The administrator *c. t. a.* is authorized to exercise the power of sale, the executors not being the donees of such a special trust as to render the power of sale personal to them, and such authority being necessary to effectuate the intent of testatrix for the ultimate division of the estate.

3. Same—

It will be presumed that a will is executed in contemplation of the statutes providing that an administrator *c. t. a.* succeeds to all the rights, powers and duties of the executor, C. S., 90, 4170.

4. Same—

Where a will provides for the sale of lands by the personal representative for distribution of the estate among the ultimate beneficiaries, mortgages and assignments executed by such beneficiaries prior to the settlement of the estate cannot defeat the power of sale, and the personal representative may convey the lands free of such liens. The right of the lienors in the proceeds of sale is not presented for determination.

APPEAL by plaintiff from *Frizzelle, J.*, at Chambers in Snow Hill, 30 November, 1939. From WAKE.

Carroll W. Weathers and Charles H. Young for plaintiff, appellant.

Smith, Leach & Anderson and John E. Lawrence for defendant, appellee.

SCHENCK, J. This is a controversy without action submitted under C. S., 626, wherein it is agreed that the defendant W. H. King Drug Company contracted to purchase and the plaintiff Wachovia Bank & Trust Company, administrator *c. t. a., d. b. n.*, of the estate of Florence P. Tucker, contracted to sell a certain tract or lot of land on the east side of South Wilmington Street in the city of Raleigh, and that the plaintiff has tendered to the defendant a deed sufficient in form to convey a good indefeasible title to said land, and that the defendant has refused to accept said deed and pay the agreed purchase price. It is the contention of the defendant that the plaintiff has not the power to convey a good indefeasible title to said land. It is the contention of the plaintiff that it does have such power. The court was of the opinion that the defendant's contention was correct and entered judgment accordingly, to which judgment the plaintiff excepted and appealed, assigning error.

The solution of the controversy involves an interpretation of the will of the late Florence P. Tucker which is duly recorded in Will Book "G," page 52, office of the clerk of the Superior Court of Wake County.

The testatrix appointed Thomas B. Womack and Cary K. Durfey executors of her will. They both qualified upon the admission of the will to probate in 1909. Womack died in 1910 and Durfey was removed in 1930. The plaintiff qualified as administrator *c. t. a., d. b. n.*, immediately upon the removal of Durfey.

After certain specific bequests and devises, Florence P. Tucker by her will, Item 8th, directed her executors to divide the residuum of her estate into six equal shares. Each of the six shares was bequeathed and devised to Thomas B. Womack and Cary K. Durfey upon certain trusts: (1) One share to be held in trust and the income used to support, maintain and educate the children of the late Wm. R. Tucker, deceased son of the testatrix, and as each child became 30 years of age the trustees to pay

over to him his aliquot part of said share. All of the children of Wm. R. Tucker have attained the age of 30 and are entitled to their proportionate shares. (2) The remaining five shares to be held in five separate equal trusts, one share for each of the five daughters of the testatrix, and the income from each said trust to be paid to each said daughter for life. At the death of any daughter the share so held in trust for her to be paid over and conveyed to her issue *per stirpes*. Three of the five daughters have died and the issue of the deceased daughters are now entitled to their proportionate shares.

Prior to the removal of Cary K. Durfey, as executor and trustee, several parcels of land included in the residuum of the estate were sold by deeds executed by Durfey as executor and trustee and by those persons entitled at the time of such sales to the remainder interests in those trusts which had terminated by virtue of the death of certain of the daughters of the testatrix, and the proceeds from such sales divided in accordance with the terms of said will.

The remainder of the real property included in the residuum of said estate, of which the *locus in quo* is a part, has not been divided as directed in Item 8th of said will, and because of the large number of parcels of land and their varying areas and values, actual division thereof is virtually impossible. For the same reasons, and also because of the large number of the remainder beneficiaries who are now entitled to their proportionate shares, division of said lands among those now entitled to the same is likewise virtually impossible.

Certain of the beneficiaries entitled to interests in the unsold real estate included in the residuum of the estate of Florence P. Tucker have executed mortgage liens and assignments against their interests in the unsold residuum of the estate, which mortgages and assignments are unpaid and outstanding.

The second paragraph of Item 12th of the will of Florence P. Tucker reads: "Said executors, for the purpose of settling my estate or making the division and executing the trusts herein provided for, shall have the power and are hereby authorized, as they see fit without being required to obtain an order of court for that purpose to sell and convey any part or portion of my property or estate, real or personal, and receive the proceeds of such sale. . . ."

C. S., 90, reads: "When any or all of the executors of a person making a will of lands to be sold by his executors die, fail or for any cause refuse to take upon them the administration; or, after having qualified, shall die, resign, or for any cause be removed from the position of executor; or when there is no executor named in a will devising lands to be sold, in every such case such executor or executors, as survive or retain the burden of administration, or the administrator with the will

annexed, or the administrator *de bonis non,* may sell and convey such lands; and all such conveyances which have been or shall be made by such executors or administrators shall be effectual to convey the title to the purchaser of the estate so devised to be sold."

C. S., 4170, reads: "In all cases where letters of administration with the will annexed are granted, the will of the testator must be observed and performed by the administrator with the will annexed, both in respect to real and personal property, and an administrator with the will annexed has all the rights and powers, and is subject to the same duties, as if he had been named executor in the will."

These statutes have been interpreted by this Court. In *Council v. Averett,* 95 N. C., 131, where the question involved was the power of the administrator with the will annexed to exercise the power of sale of real estate where the testator, in regard to his real estate, upon the death of his wife directs "it to be sold," the Court said, "The single question presented by the record for our decision is, did the will above set forth confer on the executors therein named power to sell the land embraced by it? If it did so, then the administrator *cum testamento annexo,* mentioned, had the like power by virtue of the statute (The Code, sec. 2168), which confers on such administrators the like power as the will conferred upon the executors, and the deed under which the plaintiff claims title, is valid." The Code, section 2168, referred to is now C. S., 4170.

Again in *Orrender v. Call,* 101 N. C., 399, where the will provided: "At the death of my beloved wife, then all my lands to be sold by my executor, and the money divided, as will hereafter be stated," the Court said, "We think the administrator, with the will annexed, had the power under the statute to sell, and that the deed from him to the purchaser was valid and conveyed a good title. Rev. Stats., ch. 46, sec. 34; Rev. Code, ch. 46, sec. 40; The Code, sec. 1493; *Rodgers v. Wallace,* 50 N. C., 181; *Council v. Averett,* 95 N. C., 131; *Vaughan v. Farmer,* 90 N. C., 607, and cases cited." The Code, section 1493, here cited is the same as C. S., 90.

The language of sections 90 and 4170 of the Consolidated Statutes, in their application to the case at bar, is plain and unambiguous. Section 90 provides that when all of the executors of a person making a will of lands to be sold by his executors die or are removed, the administrator with the will annexed may sell and convey such lands. There is no limitation, expressed or implied, to the effect that the administrator with the will annexed may sell only where the power given to the executor is given *virtute officii,* and not where it is given as a personal power to the executor *nominatim.* Nothing in the statute, read literally or contextually, limits the administrator's power. This position is strength-

ened by section 4170, which provides that in *"all* cases" where letters of administration with the will annexed are granted, such administrator has all the rights and powers as if he had been named executor. To construe these two statutes so as to limit the administrator with the will annexed to those powers only which are given the executor *virtute officii,* and to preclude him from exercising the powers given the executor *nominatim,* is to circumscribe the provisions and apparent intention of the statutes.

It is fundamental that the intention of the testator should be effectuated. With respect to the sale of lands by the administrator with the will annexed in lieu of the sale by the executor where power to sell is given to the latter, a construction of the statutes which makes for the exercise of the power given by the will to the executors by the administrator with the will annexed, except where a contrary intention clearly appears, does no violence to the intention of the testator, since he is presumed to have made his will in contemplation of the statutes.

All courts, so far as our investigation reveals, in applying statutes similar to ours, hold that where a power of sale of real estate is given to an executor *virtute officii* the administrator with the will annexed succeeds to the power. While some courts hold that where the power of sale is given to the executor *nominatim,* based on personal trust and confidence in the person named as executor, such person is regarded as a trustee, and the administrator with the will annexed does not succeed to the power, the contrary has been held in this jurisdiction.

In the case of *Creech v. Grainger,* 106 N. C., 213, it is written: "We are aware that there are decisions in New York and some other states that only such powers pass to the administrator as belonged to the executor *virtute officii,* and that the other trusts conferred by the will which are not in the scope of the common law duties of an executor do not pass to the administrator, but that a trustee must be appointed to execute them. A scrutiny of these cases shows that they all enforce the idea that, as an executor at common law had no control over realty, a power conferred on him by the will to sell real estate, does not pass to the administrator. Our statute, however (The Code, sec. 1493), expressly provides that it shall, and the reasoning in those cases has no application here, and we prefer to follow our own precedent. *Jones v. Jones, supra* (17 N. C., 387). As the appointment of an administrator and of a trustee would be by the same court, and both are required to give bond and to make returns, and in all respects are subject to the same supervision, there seems no good reason to require the appointment of a trustee, when The Code (secs. 1493 and 2168), by a fair and reasonable construction, indicates clearly the intention to devolve upon the administrator *c. t. a.* 'all the rights and powers' conferred on the executor

by the will. It would add to the expense, but hardly to efficiency in executing the will, to have two officers instead of one."

It would seem, therefore, with us that whether the power given to the executor be an executorial power or whether it be a power exercisable only as trustee, in the event of the death or removal of the executor, it passes to and is exercisable by the administrator with the will annexed, unless it clearly appears that the executor named is made the donee of a special trust, given by reason only of peculiar or special confidence in him, or that the testator by the language of the will definitely limited the exercise of the power to the person named as executor. When the statutes had been enacted at the time a will was executed the testator is presumed to have made his will in contemplation of their existence and application.

While the mere appointment of a person as executor is evidence of confidence by the testator in such person, and the granting of power to sell real estate in the discretion of such person is further evidence of such confidence, such appointment and such grant of power do not necessarily constitute such person the donee of a special trust and take the will from the operation of the pertinent statutes. There is nothing in the will under consideration which manifests an intention upon the part of the testatrix to limit the power of sale to the discretion of particular executors. In truth it clearly appears from the will, when read from its four corners, that the sale of the real estate is necessary to carry out at least one of its prime purposes, namely, to divide the residuum into six shares to be distributed in equal proportions to the testator's six children or their issue *per stirpes*. Without the power of sale the administrator with the will annexed would be practically unable to effectuate this purpose. Since the power to sell is coupled with other purposes of the testatrix which she undoubtedly desired to have carried out in all events, we think, and so hold, that the power of sale given in the will to the executors passed to the plaintiff as administrator with the will annexed.

Relative to mortgages on and assignments of interests in the residuum of the estate by certain beneficiaries entitled thereto under the will, it remains only to be said that it is a well settled principle of law, that where a power of sale of real estate is given by will to a person charged with the administration of an estate, and the beneficiaries under the will, for whose benefit the estate is to be administered, execute deeds or liens thereupon prior to sale of the same by the person so charged, such deeds or liens cannot operate to defeat the powers of the person charged to sell in accordance with the terms of the will, and the deed from the person so charged to the purchaser is valid to convey a good title free from encumbrances. *Orrender v. Call, supra; Jones v. Warren,* 213 N. C., 730. We are not called upon to determine what interest the holders of

these mortgages and assignments may have in the proceeds of the sale by the administrator with the will annexed. All we decide is that these mortgages and assignments cannot divest the power of sale vested by will and operation of the pertinent statutes in the administrator with the will annexed.

We conclude that his Honor erred in holding and adjudging that the deed tendered by the plaintiff would not convey to the defendant a good indefeasible title, and for this reason the judgment below must be

Reversed.

STATE OF NORTH CAROLINA, EX REL. WAY KINSLAND; TOWN OF CANTON AND WAY KINSLAND, TAX COLLECTOR, v. J. D. MACKEY.

(Filed 1 May, 1940.)

Public Officers § 6—Where term of an office is not fixed by statute or Constitution, power to remove is an incident to the power of appointment.

Where the term of a public office is not fixed by statute or the Constitution, the appointing authority has the power, as an incident to the power of appointment, to remove its appointee at will without cause, notice or hearing, and the removal may be implied by the appointment of another to the office, and such power of removal cannot be contracted away and is unaffected by the fact that the appointing authority makes an appointment for a specified term. Under this principle, the board of aldermen of the town of Canton *is held* to have authority to remove the city tax collector appointed by them for a term of two years by appointing another to this office prior to the expiration of the term of the first appointee.

APPEAL by plaintiff from *Alley, J.,* at September Term, 1939, of HAYWOOD.

Civil action in the nature of *quo warranto* to try title to office of tax collector of the town of Canton, North Carolina.

The charter of the town of Canton, a municipal corporation organized and existing under and by virtue of chapter 90 of Private Laws of 1907, and acts amendatory thereto, provides for a governing body of said town to consist of a mayor and three aldermen to be elected at an election to "be held on Tuesday after the first Monday in May, 1907, and biennially thereafter." The board of aldermen is given "the power to appoint or elect a constable or marshal, clerk, treasurer, tax collector, special policemen and such other officers and agents as may be necessary to enforce the ordinances and regulations of the town as provided by law," but the terms of office for such appointees are not fixed by the act.

Plaintiff alleges substantially these facts: That by appointment or

election duly made in special meeting of the governing body of the town of Canton, held on 30 June, 1939, he is the duly appointed or elected tax collector of said town; that the defendant having first been elected or appointed tax collector of said town by its governing body on 27 September, 1937, was continued as such by the governing body of said town at regular meetings held on 8 May, 1939, and 5 June, 1939; that the appointment of plaintiff on 30 June, 1939, operated as a removal of defendant from said office of tax collector; that, though demand has been made upon defendant to surrender said office and the books and records appertaining thereto to plaintiff, and though at a regular meeting of the said governing body held on 24 July, 1939, defendant, who was present, was ordered to surrender all things pertaining to said office of tax collector to designated certified public accountant and to plaintiff, defendant refused to relinquish the office and to surrender the moneys, books and records belonging thereto; and that "defendant now usurps, intrudes into and unlawfully holds and exercises the office of tax collector of the town of Canton."

Defendant denies that plaintiff is the duly appointed or elected tax collector of the town of Canton, and denies that plaintiff is entitled to the office and the books and records and moneys pertaining thereto. On the other hand, while admitting that he has refused to relinquish the office and to surrender the moneys, books and records appertaining thereto, defendant avers that on 27 September, 1937, he was duly and lawfully elected and appointed by the governing body of the town of Canton as tax collector; that thereafter, at a regular meeting of the mayor and board of aldermen of said town held on 5 June, 1939, he was unanimously re-elected and reappointed tax collector of said town for a fixed and definite term for the ensuing two years; that thereupon he took the oath of office, qualified and entered upon the discharge of the duties of said office, which he now lawfully holds; that his books, records and accounts have been inspected and examined at regular intervals by competent and capable auditors and accountants selected by the governing body of the town, and same have at all times been found to be correct; that no charges of incompetence, misconduct or malfeasance have been made against him by anybody; that he has faithfully and diligently discharged the duties of the office and no cause for his removal has been suggested; and that he is entitled to hold and receive the salary, fees and emoluments of said office.

Upon the trial below plaintiff introduced in evidence extracts from the minutes of the board of aldermen of the town of Canton showing (1) That J. D. Mackey was appointed tax collector at regular meeting on 27 September, 1937; (2) that at meeting on 8 May, 1939, all town employees were retained until further notice; (3) that at regular meet-

ing on 5 June, 1939, "Motion was made by Alderman Hipps, seconded by Alderman McCracken, that J. D. Mackey be appointed as tax collector. Motion carried"; (4) that at special meeting on 30 June, 1939, "Motion made by Alderman Westmoreland, seconded by Alderman McCracken, that Way Kinsland be appointed as tax collector at $145 per month. . . . Motion carried. Alderman Hipps voting 'No' on this motion"; and (5) that at regular meeting on 24 July, 1939, "Motion made by Alderman McCracken, seconded by Alderman Westmoreland, that W. Bowen Henderson, C. P. A., is requested and authorized to received from Mr. J. D. Mackey all moneys and things now in his custody and possession as tax collector and deputy clerk of the town of Canton, and to transfer all moneys and things so received immediately to Mr. Way Kinsland. . . . Motion voted two for and one (Hipps) against."

Defendant offered evidence tending to show that pursuant to his appointment on 5 June, 1939, he took the oath of office and entered upon the faithful discharge of the duties thereof and that he is now under bond required of him as tax collector. Further, by cross-examination of witnesses for plaintiff and through testimony of witnesses introduced in his behalf, defendant, over objection by plaintiff, introduced much oral testimony tending to show that at the regular meeting on 5 June, 1939, defendant was actually elected or appointed tax collector for a term of two years—and further tending to show that for a long period of time the custom has prevailed in the town of Canton for the tax collector to serve during the incumbency of the board of aldermen by whom appointment was made. In reply, plaintiff, by cross-examination of witnesses for defendant and through the testimony of his own witnesses, undertook to refute the evidence thus offered by defendant. Defendant further offered evidence tending to show that he had performed the duties of the office of tax collector faithfully and efficiently, and that no charges of any kind have been made against him by anybody.

The case was submitted to the jury upon this issue: "Does the defendant, J. D. Mackey, wrongfully withhold the office of tax collector of the town of Canton from the relator, Way Kinsland, as alleged in the complaint?" The jury answered "No." From judgment thereon in favor of defendant, plaintiff appeals to Supreme Court and assigns error.

Morgan & Ward for plaintiffs, appellants.

W. R. Francis and F. E. Alley, Jr., for defendant, appellee.

WINBORNE, J. These are the determinative questions on this appeal: Where the Legislature has granted to the governing body of the town of Canton the power to appoint a tax collector for said town, but has not

fixed the term of office, and pursuant thereto a tax collector has been appointed, has the governing body which made the appointment the power at its pleasure to remove the appointee? If so, when the governing body has attempted to fix a definite term for which the appointment is made, may such power be exercised?

We are of opinion and hold that both questions must be answered in the affirmative.

The points arise upon exceptions well taken to these portions of the charge: "And if you find they did fix a definite term, that is to say, if you find they did elect J. D. Mackey for a term to expire with their own terms, for two years, or whatever you find the time to be, then he could not be removed by appointing another man in his place, but only could be removed by preferring charges against him and giving him an opportunity to be heard and to make a defense against the charges." Exception 38.

"But if Mr. Mackey, on the night of June 5, 1939, was elected for a definite term, that is, for a term extending throughout the term of the board of aldermen and mayor, then it could not be terminated except upon charges preferred and a hearing had, as I have heretofore explained to you, and if you find that he was elected for such definite term he would be entitled to hold the office and the issue should be answered 'No.'" Exception 42.

The applicable rule, which appears to have been generally and almost universally adopted, is that where the term of office of a public officer is not prescribed by law, the office is held during the pleasure of the authority making the appointment. Likewise, the general rule is that in the absence of all constitutional or statutory provision for the removal of such public officers, the power of removal is incident to the power of appointment, and is discretionary and may be exercised without notice or hearing. 22 R. C. L., 562; 19 R. C. L., 935; 43 C. J., 641. McQuillan on Municipal Corporations (2nd Ed.), Revised Vol. 2, p. 228, sec. 509 (489), Annotations 91 A. L. R., 1097.

These general rules have been applied in well considered decisions by the courts of many states to cases in which the appointing authority has attempted to fix a definite term for the particular office. See Annotation 91 A. L. R., 1097. The trend of these decisions is that the implied power of the appointing authority to remove at pleasure an officer whose term of office is not prescribed by law cannot be contracted away so as to bind the appointing authority to retain an appointee for a fixed period.

Where an office is held during the pleasure of the appointing authority, a removal may be either express, by notification to the officer, or implied, by the appointment of another person to the same office. 19 R. C. L., 935.

Under these principles, no definite term having been prescribed by statute for the office of tax collector for the town of Canton, the appointment of defendant at the regular meeting of the board of aldermen on 5 June, 1939, entitled him to hold the office only at the will or pleasure of the board. And this is true, even though it be conceded that the board by resolution specified that the appointment be for a definite term. Hence, in the absence of constitutional or statutory provision therefor, the board, under the power of removal incident to the power of appointment, had the power to remove the defendant at any time without cause, notice or hearing. The appointment of another, the plaintiff, to the position of tax collector, of which fact defendant had notice, operated as a removal of defendant.

In view of the general rule of law applicable to the facts of this case, it appears unnecessary to advert to exceptions relating to the admission of parol evidence as to what transpired in the meeting of the board at which defendant was appointed, or as to evidence of custom, or to the charge in regard thereto.

In accordance with the principles of law here stated, let there be a New trial.

S. M. BAILEY, ADMINISTRATOR OF EUGENIA C. DAVIS, DECEASED, v. FEDERAL LAND BANK OF COLUMBIA, J. W. WEBSTER, W. G. DAVIS, AND W. O. McGIBONY, TRUSTEE.

(Filed 1 May, 1940.)

Deeds § 17d—Under facts of this case, agreement in deed to support grantor held not a charge on the land as against purchasers for value.

After the death of the owner of land, his widow executed deed to three of their children, presumably conveying her dower interest, which deed recited that the consideration therefor was an agreement on the part of the grantees to support the widow during the remainder of her life. Thereafter the land was partitioned among the three children. One of the children executed a mortgage on the land allotted to him in which his wife and mother joined. Thereafter he and his wife executed a deed of trust in favor of the corporate defendant and the proceeds therefrom were used to pay the mortgage. Thereafter the deed of trust was foreclosed and the land was purchased by the corporate defendant, which sold same to the individual defendant. About eighteen years after the execution of the deed by the widow, without previous demand or notice other than the registration of her deed to the children, she instituted action asserting her son had not paid his proportionate part for her support and that the amount he should have paid was a charge upon the land constituting an equitable lien, and upon her death the action was continued by her administrator, so that the son, as heir at law, would be entitled to a propor-

tionate part of any recovery. *Held:* Under the facts of this case, the words of the agreement did not constitute a charge upon the land in the nature of an equitable lien as against defendants, who are purchasers for value.

APPEAL by defendants from *Frizzelle, J.,* at September Term, 1939, of FRANKLIN. Reversed.

This was an action by the administrator of Eugenia C. Davis to subject lands of defendants Webster and the Federal Land Bank to a charge for the amount which it was alleged would have been required for the support of plaintiff's intestate, according to the provisions of a deed to defendants' predecessor in title. It was alleged that in 1918 Eugenia C. Davis executed deed to W. G. Davis, Marguerite Davis and Lillian Bailey, and that the recited consideration therefor was an agreement on the part of the grantees to provide for her support during the remainder of her life, and it was alleged that this imposed a charge on the land and constituted a lien thereon enforceable against the defendants, subsequent purchasers for value.

The referee, to whom the case was referred, reported findings of fact and conclusions of law in favor of the plaintiff. The defendants' exceptions to the report were overruled by the court below, and the findings of fact and conclusions of law of the referee were adopted and confirmed. From judgment in accord therewith, defendants appealed.

Malone & Malone, T. Lanier, and Yarborough & Yarborough for plaintiff, appellee.

Bailey, Lassiter & Wyatt and A. J. Templeton for defendants, appellants.

DEVIN, J. Appellants assign as error the ruling of the court below that the recital in a deed of an agreement to contribute to the support of the grantor, as the consideration for the execution of the deed, was sufficient to impose a charge on the land and to constitute an equitable lien thereon enforceable against subsequent purchasers for value.

The material facts were these: J. W. Davis, the owner of record of certain lands in Franklin County, died in 1916 leaving his widow, Eugenia C. Davis, plaintiff's intestate, and five children him surviving. In 1918, Eugenia C. Davis executed deed to three of her children, viz.: W. G. Davis, Marguerite Davis and Lillian Bailey. This deed recited as the consideration therefor "the agreement of the said parties of the second part to support the said Eugenia C. Davis during the remainder of her natural life." The *habendum* clause was in the usual form, "to the said parties of the second part and their heirs and assigns, to their

only use and behoof forever." The two children of J. W. Davis and Eugenia C. Davis not mentioned in the deed had previously conveyed their interests in the land to the named grantees.

In 1921, the land was partitioned among the three grantees, and to W. G. Davis was allotted a tract of 93 acres. Thereafter W. G. Davis and wife, together with Eugenia C. Davis, plaintiff's intestate, executed a mortgage on the 93 acres to one Loyd as security for money borrowed. In 1925, W. G. Davis and wife executed a deed of trust on the same land to the defendant Land Bank to secure money with which the Loyd mortgage, then amounting to $1,002.02, was paid off. In 1932, the Land Bank deed of trust was foreclosed, and the land was conveyed by the trustees to the Land Bank. The Land Bank took possession of the land and held same until April, 1936, when it sold the land to defendant J. W. Webster, who executed deed of trust to the Land Bank for the balance of the purchase money. In May, 1936, Eugenia C. Davis instituted this action, without previous demand or claim on the Land Bank or Webster, and shortly thereafter died, the action being continued by her administrator. It was found by the referee that W. G. Davis had not contributed his share to the support of Eugenia C. Davis. She was supported by the other grantees.

The title to the land, as it appeared of record, having been in J. W. Davis, Eugenia C. Davis apparently had only a dower interest therein. If she had an additional equitable interest there was no notice thereof to defendants, subsequent purchasers. The only notice of record was the recital in the deed of 1918 of the agreement for her support as consideration for the deed. No notice of any claim on this account was given the Land Bank when its deed of trust went to record in 1925, seven years after the deed, and there was then on record a previous mortgage on the land by W. G. Davis and wife, in which Eugenia C. Davis had joined as grantor, which mortgage was taken up by the Land Bank loan. Nor was notice of any claim thereafter given to the Land Bank or to Webster, the purchaser, at the foreclosure sale in 1932, nor at any time until suit was instituted in 1936, eighteen years after the execution of the deed containing the provision now sued on. Eugenia C. Davis, to whose support W. G. Davis agreed to contribute in part, as the consideration for the execution of the deed to him and others, is now dead. No benefit can come to her. The action is based on the failure of W. G. Davis to contribute to the agreed support. In the event of recovery in this action by the administrator of Eugenia C. Davis, there being no debts of the estate, W. G. Davis as one of the distributees would be entitled to share therein.

Interpreting the legal effect of the recital of an agreement for the support of the grantor by the grantees as the consideration for the deed

from Eugenia C. Davis to W. G. Davis and his sisters in 1918, and considering that in the deed there is no clause of re-entry, or words indicative of intention to create a condition subsequent, or to impose a charge on the land, we reach the conclusion, in the light of the attendant circumstances, that the quoted words in the deed are insufficient to constitute a lien enforceable by the grantor's administrator against the defendants, subsequent grantees and encumbrancers for value, for the payment of sums agreed to have been paid by W. G. Davis for the support of his mother, or which would have been required of him for that purpose.

The decisions of this Court in cases where language similar to that in the instant deed was considered are not in harmony. Without attempting to distinguish them, it may be said that substantially the same words as those appearing in the deed of Eugenia C. Davis were held not to constitute a charge on the land in *Taylor v. Lanier,* 7 N. C., 98; *Lumber Co. v. Lumber Co.,* 153 N. C., 49, 68 S. E., 929; *Ricks v. Pope,* 129 N. C., 52, 39 S. E., 638; *Perdue v. Perdue,* 124 N. C., 161, 32 S. E., 492; *Wellons v. Jordan,* 83 N. C., 371. Similar language was held to support a charge on the rents and profits in *Wall v. Wall,* 126 N. C., 405, 35 S. E., 811; *Misenheimer v. Sifford,* 94 N. C., 592; *Gray v. West,* 93 N. C., 442; *McNeely v. McNeely,* 82 N. C., 183.

On the other hand, there are statements in several decisions which support plaintiff's contentions, notably, *Laxton v. Tilly,* 66 N. C., 327; *Helms v. Helms,* 135 N. C., 164, 47 S. E., 415; *Bailey v. Bailey,* 172 N. C., 671, 90 S. E., 803; *Fleming v. Motz,* 187 N. C., 593, 122 S. E., 369. However, an examination of these cases shows that the facts upon which these decisions were based were in material respects different from those presented here, and we are not inclined to extend the principles there stated to the facts of this case.

In *Bailey v. Bailey, supra,* Mrs. Ervin conveyed land to J. W. Bailey in consideration of $791.00 and "my maintenance during my natural life." Six days later she married Bailey and subsequently joined him in execution of a deed of trust on the land. The suit arose as to the disposition of the surplus after foreclosure sale. It was held that a charge attached to the surplus in favor of the wife.

In *Laxton v. Tilly, supra,* Thomas Laxton conveyed land to his son Levi "in consideration of $200.00 and the faithful maintenance of Thomas Laxton and wife." In suit by widow of grantor against the administrator of Levi Laxton it was held maintenance of plaintiff was a charge on the land, which had apparently descended to Levi's heirs.

In *Helms v. Helms, supra,* the deed, in addition to reciting that the consideration therefor was the support of grantor, contained these words: "It is further understood and agreed between the parties that the above

lands shall stand good for the support and maintenance of Elmira Helms during her natural life," evidencing an expressed intention to impose a charge on the land. To the same effect was the decision in *Marsh v. Marsh,* 200 N. C., 746, 158 S. E., 400, where it was stipulated that upon failure of support by the grantee, the land should revert to grantor. In *Fleming v. Motz, supra,* the question presented was whether one claiming under deed executed in consideration of $100 and the maintenance of the grantor could convey an indefeasible title. It was held the words used constituted a charge on the land. In *Outland v. Outland,* 118 N. C., 138, 23 S. E., 972, the case turned upon the fact that the subsequent grantee took with actual notice of the provisions of a will devising the land to one son charged with the support of another. In *Raynor v. Raynor,* 212 N. C., 181, 193 S. E., 216, cited by plaintiff, the principle of equitable contribution among heirs was applied.

We are of opinion, and so decide, that the recital in the deed of Eugenia C. Davis of an agreement on the part of the grantees to support her, as the consideration for the deed, under the facts and circumstances of this case, imposed a personal obligation upon the grantees, and that lien for amounts which should have been contributed by one of the grantees for this purpose does not attach to the land in the hands of the defendants, subsequent purchasers for value.

This disposition of the case renders unnecessary discussion of other questions presented in the argument and by brief.

The court below was in error in overruling defendants' exceptions addressed to the question herein decided, and the judgment in so far as it affects the defendants Webster and the Federal Land Bank is

Reversed.

N. J. FURTICK, SR., ADMINISTRATOR OF THE ESTATE OF N. J. FURTICK, JR., v. BONNIE COTTON MILLS.

(Filed 1 May, 1940.)

Negligence § 4a—Complaint held insufficient to allege actionable negligence in maintenance of pond by defendant manufacturing company.

Allegations that defendant maintained a pond in connection with its manufacturing business, that intestate, seventeen years of age, drowned therein when he stepped into a deep hole while wading to recover some ducks, and that defendant was negligent in failing to warn of the unevenness of the bottom of the pond and in increasing the danger by discharging hot water containing oil or grease in the pond, without allegation or contention that the pond constituted an attractive nuisance, *held* insufficient to state a cause of actionable negligence proximately causing intestate's death.

APPEAL by plaintiff from *Sink, J.*, at January Term, 1940, of GASTON. Affirmed.

S. J. Durham and J. A. Wilkins for plaintiff.
J. Laurence Jones and Ernest R. Warren for defendant.

PER CURIAM. This was an action to recover damages for wrongful death of plaintiff's intestate. The plaintiff alleged in his complaint, in substance, that the defendant constructed near its mill, and in or near the mill village, a pond or reservoir for purposes in connection with its manufacturing business, and that the bottom of the pond was uneven, some portions as covered by water being deeper than others; that the defendant discharged into the pond from its engines hot water containing oil or grease; that plaintiff's intestate, a young man aged seventeen years, who lived in the mill village and the members of whose family worked in the mill, in the attempt to rescue some ducks owned by members of his family, which said ducks "were swimming deeper and deeper in the water and appeared to be in imminent danger of loss," went into the water and stepped into a deep hole and, though a good swimmer, was drowned. Plaintiff alleges that defendant was negligent in maintaining the pond without warning or notice of the depressions therein, and that it added to the danger by discharging into the pond hot water containing oil or grease. There was no allegation or contention that the pond was an attractive nuisance.

Defendant's demurrer *ore tenus* was sustained and the action dismissed. We agree with the court below that the complaint fails to set out a cause of actionable negligence proximately causing the unfortunate death of the plaintiff's intestate.

The judgment sustaining the demurrer is

Affirmed.

N. J. FURTICK, SR., ADMINISTRATOR OF THE ESTATE OF CECIL FURTICK, v. BONNIE COTTON MILLS.

(Filed 1 May, 1940.)

APPEAL by plaintiff from *Sink, J.*, at January Term, 1940, of GASTON. Affirmed.

S. J. Durham and J. A. Wilkins for plaintiff.
J. Laurence Jones and Ernest R. Warren for defendant.

PER CURIAM. This is a companion case to that of *Furtick v. Cotton Mills, ante,* 516. The disposition of this case is governed by what was said in that case.

Judgment affirmed.

MRS. J. C. HUBBEL v. TALBOT FURNITURE COMPANY.

(Filed 1 May, 1940.)

Negligence § 3—

Allegations and evidence to the effect that defendant's salesman, in demonstrating a washing machine, started it working without warning while plaintiff's hand was known by him to be in close proximity to the machine, and that plaintiff's hand was caught therein, resulting in injury, *held* sufficient to overrule defendant's motion to nonsuit.

APPEAL by defendant from *Johnston, Special Judge,* at October Term, 1939, of MECKLENBURG.

Carswell & Ervin for plaintiff, appellee.
J. Louis Carter for defendant, appellant.

PER CURIAM. This is an action by the plaintiff to recover damages for personal injury alleged to have been negligently inflicted by the defendant.

The allegations of the complaint are to the effect that the defendant left a washing machine at the home of the plaintiff for the purpose of making a sale thereof, and that while the salesman of the defendant was demonstrating said machine in an endeavor to correct some difficulty which the plaintiff had had in the operation thereof, he turned the electric current on the machine while plaintiff's hand was known to be in close proximity thereto, without giving her any warning, thereby causing the machinery to be put in motion and to catch the hand of the plaintiff therein, to her injury.

When the plaintiff had introduced her evidence and rested her case the defendant moved for judgment as in case of nonsuit, C. S., 567, which motion was denied, and defendant reserved exception.

The jury answered the issues of negligence, contributory negligence and damage in favor of the plaintiff, and from judgment predicated upon the verdict the defendant appealed, assigning error.

The only assignment of error set out in the appellant's brief is to the denial of the defendant's motion for judgment as in case of nonsuit.

Since the evidence, when taken in the light most favorable to the plaintiff, supports the allegations of the complaint, this exception cannot be sustained, and the judgment of the Superior Court must be affirmed.

No error.

STATE OF NORTH CAROLINA EX REL. J. ABNER BARKER, SOLICITOR OF THE SIXTH JUDICIAL DISTRICT, v. MAY PALMER, ALIAS MAY SMITH; JOHN IVEY BROWN AND R. M. BROWN.

(Filed 1 May, 1940.)

1. Appeal and Error §§ 21, 40e—

The refusal of a motion to nonsuit will not be held for error when the evidence is not in the record, since in such case it will be presumed that the evidence was sufficient to be submitted to the jury.

2. Nuisance § 10—Judgment against lessors may be rendered in action to abate public nuisance only if they had actual or constructive knowledge.

In an action to abate a nuisance against public morals under the provisions of Michie's Code, 3180, *et seq.*, lessors of the property are entitled to the submission of an issue as to whether they knew the lessee was operating a public nuisance thereon before personal judgment is rendered against lessors taxing them with the cost and padlocking the premises, such personal judgment against them being justified only if they knew or, by the exercise of due diligence, should have known of the maintenance of the nuisance.

3. Same: Contracts § 8—

A lease contract will be held to have been made in contemplation of the statute in effect at the time of the execution of the lease providing for the abatement of nuisances against public morals, and the lessor is subject to the rights of the State to padlock the premises in accordance with the statute if they are used in operating a nuisance as defined by the act. Michie's Code, 3180, *et seq.*

4. Constitutional Law § 10—

The State, in the exercise of its police power, may abate a nuisance against public morals.

APPEAL by defendants, John Ivey Brown and R. M. Brown, from *Olive, Special Judge,* at November Term, 1939, of LENOIR. New trial.

This is an action instituted by the State of North Carolina, on relation of J. Abner Barker, Solicitor of the Sixth Judicial District, as plaintiff, against the defendants, for the purpose of abating a nuisance as defined by chapter 60 of the Consolidated Statutes, entitled "Nuisances Against the Public Morals." N. C. Code, 1939 (Michie), sec. 3180, *et seq.*

In substance, the complaint charged that R. M. Brown, a resident of

Newport News, Virginia, and his father, John Ivey Brown, a resident of North Carolina, were the owners of the premises involved in the action, and that the defendant May Palmer was the lessee of the premises and the owner and operator of the business carried on upon the premises under the name and known as "The Jitterbug Club," and that this business as conducted constitutes a public nuisance. The complaint alleged the premises were used for the purposes of adultery, assignation, prostitution, lewdness and immorality generally, and further charged the illegal sale of whiskey and other intoxicants, resulting in drunkenness, boisterous and disorderly conduct on the premises, further resulting in public nuisance. Defendant May Palmer filed her separate answer, amounting to a general denial. The defendants John Ivey Brown and R. M. Brown filed their separate answer averring that the filling station premises in question were the property of R. M. Brown, and that he had committed the same to the charge and management of his father, the defendant John Ivey Brown; that so far as they knew, no nuisance had been maintained upon the premises; that they had observed no improper conduct thereon, and no complaint in respect thereto had been made to them, and that if any improper conduct had occurred upon the premises, they were not privy thereto; and demanded in case the issue be found against May Palmer, she be required to vacate the premises and that same be surrendered to them for their free and unrestricted use in any lawful manner. The defendant John Ivey Brown, representing himself and his son, R. M. Brown, and their counsel were present in court when the case was called for trial and participated in the selection of the jury, and their counsel read their answer.

At the trial the following issue was submitted to the jury: "Has the defendant May Palmer operated the place known as 'The Jitterbug Club' in such a manner as to constitute a nuisance pursuant to chapter 60 of the Consolidated Statutes of North Carolina?" The jury for its verdict answered the issue "Yes." No appeal has been perfected by the defendant May Palmer. The evidence adduced at the trial is sufficient to support the verdict and finding of the jury. No evidence was offered by any of the defendants.

Certain allegations in the complaint were introduced at the trial with respect to the ownership of the premises known as "The Jitterbug Club" by the defendants Brown, and the leasing thereof by the said defendants Brown to the defendant May Palmer. That May Palmer is now and for a number of months prior to the institution of this action has been the owner and proprietress of said business, and conducts the same personally and with the aid of servants. That said place of business is known as "The Jitterbug Club," and is owned and operated by the defendant, May Palmer, in a thickly populated rural community on said

much-traveled, paved State Highway; that there is a great deal of all kinds of traffic almost continuously passing said place of business; that a large number of citizens of Lenoir County of necessity pass said place of business in going to and from Kinston and their homes and in the pursuit of their own business. That the neighborhood and vicinity in which the said "The Jitterbug Club" is located being thickly populated, and the highway passing it being much traveled, the activities of the defendant May Palmer, her agents and servants and customers, incidental to the operation of said business by said defendant May Palmer, are easily seen and almost necessarily observed by citizens traversing said State Highway, and other residents and citizens in said neighborhood and vicinity.

The further allegation is made that the place is operated as a public nuisance. "That May Palmer, her agents and servants have been and are now engaged in the business of selling liquor unlawfully, and in large quantities; that the building upon said premises is so arranged as to have several rooms therein, which are used, as plaintiff's relator is advised and believes and upon such information and belief alleges, by persons of low repute for the purposes of adultery, assignation, prostitution, lewdness and immorality generally; that the activities incidental to the business of the defendant May Palmer in the illegal sale of whiskey and other intoxicants, results in drunkenness, boisterous and disorderly conduct upon said premises, and results further in the flagrant violation of the public morals to such extent that such business activities constitute a menace to the public morals of the county and have disturbed, shocked and affronted the sensibilities of decent citizens of Lenoir County and the State of North Carolina, who either live near said place of business or have occasion to pass the same on said public highway on which it is located. That said business activities constitute a public nuisance of a base sort. Plaintiff's relator further alleges that unless said public nuisance is abated, the users of said highway and the public generally, will continue to be injuriously affected by such intolerable conditions existing in, around, and adjacent to the said establishment of the defendant May Palmer."

The defendants Brown, answering the above allegations, say: "That while the defendant May Palmer was at the time of the institution of this action and for months prior thereto, the owner and operator of the business conducted upon said premises, and gave her own personal attention to the conduct of said business, these defendants have no knowledge or information concerning other persons aiding and assisting in the conduct of said business except that a niece of the said May Palmer has been observed waiting upon customers in and upon the said premises. That these defendants have observed the sign giving the name under

which said business has been conducted, to wit, 'The Jitterbug Club,' but had nothing to do therewith. . . . So far as they have been able to observe the business of the defendant May Palmer has been conducted in a decent and orderly manner; and in this connection the defendant John Ivey Brown says that he passes by the said premises almost every day and sometimes several times in one day and that he has never observed any unlawful or improper conduct upon the said premises, nor has any complaint ever been made to him by any other person concerning the manner in which the said business is conducted."

The following issue was submitted to the jury: "Has the defendant May Palmer operated the place known as 'The Jitterbug Club' in such a manner as to constitute a nuisance pursuant to chapter 60 of the Consolidated Statutes of North Carolina?" The jury answered the issue "Yes."

The judgment of the court below is, in part, as follows:

"It is now, therefore, upon motion of Thomas J. White, attorney for the plaintiff's relator, considered, ordered, adjudged and decreed that the buildings, erections and premises where the business of the defendant May Palmer, known as 'The Jitterbug Club,' has been carried on, and the tract of land belonging to the defendants John Ivey Brown and R. M. Brown, upon which said buildings are located, together with said business, furniture, fixtures, money, merchandise, stock of goods and other personal property of the defendant May Palmer, which have been used in the operation of said business, which may be found or which may heretofore have been found in and about the said property of the defendants, known as 'The Jitterbug Club,' be and they are hereby declared to constitute a general public nuisance pursuant to chapter 60 of the Consolidated Statutes of North Carolina.

"It is further ordered, adjudged and decreed that the said buildings, erections and premises and the tract of land upon which said buildings are located, be and they are hereby ordered closed against their use by the defendants herein, or either of them or any other person or persons, and the said buildings on the premises known as 'The Jitterbug Club' shall be kept closed for a period of one year from the date hereof, unless sooner released, and the defendants and each of them are hereby restrained and enjoined from leasing said buildings, erections or premises to any other person or persons, firm or corporation, and are hereby forbidden to make or allow to be made any use whatever of the same for a period of one year from the date of this judgment, unless otherwise ordered by the court.

"It is further ordered, adjudged and decreed that the defendant May Palmer be and she is hereby enjoined and restrained from henceforth

maintaining and operating said place of business known as 'The Jitterbug Club' to the end that said public nuisance arising therefrom may be abated.

"It is further ordered, adjudged and decreed that all fixtures, furniture, musical instruments, or other movable property which have been used by the defendant May Palmer in conducting the said nuisance shall be removed by the sheriff of Lenoir County from the said building in which said business of the defendant May Palmer has been carried on, and that the sheriff of Lenoir County shall sell the said personal and movable property in the manner provided by law for the sale of chattels under execution.

"It is further ordered, adjudged and decreed that the proceeds of the sale of the personal property of the defendant May Palmer as is hereinbefore provided shall be applied in the payment of the costs of this action and the abatement of said nuisance, and that out of the proceeds of said sale of personal property, the costs and expenses of this proceeding shall be taxed by the clerk. . . . And that such amount as may be left of the proceeds of said sale of personal property after the payment of the above-mentioned costs and expenses shall be paid to the defendant May Palmer. It is further ordered and decreed that the costs of this action be taxed against the defendants. It is further ordered that this judgment shall operate to restrain the said defendant May Palmer from operating any place of business in such a manner as to constitute a public nuisance anywhere in the county of Lenoir, North Carolina. This 10th day of November, 1939. Hubert E. Olive, Judge Presiding."

May Palmer introduced no evidence at the trial and did not appeal from the judgment rendered.

The cost taxed by the clerk is in excess of $250.00 and defendants Brown will have to pay most of it, as May Palmer is insolvent and the personal property seized is not sufficient to pay same. Defendants Brown 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.

Thos. J. White for plaintiff.

Sutton & Greene for defendants John Ivey Brown and R. M. Brown.

CLARKSON, J. The defendants John Ivey Brown and R. M. Brown at the close of plaintiff's evidence made a motion in the court below for judgment as in case of nonsuit. C. S., 567. The motion was refused and in this we can see no error. The evidence is not in the record of the appeal to this Court, and the presumption is that it is sufficient to sup-

port a verdict. In fact, the name "Jitterbug Club" was perhaps an invitation to the lessors Brown to make inquiry.

As a second issue to be submitted to the jury, the defendants R. M. Brown and John Ivey Brown tendered the following: "If so, has such nuisance been maintained with the knowledge and acquiescence of the defendants R. M. Brown and John Ivey Brown?" The court declined to submit the issue tendered by the defendants Brown, and defendants Brown excepted and assigned errors. Before rendering a personal judgment against the defendants Brown, we think the issue should have been submitted to the jury, and in order to support the judgment or order of padlocking the premises, it must first appear that the lessor had knowledge of the nuisance there maintained or, by the exercise of due diligence, might have known the same. Therefore, the issue as to such knowledge tendered by the defendant in this case ought to have been submitted to the jury.

N. C. Code, 1939 (Michie), sec. 3180, is as follows: "Whoever shall erect, establish, continue, maintain, use, own, or lease any building, erection, or place used for the purpose of lewdness, assignation, prostitution, gambling, or illegal sale of whiskey is guilty of nuisance, and the building, erection or place, or the ground itself, in or upon which such lewdness, assignation, prostitution, gambling, or illegal sale of liquor is conducted, permitted, or carried on, continued, or exists, and the furniture, fixtures, musical instruments and contents, are also declared a nuisance, and shall be enjoined and abated as hereinafter provided."

Section 3184, in part, is as follows: "If the existence of the nuisance be established in an action as provided in this chapter, or in a criminal proceeding, an order of abatement shall be entered as a part of the judgment in the cause, which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments, or movable property used in conducting the nuisance, and shall direct the sale thereof in the manner provided for the sale of chattels under execution, and the effectual closing of the building or place against its use for any purpose, and so keeping it closed for a period of one year, unless sooner released," etc.

Section 3185: "The proceeds of the sale of the personal property as provided in the preceding section shall be applied in the payment of the costs of action and abatement, and the balance, if any, shall be paid to the defendant."

Section 3186 provides how order of abatement may be canceled.

When the defendants Brown leased the premises to the defendant May Palmer, under the above existing statutes, ch. 60 of Consolidated Statutes, entitled "Nuisance Against the Public Morals," *et seq.*, entered into and became a part of the contract. Pertinent public statutes affecting contracts must be read into the contracts to which they apply, or, at least,

such contracts must be understood to have been made in contemplation of the law. *Spain v. Hines,* 214 N. C., 432 (437).

In *The People ex rel. Lemon v. Elmore,* 256 N. Y., 489, it is held: "A statute authorizing courts of equity upon sufficient proof to issue an injunction against the maintenance of a house of prostitution and to direct the closing of the building in which the nuisance was maintained, for a year, or until the owner shall give bond against the reëstablishment of the nuisance, does not violate the constitutional right of trial by jury." This case is carefully annotated in 75 A. L. R., 1292 (1298), and it is there said: "Decisions subsequent to the previous annotations on this subject have uniformly sustained the constitutionality of statutes conferring upon courts of equity power to abate a public nuisance, although the acts complained of also constitute a crime and no property rights are invaded." *Carpenter, Solicitor, v. Boyles,* 213 N. C., 432 (446). In the *Carpenter case, supra,* which is similar to the present action, the whole matter was thoroughly discussed, and the facts were held sufficient to abate the nuisance and the act held constitutional.

In *Calcutt v. McGeachy,* 213 N. C., 1 (7), it is written: "In *Skinner v. Thomas,* 171 N. C., 98, the Court said: 'The police power is an attribute of sovereignty, possessed by every sovereign state, and it is a necessary attribute of every civilized government.—6 R. C. L., 183.— "It is the power to protect the public health and the public safety, to preserve good order and the public morals, to protect the lives and property of the citizens, the power to govern men and things by any legislation appropriate to that end." 9 Ency. of U. S. Rep., 473: "Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life and the beneficial use of property." *Slaughterhouse cases,* 16 Wall., 36, 21 L. Ed., 394.' 'The exercise of this power is left largely to the discretion of the lawmaking body, and the authority of the courts cannot be invoked unless there is an unnecessary interference with the rights of the citizen, and when there is no reasonable relation between the statute enacted and the end or purpose sought to be accomplished. 6 R. C. L., 236.' *Durham v. Cotton Mills,* 141 N. C., 615; *Shelby v. Power Co.,* 155 N. C., 196; *Reed v. Engineering Co.,* 188 N. C., 39."

New trial.

STATE OF NORTH CAROLINA EX REL. DAVID SINCLAIR, SOLICITOR OF THE EIGHTH JUDICIAL DISTRICT, v. TOM CROOM, TRADING AND DOING BUSINESS AS "TOM'S PLACE," AND NATIONAL CASH REGISTER COMPANY, INTERVENER.

(Filed 8 May, 1940.)

1. Nuisances § 11: Chattel Mortgages § 11: Constitutional Law § 17— Property of innocent parties may not be sold unless they have knowledge of nuisance.

A proceeding to abate a nuisance against the public morals is not a proceeding *in rem* against the property itself, but is *in personam*, and the provisions of the statute for padlocking the premises and for the sale of chattels used in connection with the operation of the nuisance, being more than sufficient for the abatement of the nuisance, are penalties prescribed by law for its violation, and therefore innocent lessors of the premises or owners or mortgagees of chattels which do not constitute a nuisance *per se* may not be deprived of their property rights unless they have actual or constructive notice that the property is used in the operation of the nuisance, and they have the right to have this issue determined by the verdict of a jury.

2. Same—

Intervener sold a cash register under a conditional sales contract and same, together with other chattels of the purchaser, was seized for sale upon the determination that the purchaser was using same in the maintenance of a nuisance against public morals. Upon the facts agreed intervener had no actual or constructive knowledge that the cash register was used in the maintenance of a nuisance. *Held:* Only the equity of the purchaser could be condemned for sale under the statute and the intervener may be charged with no part of the cost.

APPEAL by intervener from *Stevens, J.*, at September Term, 1939, of NEW HANOVER. Reversed.

This case was heard upon an agreed statement of facts, according to which one Tom Croom was, prior to and until 29 July, 1939, engaged in conducting a place known as "Tom's Place" in New Hanover County, at which place the said Croom, as found by the court, was engaged in the operation of a nuisance where there was assignation for lewd and immoral purposes, where whiskey was consumed, and the place "was operated in such a way as to shock the public morals and sense of decency of the community."

Some time prior to the bringing of the injunction proceeding, and the ascertainment of the nuisance as conducted by Croom, the intervener had sold to Tom Croom a cash register, upon a conditional sales contract, and had received one installment of $10.00, leaving a balance of $70.75 due upon the purchase price when this action was brought. Pending the proceeding, and just before judgment was signed in the action, the

National Cash Register Company was permitted to intervene, setting up the facts with regard to the cash register and claiming it as its property.

It is agreed and understood that the cash register was a part of the personal property used on the premises and that the intervener had no actual knowledge of the nature of the business carried on by the defendant.

Holding that under the statute the court had the power to condemn, confiscate, and sell this property, regardless of the fact that the intervener had no knowledge of the existence or maintenance of a nuisance, the court entered a judgment confiscating it and ordering it to be sold, free and clear of any right which the intervener claimed therein. From this judgment the defendant intervener appealed.

A. A. Marshall, W. A. Simon, Jr., and George Rountree, Jr., for plaintiff, appellee.

Rodgers & Rodgers for intervener, appellant.

SEAWELL, J. This case is governed by *Habit v. Stephenson, ante,* 447, and *Barker, Solicitor, v. Palmer, ante,* 519. In both of these cases this Court has decided that the property of an innocent person, which in itself is not of a character such as to constitute a nuisance *per se,* or according to its ordinary use, may not be condemned, or its innocent use by the owner forbidden or destroyed, because it happens to be in the possession of a person who is guilty of maintaining a nuisance, aided by its use, unless the owner has participated in the creation or maintenance of the nuisance, or has knowledge thereof, or by the exercise of due diligence should have known of its existence. The taking of such property, or the condemnation of its use as against such innocent owner, under such circumstances, is considered a taking without due process of law. In both of these cases it will be noted that the court does not accept, under the particular circumstances here outlined, the doctrine that the proceeding to abate the nuisance is purely *in rem,* such as might be, and has been from ancient times, pursued for the abatement of a nuisance *per se*— where the property seized, confiscated, or destroyed is of a character especially designed and ordinarily used for carrying on the nuisance, and is in itself inherently such a nuisance.

The position of the Court in the present case may be fairly illustrated by reference to *Barker, Solicitor, v. Palmer, supra,* where the Court declined to permit the padlocking of the premises of an innocent lessor on the ground that they were used by the lessee in the maintenance of a nuisance, without first having the issue as to his participation in the nuisance, or his knowledge thereof, inquired of by a jury, as the lessor defendant had demanded. *Barker, Solicitor, v. Palmer, supra.*

Under a just government, men do not suffer punishment or penalty unless they have violated some law. Confiscation of property which may be said to be innocent in itself and ordinarily used for lawful and innocent purposes, as required by the statute under consideration, cannot be considered in any other light than as a penalty for having engaged in the maintenance of the nuisance. For example, the padlocking of the premises of an innocent lessor for a whole year against its use for any purpose is so wholly beyond any measure necessary for the proper abatement of the nuisance that it must be regarded as a vindictive visitation of the law, based upon the fictional declaration in the act that the building itself is a nuisance. Of course, we are using the term "vindictive" in its technical sense, indicating a punishment or penalty for an unlawful act. This becomes plain since in no aspect of the case might the house be a nuisance *per se,* and since it is beyond the power of the Legislature to declare that to be a nuisance which essentially is not a nuisance. 46 C. J., p. 652, note 28. It could be sustained only on the principle that the owner had actively or passively participated in the creation or maintenance of the nuisance for which, of course, the Legislature has the right to prescribe both punishment and penalty. The same is true of the confiscation of personal property, which confiscation in many instances can have no relevancy to abatement. The exactions made by the act are too substantial and important to be classed as one of those trivial burdens which must be borne as an incident of citizenship. Its confiscatory features can be sustained only by rational interpretation, reading into it the necessity of notice and hearing.

They cannot be explained or justified by the simple statement that they are in aid of abatement, nor that the nuisance was by sufferance of the owner. Compare: *People ex rel. Lemon v. Elmore,* 256 N. Y., 489, 177 N. E., 14, 75 A. L. R., 1292, 1295. (In the cited case the Court definitely abandons the *in rem* doctrine by proposing the theory of personal responsibility.) The statute before us does not attempt to impute to the owner a knowledge of the nuisance, even *prima facie,* and we are persuaded that it did not intend to act upon such assumption. The theory of agency, whether declared in a statute or adopted by the Court, is so wanting in reality as to be capricious. The factual situation between a person who in good faith places his property in the hands of another under a sales contract or between the lessor and lessee of property makes a declaration of agency arbitrary. We may say, with equal force, that a law which requires such a person at all times to know what is being done with his property, in other words, by the act of sale or lease to make a public guaranty that it shall at all times be used for a legitimate purpose, is opposed to common experience and the necessity of commercial and social intercourse, and is so obviously unjust as to be

arbitrary. We regard it as an unreasonable and unconstitutional restriction upon the use of property, and confiscation upon that ground is taking property without due process of law. A rational interpretation of the law before us does not allow this to be done.

A clear distinction must be maintained between the mere abatement of the nuisance and the particular matter here at issue, that is, the padlocking of the premises of an innocent owner or the confiscation and sale of his property as a statutory incident to such abatement.

With respect to trial by jury, and other constitutional guaranties by which property rights are protected, cases holding to the extreme theory that the property of an innocent owner used in connection with the maintenance of a nuisance by another may be confiscated although the owner does not participate in the maintenance of the nuisance and has no knowledge, actual or constructive, thereof, sometimes point out that the abatement of public criminal nuisances by an equity proceeding is of ancient origin, tracing the jurisdiction back to the time of Queen Elizabeth. *Mugler v. Kansas,* 123 U. S., 623, 31 L. Ed., 205. Other authorities regard it as of comparatively modern origin. *Pana v. Central Washed Coal Co.,* 260 Ill., 111, 102 N. E., 992; *Simpson v. Justice,* 43 N. C., 115. It really makes no difference which brand of erudition we prefer, since the device of padlocking the property of an innocent person as an aid to abatement of a nuisance or as a penalty therefor has not been shown to be of such ancient origin. While other sections of the Constitution may be invoked, the guaranty of trial by a jury provided in Article I, section 19, of the State Constitution, cannot be evaded by the device of enlarging the jurisdiction of the equity court by statute and turning over the determination of these rights to a chancellor's court, where a jury is not required. A statute which limits the judicial inquiry as to the mere existence of the nuisance and follows this with the authority to confiscate, does not meet constitutional requirements in its incidence upon innocent owners of property.

The two cases cited affirmatively answer the question whether such a jury trial must be accorded an allegedly innocent owner whose property has been used without his knowledge or assent in the creation or maintenance of a nuisance. And the holding of the court, which we regard as necessary to maintain the constitutionality of the statute, is supported by what we regard as the best considered opinions on the subject which we find consonant with the genius of our people and the interpretation which we have hitherto put on our constitutional guaranties respecting liberty and the rights of property. *Gregg v. People,* 65 Colo., 390, 175 Pac., 483; *Holmes v. United States,* 26 Fed., 489; *State ex rel. Wilcox v. Gilbert,* 126 Minn., 95, 147 N. W., 953; *State ex rel. Robertson v. Wheeler,* 131 Minn., 308, 155 N. W., 90; *Hinson v. Porter,* 149 Ga., 83, 99 S. E., 119.

There is nothing in the record disclosing that the intervening defendant, National Cash Register Company, either participated in the nuisance carried on by Tom Croom, had any knowledge thereof, or could by due diligence have obtained such knowledge—facts which must affirmatively appear before its property could be confiscated. *Habit v. Stephenson, supra.* The court was in error in signing the judgment declaring the interest of the said National Cash Register Company in the property forfeited.

According to the construction of the statute by the Court in *Habit v. Stephenson, supra,* the court was also in error in assuming that the statute requiring the sale of condemned property in the manner provided for sale of chattels under execution referred only to details of advertising, exposure to auction, and matters of that kind. It involves the preservation of the fundamental right of an innocent owner or claimant of the property sought to be sold to have his case heard as to such ownership. When he is in court either by service or summons, originally or by intervention, he is not there for the mere purpose of "seeing proceedings" as in the caveat to a will, but is entitled to make his defense at that time. The intervener did make such defense, and upon the agreed statement of facts only the interest of the defendant Tom Croom, acquired by his ten-dollar payment on the cash register, was subject to condemnation and confiscation by the court.

Under the view of the rights of the parties taken by the trial judge, no attempt was made in the judgment to segregate or specify what equitable interest the defendant Croom may have had in the cash register. He had made a payment of ten dollars on the purchase price of $80.75.

As to the intervener, the judgment is reversed. Subject to the right of the plaintiff to make a motion in apt time for the separate condemnation of the interest of Tom Croom in the cash register, not exceeding the sum of ten dollars paid thereupon as a first installment, the property should be surrendered to the intervener, National Cash Register Company, against which no costs of this action should be taxed.

The cause is remanded for judgment in accordance with this opinion.

Reversed.

BILL HUMPHREY v. S. R. CHURCHILL, SHERIFF OF LENOIR COUNTY.

(Filed 8 May, 1940.)

1. Nuisances § 11: Execution § 11—Remedy to prevent sale of chattels not used in operation of nuisance is by motion in the cause.

In a proceeding under C. S., 3180, *et seq.*, judgment was entered upon determination that the defendant therein was operating a nuisance against public morals, directing that the personal property of defendant used in

the operation of the nuisance be sold in accordance with C. S., 3184. Thereafter the defendant in that proceeding instituted this action against the sheriff to restrain the sale of certain of the personal property upon allegations that the property specified had not been used in the operation of the nuisance and that the sheriff was about to sell it under the prior judgment. There was neither allegation nor contention that the execution was void. *Held:* The temporary restraining order was properly dissolved, the proper remedy being by motion in the cause and not by independent action to restrain the sheriff from selling the chattels as directed by the prior judgment.

2. Execution § 11—Complaint in independent action to restrain execution cannot be treated as a motion in the cause when plaintiff in former action is not a party.

Where judgment directing the sale of personal property used in the operation of a nuisance is entered in a proceeding instituted by the solicitor, the complaint in an independent action thereafter instituted against the sheriff alone by the defendant in the former proceeding to restrain the sale of certain of the personalty on the ground that it was not used in the operation of the nuisance cannot be treated as a motion in the cause, since the plaintiff in the former action is not a party.

SEAWELL, J., dissenting.

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

APPEAL by plaintiff from *Cowper, J.*, at December Term, 1939, of LENOIR. Affirmed.

Louis I. Rubin and Sutton & Greene for plaintiff.
Thos. J. White for defendant.

DEVIN, J. This action was instituted to restrain the sale of certain personal property of the plaintiff Bill Humphrey, which it is alleged the defendant sheriff was threatening to sell, pursuant to a judgment of the Superior Court.

Plaintiff alleged that in the case entitled "State *ex rel.* Barker, Solicitor, *v.* Bill Humphrey," an action instituted and prosecuted to judgment against him under the provisions of C. S., 3180 and 3184, relating to the abatement of nuisances, it was adjudged that a public nuisance as defined by the statute had been maintained by Bill Humphrey at the place known as Bill Humphrey's Filling Station, and the premises where said business had been carried on, together with the furniture, fixtures, stock of goods and other personal property used in the operation of said business, were declared a nuisance, and the sheriff was ordered to remove all fixtures, furniture, musical instruments and other movable property used by Bill Humphrey in conducting said nuisance and to sell the same in the manner provided by law.

The plaintiff Bill Humphrey alleged in the present action that the stock of goods referred to in the judgment had not been used in the conduct of a nuisance as defined by the statute, and that the sheriff, pursuant to said judgment, was wrongfully threatening to sell same. He prayed that the defendant sheriff be restrained from selling this property.

Plaintiff attached to his complaint in this action the pleadings, order, and judgment in the former action wherein he was the defendant. From these it appears that it was alleged in the complaint in the former action that "said business, furniture, fixtures, money, merchandise, stock of goods and all other personal property of the defendant Bill Humphrey which may be found in and about the said Bill Humphrey's Filling Station constitute a public nuisance which in the interests of the public morals and decency should be abated." Upon that complaint the order of Stevens, J., required the delivery to the sheriff of "all the personal property, equipment, fixtures, money, merchandise and musical instruments used in connection with the conduct or maintenance of said establishment or business located therein."

Bill Humphrey filed answer denying that a nuisance had been maintained as alleged. Upon the trial of the issue in the former suit verdict was rendered against Bill Humphrey, and the judgment decreed that the premises where the business of Bill Humphrey, known as Bill Humphrey's Filling Station, had been carried on "together with said business, furniture, fixtures, money, merchandise, stock of goods and other personal property of defendant Bill Humphrey which have been used in the operation of said business" constituted a public nuisance as defined by ch. 60, Consolidated Statutes, and the sheriff was ordered to remove all fixtures, furniture, musical instruments or other movable property which have been used by defendant Bill Humphrey in conducting said nuisance, with directions, in the language of C. S., 3184, that same be sold in the manner provided by law.

To this judgment Bill Humphrey noted exception, but did not perfect his appeal, and same was dismissed on motion.

Thus it appears that the matters upon which Bill Humphrey sues in this action were presented under the pleadings in the former action and judgment was rendered thereon. In this situation we are of opinion, and so hold, that his recourse, if any, is by motion in the original cause rather than by independent action. Having had a day in court, with opportunity to present his contention, and having failed to perfect his appeal from an adverse judgment, a new action upon the same ground to restrain the execution of the judgment would not lie. There is neither allegation nor contention that the execution is void. His remedy, if any, is by motion in the original action to recall the execution, modify the judgment, or restrain the sheriff. *Davis v. Land Bank, ante,* 145;

Crowder v. Stiers, 215 N. C., 123, 1 S. E. (2d), 353; *Finance Co. v. Trust Co.,* 213 N. C., 369, 196 S. E., 340; *Kistler v. Weaver,* 135 N. C., 388, 47 S. E., 478; *Baxter v. Baxter,* 77 N. C., 118; McIntosh Prac. & Proc., secs. 735 and 861.

In *Finance Co. v. Trust Co., supra,* where an independent action was instituted to restrain an execution sale, it was said by *Barnhill, J.,* speaking for the Court: "The plaintiffs cannot maintain this action as an independent proceeding for two reasons: (1) this is an injunctive proceeding and the plaintiffs have an adequate remedy at law by motion in the cause, and (2) the relief sought must be obtained by motion in the original cause and not by independent action." It was also said in that opinion: "An action is not ended by the rendition of a judgment but is still pending until the judgment is satisfied."

The complaint in this action may not be treated as a motion in the cause, as is sometimes done, for the reason that this action is solely against the sheriff as such, and the plaintiff in the original action is not a party.

The exception to the ruling of the court below in dissolving the temporary restraining order and sustaining defendant's demurrer cannot be sustained. However, the execution will be stayed until the plaintiff shall have had opportunity to enter his motion in the original cause if he so desires.

The judgment below is

Affirmed.

SEAWELL, J., dissenting: The order of sale in this case attempts to confer on the sheriff, a ministerial officer, the judicial function, since it makes him the judge of what property was used "by Bill Humphrey" in conducting the nuisance complained of. Such a power is not only dangerous to the public, but its delegation has been universally condemned as unconstitutional. 16 C. J., 505; *Strickland v. Cox,* 102 N. C., 411, 9 S. E., 414. It makes no difference that it is in the words of the statute. That is a charter for the court and jury, not the sheriff.

Even the Legislature cannot confer on a ministerial executive officer such incompatible powers. Constitution of North Carolina, Article I, section 8; 11 Am. Jur., p. 909, section 207.

The order, or execution, has no more validity than an execution in an action of *detinue,* which requires the sheriff to take from the defendant and deliver to the plaintiff "the property which belongs to him." The order directed to the sheriff is void and the proposed action thereunder is utterly without authority; *Barham v. Perry,* 205 N. C., 428, 171 S. E., 614; and subject to restraint by injunction. *Daniels v. Homer,* 139 N. C., 219, 248 S. E., 237.

In the main opinion it is said that the plaintiff has neither alleged nor contended that the execution is void. In this case the order of execution is embodied in the judgment, and that part which relates to the sale of the property by the sheriff is the part around which the controversy hinges, and the objection, as stated in plaintiff's brief, is that the order leaves to the personal judgment of the sheriff "what might or might not have been used in the way of movable property in the conduct of the nuisance."

No doubt the defendant, in the vernacular, "got what was coming to him." But the precedent might be used to defeat justice in a more meritorious cause.

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

B. F. WELLONS, ADMINISTRATOR OF THE ESTATE OF BILLY JEAN NEWSOM, v. M. B. SHERRIN, D. E. SAPPENFIELD, AND R. C. SAPPENFIELD, INDIVIDUALLY, AND D. E. SAPPENFIELD AND R. C. SAPPENFIELD, PARTNERS, TRADING UNDER THE FIRM NAME AND STYLE OF "JACKSON PARK GRILL."

(Filed 8 May, 1940.)

Negligence § 4a—Allegations held sufficient to state cause against all defendants who maintained open pit on land.

The complaint alleged that the lessor and lessees of a filling station, upon finding out that the septic tank constructed by the lessee on the premises was inadequate, dug a pit on the adjacent lot belonging to one of lessees and connected the said pit with the septic tank, the cost of constructing the pit being borne by all of them, that the open pit was allowed to become filled to a depth of five to eight feet with refuse from the septic tank, that it was not covered or guarded in any manner but was permitted to become hidden by weeds, that the vacant lot on which the pit was maintained was frequented by many people, including a number of children, that the pit was constructed within two feet of the adjacent property line, that intestate's father rented the house on the adjacent premises, moved therein with his wife and six children, including intestate, that no warning was given to intestate's father or mother, that intestate, a child five years old, fell into the open pit and was drowned. Defendant lessor demurred to the complaint on the ground that it failed to state a cause of action as to him. *Held:* The facts alleged are sufficient to state a cause of action against the demurring defendant and the demurrer was properly overruled.

BARNHILL, J., concurring. STACY, C. J., SCHENCK and WINBORNE, JJ., join in concurring opinion.

APPEAL by M. B. Sherrin from *Grady, Emergency Judge,* at September, 1939, Extra Session, of MECKLENBURG. Affirmed.

This is an action for actionable negligence, brought by plaintiff, administrator of the estate of Billy Jean Newsom, against the defendants, landlord and tenants, as joint tort-feasors, for the death of his intestate.

The complaint, in part, is as follows:

"That M. B. Sherrin has caused to be erected on his said lot of land hereinbefore described a gasoline service station, building, store and grill.

"That subsequent to the erection of said service station building, M. B. Sherrin, owner, executed a written lease on said premises to R. C. Sappenfield and D. E. Sappenfield, who operate a business at said location as partners, trading under the firm name and style of 'Jackson Park Grill.' . . .

"That in erecting and equipping the original service station building for occupancy, the said M. B. Sherrin, owner, had installed in said building a water system, together with a septic tank for disposal of waste and sewage, which septic tank was located on the said lot of M. B. Sherrin only a few feet from the building hereinbefore described and alleged.

"That D. E. Sappenfield and R. C. Sappenfield, lessees, entered into possession of said service station building under their lease from M. B. Sherrin, owner of said property, and were in possession of said building on the 16th day of February, 1939.

"That for the period beginning with the year 1933 and up to the present time, D. E. Sappenfield and R. C. Sappenfield have occupied said building continuously under said lease, and operated their business at said location.

"That in the year 1938, the defendants M. B. Sherrin, R. C. Sappenfield and D. E. Sappenfield discovered that the septic tank which had been installed with the water system in the original service station building was unsatisfactory and was failing to carry the refuse and sewage from the lavatory and sewage connections at said location, and was entirely too small adequately to carry away and dispose of said refuse and waste and sewage.

"That upon the discovery that the septic tank at said location was inadequate and too small to carry away the refuse from the sewage and plumbing connections at said location, the defendants M. B. Sherrin, R. C. Sappenfield and D. E. Sappenfield agreed to remedy the defects and inadequacy of the said septic tank as then constructed by laying a pipe line from the said septic tank to the easterly end of the lot owned by the defendant Sappenfield, and at the end of said pipe line to dig a hole, or pit, in the ground about ten feet long and about eight feet wide, and with a depth of about ten to twelve feet, into which hole, or pit, the sewage and refuse from the original septic tank on Sherrin's lot was to be conveyed, which agreement was executed, and the costs and expenses

incident to such extension and construction of said hole, or pit, were borne by the three defendants herein, M. B. Sherrin, R. C. Sappenfield and D. E. Sappenfield.

"That the lot of M. B. Sherrin on which the service station building hereinbefore described is situated, and the vacant lot of the defendant Sappenfield, to which said septic tank was removed, adjoined one another, are located between the two main highways hereinbefore described, and are in a thickly settled residential section where hundreds of children live, congregate and play, and where they have lived, congregated and played for many years, all of which was well known to the defendants, and each of them.

"That the drain pit from the septic tank as hereinbefore described is located within thirty feet of State Highway No. 15, and is a pit, or open hole, about 10 feet long and 8 feet wide and 10 to 12 feet deep, and was on the 16th day of February, 1939, and prior thereto, filled to within two feet of the top with refuse liquid, raw sewage, water and waste from the plumbing connections at said service station building; and that said pit or hole was allowed by the defendants to remain without signal, barricade, top, railing or protection of any kind, and around which pit the defendants had negligently allowed weeds to grow and lap over.

"That said pit, or hole, was dug near to the said State Highway No. 15, as hereinbefore alleged, and also within two feet of the adjoining property line of the premises of a property owner who offered said premises for rent, all of which was well known to the defendants, and each of them.

"That a few days prior to the 16th day of February, 1939, J. C. Newsom, father of plaintiff's intestate, Billy Jean Newsom, rented a house situate on the lot adjacent to the Sappenfield lot upon which the defendants had caused the pit, or hole, hereinbefore described, to be dug and left open; and the said J. C. Newsom moved his family, which family consisted of his wife and six children, including plaintiff's intestate, to the said rented house.

"That neither J. C. Newsom nor his wife, the mother of said children, had any knowledge of the existence of said open pit, or hole, and had no way of ascertaining the danger and hazard caused by said open pit being on the lot adjoining their yard, for that the defendants had allowed weeds to grow up and around said pit, and the defendants, and neither of them, cautioned the mother and father of said children against the danger caused by said open pit, or hole, being situate near to their yard where their children would naturally play; and neither the father nor mother of said children had any warning or notice whatsoever of said dangerous open pit, for that the defendants had erected no barricade that was visible to the eye, had placed no top over said hole, and had given no warning whatsoever of its existence and location.

"That on the 16th day of February, 1939, and prior thereto, the defendants had allowed stagnant water, sewage and waste from the plumbing in said building hereinbefore described, to accumulate in said pit or hole to a depth of some seven to ten feet, and stand open as a dangerous hazard to the lives and safety of the children of the family of J. C. Newsom and his wife, one of whom was plaintiff's intestate, and to other persons in said neighborhood and children in the surrounding homes.

"That the said pit, or hole, hereinbefore described and alleged, was situate on an open lot adjoining the lot on which the defendants' filling station, store and place of business was located; and that on both of said lots many people, including many children of the neighborhood, visited and patronized daily, all of whose lives were menaced by the said open pit, or hole, all of which facts were well known to the three defendants, and each of them.

"That about 4 o'clock in the afternoon of the 16th day of February, 1939, plaintiff's intestate, Billy Jean Newsom, a child less than five years of age, was playing in the yard of the home which his parents had rented, and into which they had moved as a residence.

"That there was no fence dividing the lot on which the residence occupied by the parents of Billy Jean Newsom was situate and the lot owned by the defendant Sappenfield upon which the hole, or pit, hereinbefore described had been dug and left open by the defendants.

"That on the said afternoon of February 16, 1939, J. C. Newsom, the father of Billy Jean Newsom, was away from home and at work in his regular employment; and Frances Newsom, mother of the plaintiff's intestate, Billy Jean Newsom, was at her home attending to her duties as wife and mother.

"That shortly after 4 o'clock on the afternoon of February 16, 1939, Frances Newsom, mother of plaintiff's intestate, Billy Jean Newsom, missed her infant son Billy Jean Newsom from his play and immediately made search to locate him, going to several places in the neighborhood.

"That in the course of about an hour after plaintiff's intestate, Billy Jean Newsom, had been missed from his play, his body was recovered from the pit or hole hereinbefore described, where he had drowned.

"That the death of plaintiff's intestate, Billy Jean Newsom, was caused solely and proximately by the negligence, lack of care and unlawful maintenance of said hole or pit dug and maintained by the defendants on the lot of the defendant Sappenfield, which pit or hole had been allowed by the defendants to fill to a depth of five to eight feet with waste water, sewage and fetid matter from the plumbing of the defendants in the said filling station building and place of business of the defendants on the lot belonging to the defendant M. B. Sherrin.

"That the defendants were negligent, in that (a) they and each of them dug, constructed and maintained the hole or pit hereinbefore described and alleged on the lot belonging to the defendant Sappenfield, and failed to enclose the same with any fence, barricade, or protection whatsoever; in that (b) they dug, constructed and maintained said hole or pit as aforesaid without placing any cover over the same; and that (c) they failed to give any notice, warning, or signal of the location and existence of the said hole or pit; in that (d) they permitted grass and weeds to grow up around the edges of said hole or pit, which rendered it difficult to observe and beware of said pit or hole; in that (e) they failed to notify anybody, and particularly the parents of Billy Jean Newsom, plaintiff's intestate, of the presence and danger and hazard of the said hole or pit; and in that (f) they dug, constructed and maintained a hole or pit eight to ten feet deep on open, level ground, without preparing any safeguards around the same, and then permitted said pit to be filled to a depth of some five to eight feet with water, sewage, fetid matter and other refuse, into which any person falling would surely be drowned."

The prayer set forth the damage. The defendant M. B. Sherrin demurred to the complaint on the ground that "Said complaint fails to state a cause of action against M. B. Sherrin."

The judgment of the court below is, in part, as follows: "Now, therefore, it is considered, ordered and decreed that said demurrer as filed by the defendant M. B. Sherrin is hereby overruled, and the defendant M. B. Sherrin is allowed twenty (20) days from this date in which to file his answer." The defendant M. B. Sherrin excepted and assigned error to the court below overruling the demurrer and appealed to the Supreme Court.

Jake F. Newell and B. F. Wellons for plaintiff.

Sherrin & Barnhardt and Hartsell & Hartsell for defendant M. B. Sherrin.

CLARKSON, J. The defendants D. E. and R. C. Sappenfield, tenants, did not demur to the complaint, the landlord M. B. Sherrin did. The question for our decision is: Did the court below properly overrule the demurrer of M. B. Sherrin, who demurred to the complaint of plaintiff on the ground that it failed to state a cause of action against him? We think so.

The facts succinctly alleged in the complaint are as follows: The defendant M. B. Sherrin, a landlord, owned a filling station located in a thickly settled residential section of Cabarrus County, where hundreds of children lived and played, which he leased to his codefendants Sappen-

field. One of the Sappenfields owned a vacant lot adjacent to the property of the defendant Sherrin. Subsequent to the lease, and upon discovery that the septic tank built with the original plant was inadequate, all of the defendants met on the premises and agreed to enlarge the plant by digging a large pit on the land owned by Sappenfield and to connect with the original plant. The defendant Sherrin and both his codefendants Sappenfield shared equally the costs of the extension and excavation of the pit, and upon completion left the same uncovered, unprotected and concealed by weeds, without warning, and allowed to fill with water, sewage and other waste liquids. A few days before 16 February, 1939, while this condition existed, plaintiff's intestate, together with his parents, moved into a vacant house immediately adjacent to the lot upon which the unenclosed pit existed, and on said 16 February, 1939, while at play, the child, plaintiff's intestate, fell into the pit and was drowned. No member of the family of plaintiff's intestate had any knowledge or warning beforehand of the existence of the open pit.

In *Knight v. Foster,* 163 N. C., 329 (332), the following is stated: "Where dilapidated premises are leased in a ruinous condition, known to the landlord, and such condition causes the use of public highways and thoroughfares in populous cities to become unsafe and insecure, and the landlord knows of the conditions and suffers them to continue, both the landlord and tenant are tort-feasors, and may be sued jointly or severally. *Ahern v. Steele,* 115 N. Y., 202, is an instructive case in which the authorities as to the liability of landlord and tenant to third parties are collected and differentiated. It is there held, citing Wood's Landlord and Tenant, 230, 'If a nuisance existed upon the premises at the time of the demise, the landlord as well as the tenant is liable for the damages resulting therefrom.' " Annotated 50 L. R. A., New Series, 286.

In *Boyd v. R. R.,* 207 N. C., 390, the following is cited with approval: "A judgment of nonsuit was reversed in *Starling v. Cotton Mills,* 168 N. C., 229, 84 S. E., 388. In that case the plaintiff's intestate, a boy six years of age, fell into a reservoir on the defendant's premises, and was drowned. The defendant had caused a fence to be constructed around the reservoir, but had failed to keep the fence in repair. Plaintiff's intestate crawled through a hole in the fence and fell into the reservoir. There was evidence tending to show that plaintiff's intestate and other children had been accustomed to play about the reservoir, and that the defendant knew of this custom, and because of this custom had caused the fence to be erected for the protection of the children. In the opinion in that case it is said: 'It does not admit of debate that the fact that such a dangerous place was unguarded by a secure fence, where children of that age were allowed to play, was culpable negligence on the part of the officers of the defendant. The very fact that a fence has been put

up of itself shows that these authorities were aware of the danger. To permit it to become dilapidated was negligence.'" *Brannon v. Sprinkle,* 207 N. C., 398.

In *Wilson v. Dowtin,* 215 N. C., 547 (550), is the following: "The general and basic rule is that when third parties are injured as the result of any defective condition in leased premises he may have recourse against the lessee, but not against the lessor. *Williams v. Strauss,* 210 N. C., 200, 158 S. E., 252; *Combs v. Paul,* 200 N. C., 382, 157 S. E., 12. The liability may, however, be extended to the landlord or owner—(a) When he contracts to repair; (b) where he knowingly demises the premises in a ruinous condition or in a state of nuisance; (c) where he authorizes a wrong. 1 Jaggard Torts, 223; 5 Dillon Mun. Corp. (5th Ed.), 3028; 36 C. J., 208; *Knight v. Foster,* 163 N. C., 329."

In Thompson on Real Property (4th Ed.), (1940), part sec. 1555, p. 23, we find (citing the *Wilson case, supra*): "So, as a general rule, a third person who is injured as a result of the defective leased premises may have recourse against the tenant but not against the landlord, but a landlord who contracts to repair, or knowingly demises the premises in a ruinous condition, he may be held liable to such third person. . . . (p. 26) The landlord is liable, however, where he has leased the premises with a nuisance upon them. . . . (sec. 1581, p. 71) A person injured on leased premises may bring a joint action against the landlord and tenant for injuries alleged to have resulted from their joint negligence. (p. 72) 'It is settled law that where the owner lets premises which are in a condition which is unsafe for the avowed purpose for which they are let, or with a nuisance upon them when let, and receives rent therefor, he is liable whether in or out of possession, for the injuries which result from their state of insecurity to persons lawfully upon them; for by the letting for profit he authorized a continuance of the condition they were in when he let them, and is, therefore, guilty of misfeasance.'" *Gaither v. Generator Co.,* 121 N. C., 384.

N. C. Code, 1939 (Michie), sec. 4426 (c), is as follows: "It shall be unlawful for any person, firm or corporation, after discontinuing the use of any well, to leave said well open and exposed; said well, after the use of same has been discontinued, shall be carefully and securely filled: Provided, that this shall not apply to wells on farms that are protected by curbing or board walls. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, in the discretion of the court." This section is said to be a sensible regulation in 1 N. C. Law Rev., p. 300.

In the present action it is specifically alleged that "They and each of them dug, constructed and maintained the hole or pit hereinbefore described and alleged on the lot belonging to the defendant Sappenfield,

and failed to enclose the same with any fence, barricade, or protection whatsoever."

For the reasons given, the judgment of the court below overruling the demurrer of M. B. Sherrin is

Affirmed.

BARNHILL, J., concurring in the result: The complaint discloses that the condition about which the plaintiff complains did not exist on property belonging to the defendant Sherrin. He was not the lessor thereof. Consequently, *Knight v. Foster,* 163 N. C., 329, 79 S. E., 614; *Wilson v. Dowtin,* 215 N. C., 547, 2 S. E. (2d), 576, and other cases cited which discuss the liability of a landlord who demises premises in a ruinous condition are not authoritative and have no bearing upon the question here presented. Nor is it alleged, either directly or indirectly, that the provisions of C. S., 4426, have been violated by the defendant.

In the argument here counsel admitted that the plaintiff is not relying on the attractive nuisance doctrine. The allegations in the complaint would not sustain such contention. It follows that the discussions in the opinions in *Boyd v. R. R.,* 207 N. C., 390, 177 S. E., 1; *Starling v. Cotton Mills,* 168 N. C., 229, 84 S. E., 388; and *Brannon v. Sprinkle,* 207 N. C., 398, 177 S. E., 114, do not tend to sustain the complaint nor justify the conclusion that a cause of action is therein set out.

It is alleged that the defendant Sherrin, together with the defendants Sappenfield, constructed and are maintaining the pit, which is described in the complaint, on premises belonging to the defendants Sappenfield for the joint benefit of all the defendants; that this pit is concealed or hidden by weeds and other growth; that it is constructed within 2 feet of the unprotected property line of the property occupied by the deceased and other members of his family; that there were six small children in the family of the deceased, who was five years of age; that the property is located in a thickly settled residential section; that small children are accustomed to play on the vacant premises on which the pit is located; that the defendant knew or, in the exercise of ordinary care, should have known that such children were accustomed to play on the lot and that their safety and lives were menaced by the open pit or hole which was hidden by weeds and other growth and around which no fence or other protection was placed and of which no warning was given.

In my opinion these allegations are sufficient to constitute a cause of action. If the defendant Sherrin was in fact at the time participating in the maintenance of the pit or hole located on the premises of the defendants Sappenfield and the plaintiff offers evidence tending to support the other allegations, then it is for the jury to say whether, in the exercise of ordinary care, it was his duty to provide protection by fence

or other devices and to give warning of the danger incident to the existence of the pit. I concur in the view that the judgment below should be affirmed.

STACY, C. J., SCHENCK and WINBORNE, JJ., join in this opinion.

MRS. CARRIE LEWIS SIMPSON v. THE AMERICAN OIL COMPANY AND BOON-ISELEY DRUG COMPANY.

(Filed 8 May, 1940.)

1. Sales § 17—

Where a manufacturer of an insecticide prints on the container designed for sale to the ultimate consumer statements that the product is not poisonous to human beings, such statement, since it is made for the purpose of inducing the purchase of the article, constitutes a warranty from the manufacturer to the consumer, and the consumer may maintain an action against the manufacturer for breach of such warranty.

2. Sales § 14—

Evidence that insecticide manufactured for use as a spray indoors resulted in inflammation, boils and sores on the body of plaintiff where the substance touched her body when she used the spray as directed, is sufficient to show that the insecticide was "poisonous" as to the plaintiff within the meaning of that term as used in the manufacturer's warranty.

3. Election of Remedies § 1—

If defendant deems that plaintiff is attempting to recover on two inconsistent theories of liability, defendant must move that plaintiff be required to make his election.

4. Damages § 13—

Plaintiff alleged a cause of action in contract and in tort to recover for personal injuries alleged to have been caused by an insecticide manufactured by defendant. The charge of the court on the issue of damages *is held* to contain prejudicial error in being susceptible to the construction that the damages sustained might be found separately under the issue of negligence and under the issue of breach of warranty, and added together, thereby permitting two recoveries for one injury.

CLARKSON, J., concurring.

APPEAL by defendant American Oil Company from *Williams, J.*, at January Term, 1940, of WAKE. New trial.

(During the course of the trial a voluntary nonsuit was taken as to the defendant Boon-Iseley Drug Company.)

The plaintiff brought action against the American Oil Company and Boon-Iseley Drug Company to recover for injuries which she alleges she

received from the poisonous effect of an insecticide, the spray of which had settled upon various portions of her person and had caused inflammation, pustules and boils of a serious and recurrent nature.

Plaintiff complained that her eyesight was affected, permanent organic injuries had resulted, a serious nervous condition brought on, with occupational loss and mental anguish.

Defendants denied the substantial allegations of the complaint, maintained that the preparation manufactured by the defendant Oil Company and sold by the defendant Drug Company was nontoxic as far as humans were concerned, and did not produce the condition complained of, and averred that plaintiff's condition, whatever it was, was not the result of any negligence or want of duty, contractual or otherwise, on their part.

The plaintiff's evidence tended to show that she had purchased of the defendant Boon-Iseley Drug Company a can of insecticide, or insect eliminant, distributed by the defendant American Oil Company under the trade-name "Amox," upon which the following statements and guarantees were printed: "For Best Results use *Amox* hand Sprayer—How to Use Amox—The 100% Active Insecticide. Amox is made for the purpose of killing insects, it is not poisonous to human beings, but is sure death to insects. Amox Liquid Spray is non-poisonous to human beings, but is not suited for internal use. Do not spray on food or plants. Note with all its insect killing power Amox may be used freely indoors."

That plaintiff on the day of the purchase, after having carefully read the instructions, proceeded in accordance therewith and sprayed her studio at No. 110½ Fayetteville Street, in the city of Raleigh, with the insecticide, spraying the furniture and under the mantel; that it was intensely warm at that time and plaintiff was thinly clad, and in the process of spraying a small portion of the spray came in contact with her body, especially upon her shoulders, bust and breast; that on the next day she became nauseated and felt suffocated, and collapsed in the midst of a music rehearsal, trembling and perspiring to such an extent that large drops covered her body. This recurred the next day, and almost immediately thereafter she began to have an itching and burning sensation on her chest and bust, and, upon examination, she found that her body had become inflamed and red, and on the next day boils and sores manifested themselves over her whole bust. Plaintiff sought medical advice but grew rapidly worse, the sores and boils increasing in intensity for many weeks, until finally her eyes became affected and the tissues surrounding them became greatly swollen. There was much further evidence as to the condition of the plaintiff, both physically and mentally, which she attributed to the effect of the insecticide which she had used. Mrs. Simpson's testimony was corroborated by her husband, Frank B. Simpson.

Dr. Michael Bolus, a skin specialist, corroborated Mrs. Simpson as to her symptoms and condition, and further testified that he had tried a number of infectious substances upon her, from which he got no reaction, but did try Amox and got reaction; that the Amox test was that which was generally employed for purposes of that kind. It indicated that she was sensitive to Amox, or, rather, that Amox was poisonous to her. Pursuing his investigation, he tested a number of persons at the State's Prison, including a doctor, two nurses and two orderlies, all of whom reacted to the Amox.

On cross-examination he testified that in the test on Mrs. Simpson he was looking for an allergy or hypersensitiveness and found that she was very sensitive to Amox; that she reacted worse to it than did the five men he had tested. He further testified that a volatile substance like Amox would probably evaporate if not covered before reaction took place. This witness testified extensively upon the subject of allergy and allergic sensitivity to various substances.

L. V. Kiger and John P. Wood, witnesses for plaintiff, corroborated Mrs. Simpson as to her collapse in the studio.

W. W. Hinnant testified that he operated the Atlantic Tobacco Company in Raleigh, which company handled Amox, which was purchased from American Oil Company. He sold the Boon-Iseley Drug Company a lot on 26 April, 1937. It was packed in 12 dozen six-ounce cans, six dozen pints and six dozen quarts. It was sold in the same container in which it was received, that is, it was sold to Boon-Iseley Drug Company in the original case just as it came from the American Oil Company.

Photographs of the body of Mrs. Simpson were exhibited.

R. I. Blackwell, owner of Boon-Iseley Drug Company, testified that he purchased the box of Amox from the Atlantic Tobacco Company, all at one time. All the Amox he had in stock came from the Atlantic Tobacco Company. This witness identified a number of prescriptions from various physicians for skin lotions to be used by Mrs. Simpson and testified that it might have been used for eczema, which the evidence tended to show had been for some time on the plaintiff's ankle.

At the conclusion of the plaintiff's evidence, the defendant moved for judgment as of nonsuit, which motion was overruled, and defendant excepted.

The defendant introduced evidence in rebuttal, Dr. C. C. Carpenter testifying that he had sprayed Amox on 62 students at Wake Forest College, spraying the Amox on the naked arms, after which the sleeves were rolled down and the students went on in their usual manner as if nothing had happened, and then made observations at the end of twenty-four and forty-eight hours, and observed no harmful effects whatever.

The arm was sprayed on the inner surface because it was the normal, sensitive, tender area and the clothing could well drop over it in a convenient way. Witness was of the opinion that the Amox was not in any way harmful to the human being, basing this on his own experience with the material. He did not interpret the word "poisonous" as applicable to Amox.

The defendant renewed his motion for judgment of nonsuit at the end of all the evidence and the motion was overruled, and defendant again excepted.

Upon the verdict, the court signed a judgment for $5,000, from which the defendant appealed, assigning errors.

Douglass & Douglass and John W. Hinsdale for plaintiff, appellee.
Ruark & Ruark for defendant American Oil Company, appellant.

SEAWELL, J. 1. We do not regard the exceptions to the admission of evidence as meritorious, and refrain from detailed expression of opinion in that connection.

2. The more serious challenge which the defendant makes to the plaintiff's position in this appeal is to the submission of the first issue relating to the supposed warranty of the manufacturer and distributors in the sale of the product "Amox," and the charge of the judge relative thereto, in which he finds such warranty might exist.

The printed matter on the can of Amox described it as "100% active insecticide," and recommends its use in a hand sprayer, from which, of course, in the nature of things, it is expected to commingle freely with the atmosphere of the room in which it is used for at least an extensive space.

It is further stated that "Amox is made for the purpose of killing insects, it is not poisonous to human beings, but is sure death to insects." "Amox Liquid Spray is non-poisonous to human beings, but is not suited for internal use. Do not spray on food or plants." "Note with all its insect killing power Amox may be used freely indoors."

We are not disposed to entertain medico-legal technicalities on the definition of the word "poisonous" or the word "poison." It has a popular as well as, perhaps, a technical significance. Not conceding that the technical significance would not cover a substance the contact of which would produce violent alterations in the cell structure, normal metabolism and healthy functioning of any portion or organ of the body, including the skin, we may easily understand that when the word appears as a label upon products intended for popular consumption and use, it has its popular significance. In Funk & Wagnall's Dictionary "poison" is defined as "any substance that when taken into the system acts in a

noxious manner by means not mechanical, tending to cause death or serious injury to health." Century Dictionary: "Any substance which by reason of an inherent deleterious property tends to destroy life or impair health when taken into the system." No one would deny that the toxic properties of poison ivy or poison sumac brought into the system by external contact with the skin, constitute poison in this popular sense, and we do not doubt in strict medical terminology.

Featuring prominently in this case are the doctrines of warranty and of negligence. As to the first, it is argued by appellant that this case is controlled by *Thomason v. Ballard & Ballard Co.*, 208 N. C., 1, 179 S. E., 30. But the situation in this case is somewhat different from that in the *Ballard case, supra,* and the distinction in the facts involved is sufficient to mark a distinction also in principle. In that case the Court had nothing before it but the sale of a food product by the wholesale dealer to the retail dealer, with such implications as might arise from that transaction. The Court simply held that the purchaser from the retail dealer was neither party nor privy to the contract between the vendor and vendee and, therefore, could not avail himself of any warranty that may have existed between them. This was by no means an intimation that the original manufacturer and distributor might not warrant his product to the ultimate consumer in such a way as to make a breach of that warranty actionable.

Here we have written assurances that were obviously intended by the manufacturer and distributor of Amox for the ultimate consumer, since they are intermingled with instructions as to the use of the product; and the defendant was so anxious that they should reach the eye of the consumer that it had them printed upon the package in which the product was distributed. The assurances that the product as used in a spray was harmless to human beings while deadly to insects was an attractive inducement to the purchaser for consumption, and such purchase in large quantities was advantageous to the manufacturer. We know of no reason why the original manufacturer and distributor should not, for his own benefit and that, of course, of the ultimate consumer, make such assurances, nor why they should not be relied upon in good faith, nor why they should not constitute a warranty on the part of the original seller and distributor running with the product into the hands of the consumer, for whom it was intended. Upon the evidence in this case, it must be so regarded.

3. After having proceeded upon the theory of negligence, the plaintiff was permitted to amend her pleading and pursue the warranty. We need not consider here whether the two theories are incompatible. No motion was made by the defendant that the plaintiff be required to elect between them. *Quære* whether the subsequent allegation of injury be-

cause of breach of warranty might not have had the effect of such election.

But the trial judge gave an instruction in this connection which we cannot sustain. Following his instructions on the first and second issues, relating respectively to warranty and negligence, and addressing himself to the issue of damages, he said: "If you answer both the first and second issues 'Yes,' then you will add to that sum of money which you may find under the rule just laid down such as you may find under the rule first stated." Reading the instructions to which this observation refers, we think the jury might have inferred that they would be permitted to find separate damages as to each of these issues and add them together in answer to the issue as to damages.

The plaintiff is seeking recovery for one damage sustained as a consequence of her injury and is, of course, entitled to no more.

We think this instruction erroneous, and there must be a

New trial.

CLARKSON, J., concurring: I concur in the able and well written opinion of *Mr. Justice Seawell.* The opinion refers to *Thomason v. Ballard & Ballard Co.,* 208 N. C., 1. I wish to reiterate here a part of my dissent in that case: "The weight of authorities, I think, holds that an implied warranty will lie in cases such as the case at bar. In 26 C. J., 785, it is said: 'It is generally agreed by the authorities that a manufacturer, packer, or bottler of foods or beverages is directly liable to a consumer for an injury caused by the unwholesomeness or the unfitness of such articles, although purchased from a dealer or middleman and not from such manufacturer, bottler, or packer.' The modern doctrine is stated in 11 R. C. L., 1122, as follows: 'In the case of food sold in cans, bottles, and sealed packages, some of the earlier decisions denied the right of the consumer to recover from the manufacturer, it appearing that the goods were purchased through the medium of a retail dealer. . . . A great majority of the more recent cases, however, hold that the ultimate consumer of products sold in cans or sealed packages may bring his action direct against the packer or manufacturer.' 17 A. L. R., 688; 39 A. L. R., 995; 63 A. L. R., 343; 88 A. L. R., 531; *Dothan-Chero-Cola Co. v. Weeks,* 80 So., 734 (Ala.); *Davis v. Van Camp Packing Co.,* 176 N. W., 382 (Iowa); *Parkes v. C. C. Yost Pie Co.,* 144 Pac., 202 (Kan.); *Meshbessher v. Channellene Oil Co.,* 119 N. W., 428 (Minn.); *Chesnault v. Houston Coca-Cola Bottling Co.,* 118 So., 177 (Miss.); *Tomlinson v. Armour,* 70 Atl., 314 (N. J.); *Nock v. Coca-Cola Bottling Works of Pittsburgh,* 156 Atl., 537 (Pa.); *Mazetti v. Armour,* 135 Pac., 633 (Wash.). . . . As pointed out in *Ward Baking Co. v. Trizzino,* 161 N. E., 557 (Ohio), there is no doubt that an implied warranty

arises between the groceryman who makes the purchase and the manufacturer. The groceryman did not make the purchase for himself, but for his customers, who are the ultimate consumers. The groceryman is merely the distributing agent, he has no opportunity to make an inspection of a sealed package and the manufacturer is fully aware of that fact. The contract between the manufacturer and the retailer is one for the benefit of a third party, the ultimate consumer. If there is any implied warranty between the manufacturer and the retailer, and there is no conflict of decisions on that point, then it is for the benefit of the third party, the ultimate consumer. Therefore, I fully agree with the holding in *Ward Baking Co. v. Trizzino, supra,* that an implied warranty for the benefit of an ultimate consumer of a food product can be relied upon by such ultimate consumer against its maker, who supplied it to the store for resale to the public, upon the ground that 'there is imposed the absolute liability of a warrantor on the manufacturer of articles of food, in favor of the ultimate purchaser, even though there are no direct contractual relationships between such ultimate purchaser and the manufacturer.' It is of the greatest importance to the health of the general public that when they purchase food or drink it should be pure, wholesome, and fit for use. It is a hard measure and almost impossible to prove negligence and by weight of authorities, this rule under modern conditions is fastly growing obsolete. The true rule, in more recent decisions, is that there is an implied warranty from the manufacturer to the consumer, the general public, where there is no opportunity to inspect, that the food or drink is pure, wholesome, and fit for consumption."

HARRY VENABLE v. AMERICAN EXPRESS COMPANY AND RAILWAY EXPRESS AGENCY, INC.

(Filed 8 May, 1940.)

1. Bills and Notes § 6—

A travelers' cheque not signed or countersigned by the purchaser or holder is not a negotiable instrument, since it is not an unconditional promise to pay to the order of a specified person or bearer, the promise to pay being conditioned upon the cheque being countersigned with the signature appearing at the top of the cheque. C. S., 2982.

2. Bills and Notes § 9f—Purchaser of blank travelers' cheque may not recover thereon free from equities.

The evidence tended to show that plaintiff in good faith accepted travelers' cheques in payment for services rendered, which cheques were undated and were not signed or countersigned by the purchaser or holder,

that the cheques were some of the cheques which defendant had sent to a bank for sale, and that the bank had become insolvent and closed its doors and had never accounted to defendant for the blank travelers' cheques in its possession. *Held:* Even conceding that plaintiff purchased the cheques in good faith and for value, plaintiff is not entitled to recover thereon, since the blank cheques are not negotiable instruments, and defendant's motion to nonsuit was properly granted.

APPEAL by plaintiff from *Johnston, Special Judge,* at September Term, 1939, of MECKLENBURG. Affirmed.

From judgment of nonsuit rendered at the close of the evidence, the plaintiff appealed.

Hiram P. Whitacre and B. Irvin Boyle for plaintiff, appellant.
Cansler & Cansler for defendant, appellee.

DEVIN, J. This appeal presents the question of the liability of the defendant American Express Company upon certain travelers' cheques issued by it, which came into the possession of the plaintiff and were presented for payment without signature or countersignature of the purchaser.

The pertinent facts, as shown by the evidence adduced in the trial below, may be stated as follows: The defendant American Express Company, prior to December, 1926, sent to the Charlotte Bank & Trust Company for sale to its customers numbers of printed travelers' cheques bearing only the signature of defendant's treasurer. These cheques, all of like tenor, conformed to the following exhibit:

"U. S. Dollar Travelers Cheque — D. 788,170 —
When Countersigned below with this signature — Before Cashing write here City and Date.
....19.....

AMERICAN EXPRESS COMPANY
At Its Paying Agencies

Pay this cheque from our
Balance to the Order of.....$100.00.

In United States — :In All Other Countries :—At Current Buying Rate—
One Hundred Dollars — :For Bankers' Cheque on :New York.

Countersign Here in
Presence of Person Cashing.

..... (Signed) Jas. F. Fargo, Treasurer

This cheque is redeemable only at the company's offices and bankers in the United States."

These cheques when sent to the Charlotte Bank were enclosed in covers on which were printed instructions for the seller, requiring, among other things, that the purchaser's application be filled out for every sale of travelers' cheques and signed showing the address of the purchaser, also that "purchasers must immediately sign their names in the space provided in the upper portion of the cheques only, leaving blank all other spaces, including that for countersignature provided in the lower part, until cheques are presented for payment."

In December, 1926, the Charlotte Bank & Trust Company closed its doors on account of insolvency and a receiver was appointed. Travelers' cheques, in indicated amounts of more than four thousand dollars, which had been sent to the Charlotte Bank, were never returned to the Express Company or in any way accounted for.

On 25 June, 1938, the plaintiff Venable presented to the defendant certain of these travelers' cheques, the numbers thereon corresponding with those which had been originally sent the Charlotte bank, and demanded payment. These aggregated $1,800 in indicated value, and were contained in four books of ten cheques each enclosed in covers with the above quoted printed instructions thereon. All of these cheques were undated, and were without signature or countersignature of purchaser or holder. Payment was refused.

The plaintiff testified that these cheques were given him by one John Waldruff in payment for personal services rendered Waldruff extending over a period of several years. It appeared that Waldruff, a painter and paper hanger, had suffered a stroke of paralysis, and finally died in the County Home, 22 June, 1938. The cheques were delivered to plaintiff by Waldruff shortly before he died. Plaintiff was shown to be a man of good character.

The plaintiff sought recovery on these cheques on the ground that the cheques were intended by the defendant to take the place of currency, to pass as money, and to provide an international exchange; that these printed instruments, while *sui generis,* possessed certain characteristics of bills of exchange, and that according to the negotiable instruments statutes the plaintiff was a holder for value, that he took the cheques in good faith and for value, without notice of any infirmity, and was therefore *prima facie* a holder in due course, unaffected by the failure of the bank to account to the Express Company. Plaintiff contended that it was not essential to the negotiability of the instruments that they be signed or countersigned by the purchaser.

In support of these contentions plaintiff cited the recent case of *American Express Co. v. Anadarko Bank & Trust Co.,* 179 Okla., 606. In that case travelers' cheques, in the same form as here, were stolen from a bank to which they had been sent for sale by the American

Express Company. At the time of the robbery the cheques were unsold and unsigned. When presented for payment, subsequently, in another state, a name was signed in the upper space on the cheque and countersigned by like signature in the lower space. It was held that the Express Company was liable to the *bona fide* purchaser and holder.

It is apparent that the facts in the instant case differ from those upon which the decision in the Oklahoma case was based. Here the cheques came to the plaintiff in their original form, undated, unsigned, uncountersigned, still covered by enclosures showing the printed instructions of the Express Company.

The legal effect of the possession of travelers' cheques, which did not bear the signature or countersignature of the purchaser, has been considered by courts in Texas, Michigan and New York. *City National Bank of Galveston, Texas, v. American Express Co.,* 16 S. W. (2d), 278; *Same case,* 7 S. W. (2d), 886; *Samberg v. Am. Express Co.,* 136 Mich., 639, 99 N. W., 879; and *Sullivan v. Knauth,* 220 N. Y., 216. In the last case the cheques, which had been sold to the plaintiff and which bore his signature in the upper space, were lost or stolen. They were subsequently paid by the defendant to other than the purchaser, upon a forged countersignature. Holding the defendant liable to the plaintiff, the original purchaser, the Court said: "While the requirement of a countersignature on the check was some protection to the purchaser of the same, it was a primary protection to the defendants, as their promise to pay arose when its check was countersigned 'below with the opposite (genuine) signature which must conform with the above signature.' "

In the Texas case blank cheques had been stolen from a bank in another state. When cashed the blank spaces had been filled in. The Express Company was prevented from showing that at the time they were stolen from the bank the spaces were unfilled. In reversing the trial court it was held that this testimony, if believed, would have established a complete defense for the Express Company.

In the Michigan case, considering a traveler's cheque, the Court used this language: "The Company has the right to refuse to pay when the check does not bear the countersign agreed upon."

In Ogden Negotiable Instruments (4th Ed.), at page 480, the author states the principle as follows: "A traveler's check is a negotiable instrument upon which the holder's signature must appear twice in order to be a complete instrument. It is issued by a bank to a holder who must place his signature upon the instrument at the time it is issued, and the instrument must be countersigned by the holder before it is paid. Checks of this character have come into very general use, especially by travelers. They are an ingenious, safe and convenient method by which the traveler may supply himself with funds in almost all parts of the civilized world

without the hazard of carrying the money on his person. The bank or company issuing the instrument has the right to refuse to pay it when it does not bear the countersign agreed upon."

An examination of the wording on the checks presented by the plaintiff for payment in this case leads to the conclusion that these instruments, without signature of purchaser, name of payee, or countersignature, do not come within the definition of negotiable instruments (C. S., 2982), in that they are not unconditional promises to pay, nor are they payable to the order of a specified person or to bearer, and hence are incomplete. *Johnson v. Lassiter,* 155 N. C., 47, 71 S. E., 23; *Hunt v. Eure,* 188 N. C., 716, 125 S. E., 484. For the protection of the purchaser as well as for the protection of the Express Company, it is made to appear that "when countersigned below with this signature," that is, with the same signature as that appearing in the upper space, the check will be paid.

We conclude that the court below has correctly ruled that the evidence offered is insufficient to make out a case of liability on the part of defendant for the cheques sued on, and that the judgment of nonsuit must be

Affirmed.

SARAH ASHKENAZI, BY HER NEXT FRIEND, MRS. SOFIA ASHKENAZI, v. NEHI BOTTLING COMPANY.

(Filed 8 May, 1940.)

Negligence § 19a—Evidence of negligence resulting in explosion of bottle containing soft drink held sufficient.

The evidence tended to show that a bottle of Royal Crown Cola, purchased from a retailer to whom defendant manufacturer had sold same, exploded and injured plaintiff while she was carrying same to her mother to be opened. A witness for plaintiff testified that about five months prior to the injury in suit a bottle of Royal Crown Cola, prepared by defendant, exploded in the witness' ice box and cut the witness' finger. Another witness testified that about a month before the injury in suit two bottles of Royal Crown Cola exploded while defendant's salesman was placing them in his ice box. Defendant's president and general manager testified on adverse examination that he knew that if bottles were hot and were placed in cold water with syrup in them they would explode, and that bottles had exploded on the machine ever since he had been bottling them. *Held:* Plaintiff's evidence tended to show that other bottles prepared by defendant exploded under substantially similar circumstances and within reasonable proximity in time, and defendant's motion to nonsuit was properly overruled.

BARNHILL, J., dissenting.

WINBORNE, J., concurs in dissent.

ASHKENAZI *v.* BOTTLING CO.

APPEAL by plaintiff from *Sink, J.*, at February Term, 1940, of MECKLENBURG.

Ralph V. Kidd and Uhlman S. Alexander for plaintiff, appellant.
J. Laurence Jones for defendant, appellee.

SCHENCK, J. This is a civil action by an ultimate consumer to recover of a bottler damages resulting from the explosion of a bottle of Royal Crown Cola. At the conclusion of the plaintiff's evidence the court sustained defendant's motion for judgment as in case of nonsuit, C. S., 567, and from judgment accordingly, the plaintiff appealed, assigning error.

There was sufficient evidence to establish that while the plaintiff was carrying a bottle of Royal Crown Cola, which had been bottled and sold by the defendant to a merchant, who in turn had sold it to her sister, the bottle exploded and injured the plaintiff.

The sole question presented by the exceptions and briefs filed is whether there was sufficient evidence of other instances of bottles bottled by the defendant exploding under "substantially similar circumstances and reasonable proximity in time" to bring the case within the principles enunciated in *Dail v. Taylor,* 151 N. C., 285; *Cashwell v. Bottling Works,* 174 N. C., 324; *Perry v. Bottling Co.,* 196 N. C., 175; *Enloe v. Bottling Co.,* 208 N. C., 305.

The allegation is, and the evidence tends to prove, that the bottle exploded in the hands of the plaintiff on 21 September, 1939, and cut and injured her face.

The witness Camp testified in effect that in the month of April, 1939, he was gathering up Coca-Cola bottles from an ice box, in Cherryville, Gaston County, and that under the Coca-Cola bottles there was a crate of Royal Crown Cola, and as he reached down to pick up a Coca-Cola bottle a Royal Crown Cola bottle exploded and cut his finger.

The witness Sharpe testified in effect that one day in August, 1939, while the salesman of the defendant was placing Royal Crown Cola in his ice box in Charlotte, two of the bottles exploded, and scattered glass.

The testimony of A. B. Fitzgerald, taken on adverse examination by the plaintiff, was introduced in evidence and was to the effect that he was president and general manager of the defendant corporation, and had been since its formation in 1925, and he knew that if bottles were hot and were put in cold water with syrup in them they would explode—too drastic a change of temperature would make them explode on the machine. "They have exploded on the machine ever since I have been bottling." "The general conditions under which we manufacture, bottle and distribute the beverage known as Royal Crown Cola in Mecklenburg

County have not changed any in the last four years, and we are using the same methods of preparation and bottling that we used in the last four years."

We are of the opinion, and so hold, that this evidence when construed in the light most favorable to the plaintiff, as it must be upon demurrer thereto, is sufficient to carry the case to the jury, and that the court erred in granting the motion for and entering a judgment as in case of nonsuit.

Reversed.

BARNHILL, J., dissenting: The plaintiff has failed to offer any evidence of other instances of bottles exploding under "substantially similar circumstances." The plaintiff took up a bottle of Royal Crown Cola which was in her home. While she was carrying it to her mother to be opened it exploded. This alone is not evidence of negligence and there is no explanation in the evidence as to what caused the bottle to explode. If the plaintiff has failed to offer evidence that bottles manufactured and put on the market for sale by the defendant at approximately the same time exploded under substantially similar circumstances there is no evidence of negligence.

Witness Camp testified that in gathering Coca-Cola bottles he went to the grocery store of one McCord, reached underneath the ice box where there was a crate containing 24 bottles of Royal Crown Cola; that an empty Coca-Cola bottle was lying on top of the case of Royal Crown Colas; that one of the bottles of Royal Crown Cola exploded but that he did not know whether in getting the Coca-Cola bottle he struck the other bottle or not. The explosion of this bottle was under substantially different circumstances than the incident of which the plaintiff complains.

The witness Sharpe testified that a Royal Crown Cola salesman came to his place of business and proceeded to put Royal Crown Cola in the ice box which contained soft drinks for the use of his customers; that he was five or ten feet from the box; that as the salesman was putting bottles in the ice box he heard an explosion; that upon investigation he found that two Royal Crown Cola bottles were broken; that on a former occasion another bottle exploded while the salesman was putting the bottled drinks in the ice box; and that he did not know whether the salesman struck the bottles he had in his hand against others or not. These are not similar instances.

The manager of the defendant corporation testified that if bottles are hot and are put in cold water with syrup in them they will explode; that a drastic change in temperature will cause an explosion. There is no evidence that the bottle which plaintiff had was subjected to a

drastic change of temperature or that it, while hot, was put in cold water. The manager further testified that bottles in the manufacturing plant on the machine would, at times, explode. Certainly a bottle actually on the machine being cleansed, filled and capped, is not being handled in a manner similar to that in which the plaintiff was handling the one she had.

For the reasons stated I am unable to agree that the court below committed error in granting the motion to dismiss as of nonsuit.

WINBORNE, J., concurs in this opinion.

MRS. MARGARET M. BROWN, WIDOW OF ALFRED W. BROWN, DECEASED, v. CARRIE L. McLEAN, ADMINISTRATRIX D. B. N., C. T. A., OF THE ESTATE OF ALFRED W. BROWN, DECEASED.

(Filed 8 May, 1940.)

Dower § 2c: Executors and Administrators § 16—Where encumbered land is sold without bringing surplus, widow's claim of value of dower against her husband's estate has no priority.

Where a wife joins with her husband in executing a mortgage or deed of trust on lands she thereby conveys her dower right as security for the debt, and while she has the right upon foreclosure after her husband's death to require the mortgagee to first sell the two-thirds of the land not embraced in the dower and the reversion thereof and if it does not bring an amount sufficient to pay the debt to file a general claim against the estate for the balance, and to sell the dowerable land only if pro rata payment out of the estate is insufficient to pay the debt in full, and even when she does not so protect her dower interest she is entitled to priority in the surplus after foreclosure, when she permits the mortgage or deed of trust to be foreclosed without protecting her dower right and the land brings only a sum sufficient to pay the mortgage debt, her claim no longer retains the status of dower, but she is in the position of a surety whose property has been sold to satisfy the debt of the principal, and her claim for the value of her dower in the encumbered land is a general claim against her husband's estate and has no priority.

APPEAL by plaintiff from *Sink, J.*, at First March Term, 1940, of MECKLENBURG. Affirmed.

Controversy without action to determine the rights of the plaintiff, widow, in the proceeds of a sale to make assets to pay debts.

Alfred W. Brown, husband of the plaintiff, died testate, seized and possessed of several parcels of land. Plaintiff dissented and claimed her statutory interest in his estate.

Several of the parcels of land of which the testator died seized and possessed were encumbered by mortgages or deeds of trust in which the plaintiff had joined her husband as a grantor, thereby conveying her dower interest as security for the respective debts. These liens have been foreclosed. Neither parcel so foreclosed brought any surplus in excess of the indebtedness due thereon.

All personal property not allotted to the plaintiff as her year's allowance has been exhausted and the estate of the testator is insolvent.

Claims, exclusive of the claim of the plaintiff, aggregating approximately $6,000 have been filed with and allowed by the defendant.

The defendant instituted a special proceedings to sell the unencumbered land to make assets to pay debts. One parcel has been sold and plaintiff contends that her claim in the agreed sum of $2,126.84, based on her loss of dower in the encumbered land, is entitled to priority in payment out of the proceeds of said sale and out of the proceeds of the sale of the other unencumbered land.

The court below held, as a matter of law, that plaintiff is not entitled to any preference in payment over the other unsecured creditors out of the proceeds of the sale of the unencumbered land and entered judgment accordingly. The plaintiff excepted and appealed.

J. H. McLain for plaintiff, appellant.
Taliaferro & Clarkson and Carrie L. McLean for defendant, appellee.

BARNHILL, J. It being admitted that the plaintiff has received the present cash value of her dower interest in the unencumbered land and that the estate of her husband is insolvent, the only question presented here is what is the status of her claim for reimbursement for the value of her dower interest in the encumbered land sold under mortgage signed by her—that is, is her claim preferred as against the claims of unsecured creditors and is she entitled to priority in payment out of the proceeds from the sale of unencumbered land to make assets?

Where a husband with the joinder of his wife has conveyed his land as security for a debt and after his death the lien is foreclosed and the land is sold under the mortgage or trust deed for an amount in excess of the debt, the widow's right of dower attaches to the excess fund arising from the sale and has priority as to such fund over the claims of unsecured creditors, for such surplus *pro hac vice* is still to be deemed real estate. *Chemical Co. v. Walston,* 187 N. C., 817, 123 S. E., 196.

The widow may, if she so elects, require the mortgagee to sell the two-thirds of the land not embraced in the dower and the reversion of the dower, apply the proceeds to the payment of the mortgage and then file claim for the residue of the debt as an unsecured claim against the

general estate of the deceased. If the ratable payment on this claim out of the general assets is insufficient to pay the balance due, then and only then may the mortgagee foreclose the dower interest. Thus, she may, if she desires, protect her dower in the encumbered land. *Creecy v. Pearce,* 69 N. C., 67; *Caroon v. Cooper,* 63 N. C., 387; *Smith v. Gilmer,* 64 N. C., 546; *Chemical Co. v. Walston, supra.* When seeking to protect her dower in encumbered property in this manner the widow must take her dower in each tract separately and work out her equity against each mortgagee as he seeks to enforce his security. *Chemical Co. v. Walston, supra,* and cases cited.

When the plaintiff joined her husband in the conveyance of his land in trust to secure his debts she joined for the purpose of conveying her dower and in so doing she became his surety to the extent of the value of her dower interest in the land. *Purvis v. Carstaphan,* 73 N. C., 575; *Gwathmey v. Pearce,* 74 N. C., 398; *Trust Co. v. Benbow,* 135 N. C., 303; *Gore v. Townsend,* 105 N. C., 232; *Chemical Co. v. Walston, supra.* As she suffered the encumbered land to be sold in foreclosure without demand for the protection of her dower interest therein, her dower was conveyed by the foreclosure deed and as to such tracts she is no longer a dowress. She is relegated to the position of a surety whose property has been sold to pay the debt of her principal and she becomes a creditor of her husband's estate to the extent of the value of her dower interest in the land foreclosed. *Trust Co. v. Benbow, supra; Blower Co. v. MacKenzie,* 197 N. C., 152, 147 S. E., 829; Mordecai's Law Lectures, p. 311. Her claim, thus accrued, has no greater priority in the administration of the assets of the principal than did the debt before its payment, C. S., 3964, and the debt of the mortgage remaining after the application of the security to the payment thereof is an open, unsecured debt.

The weakness in the position of the plaintiff lies in the fact that she is proceeding upon the assumption that she still possesses dower in the encumbered land which has been foreclosed and that her claim for the value thereof retains the status of dower. Whereas, when she suffered the land to be sold under foreclosure her dower was conveyed as authorized by the lien executed by her and she has lost all interest in such land. She is now nothing more than a surety seeking reimbursement for the loss she has sustained by reason of the fact that her property has been sold to pay the debt of her husband. Being a surety whose property has been sold to pay the debt of her principal she, in law, has a claim against her husband's estate, which claim stands in the same category as would the unsecured claim of the mortgagee.

The judgment of the court below is

Affirmed.

GRAY WHITLOW, BY HIS NEXT FRIEND, J. C. WHITLOW, v. SOUTHERN RAILWAY COMPANY AND A. M. KIMBROUGH.

(Filed 8 May, 1940.)

Pleadings § 29—In action based on negligence, allegations of facts not constituting contributing factors to negligence are properly stricken on motion.

The amended complaint alleged that the individual defendant negligently and carelessly pointed and fired a pistol at plaintiff, resulting in injury, and that the individual defendant was acting within the scope of his employment by the corporate defendant. *Held:* Allegations that the individual defendant knew or should have known that to point a pistol at any person was in direct violation of C. S., 4216, was properly stricken upon motion, since knowledge of the unlawfulness of such act is not an essential element of the crime delineated by the statute, and allegations that the individual defendant possessed an irritable disposition and a violent and ungovernable temper were properly stricken upon motion, since such facts cannot be contributing factors to negligence, but allegations that the individual defendant was of a nervous disposition were improperly stricken, since nervousness may readily be a concomitant element of negligence, the test of relevancy being the right of the plaintiff to present evidence in support of the allegations upon the trial.

APPEAL by plaintiff from *Grady, Emergency Judge,* at December Term, 1939, of MECKLENBURG.

Hiram P. Whitacre and J. C. Newell for plaintiff, appellant.

W. T. Joyner, John M. Robinson and Hunter M. Jones for Southern Railway Company, defendant, appellee.

Grant & Grant for A. M. Kimbrough, defendant, appellee.

SCHENCK, J. This is an appeal by the plaintiff from a judgment striking out certain portions of the amended complaint in an action to recover damages for personal injuries alleged to have been negligently inflicted by the defendants upon the plaintiff.

The original complaint alleged that the individual defendant, while acting in the scope of his employment as station agent of the corporate defendant, "willfully and maliciously assaulted" the plaintiff "by firing a pistol from the window of the office of the said railway station, the bullet from which struck the infant plaintiff's left leg producing a compound fracture."

The amended complaint, portions of which the court ordered stricken out, abandoned the original allegation of a willful and malicious assault, and alleged that the individual defendant, while acting in the scope of his employment as station agent of the corporate defendant, "negligently and carelessly pointed and fired a pistol or revolver at this plaintiff from

the open window of said depot station, the bullet from which said pistol struck the plaintiff's left leg" thereby causing injury.

The motions of the defendants to strike, which were allowed by the court, related to allegations that the individual defendant was possessed of a nervous and irritable disposition and of a violent and ungovernable temper, all of which was known to the corporate defendant.

We think, and so hold, in view of the fact that the alleged cause of action is now bottomed on negligence, rather than on a willful and malicious assault, the motions were properly allowed as to those allegations relating to the individual defendant's irritable disposition and violent and ungovernable temper, but were improperly allowed as to those allegations relating to said defendant's nervous disposition, or nervousness. Irritability and violent and ungovernable temper could hardly be a contributing factor to negligence, while nervousness may readily be a concomitant element thereof, and the retaining of a person equipped with firearms with which to guard the railway station of which he was in charge, when such person was known to possess a nervous disposition, might constitute negligence on the part of the railway company.

We therefore conclude that the judgment of the Superior Court should be affirmed in so far as it relates to the words "and irritable person; and he was possessed of a dangerous, violent and ungovernable temper," in paragraph 11 of the amended complaint, and reversed in all other respects relating to this paragraph; and affirmed in so far as it relates to paragraph 12 of said complaint; and affirmed in so far as it relates to the words "and possessed of a dangerous and violent temper" in paragraph 13 (d) of said complaint, and reversed in all other respects relating to this paragraph.

We also conclude that the motions to strike were likewise properly allowed in so far as they relate to the words "when he (defendant Kimbrough) knew, or should have known that to point a pistol, loaded or unloaded, at any person was a direct violation of section 4216 of the Code of the State of North Carolina" in paragraph 13 (c), since the knowledge of the unlawfulness of the act of pointing a pistol at another is not an essential element of the crime delineated by the statute.

"On a motion to strike out, the test of relevancy of a pleading is the right of the pleader to present the facts to which the allegation relates in the evidence upon the trial." *Trust Co. v. Dunlop,* 214 N. C., 196, and cases there cited, and *Duke v. Children's Commission,* 214 N. C., 570. When this test is applied to the judgment under consideration, we think it should be affirmed in part and reversed in part.

In those respects indicated the judgment of the Superior Court is affirmed, and in all other respects it is reversed and the case is remanded that the judgment may be modified in accord with this opinion.

Modified and affirmed.

ARNETHA SMART v. S. E. RODGERS AND LULA P. RODGERS, ADMINISTRATRIX OF S. E. RODGERS (NOW DECEASED).

(Filed 8 May, 1940.)

Automobiles §§ 9c, 12a—

While ordinarily the violation of a safety statute constitutes negligence *per se* and is actionable when the proximate cause of injury, speed in excess of the limits prescribed by chapter 407, Public Laws of 1937, is made merely *prima facie* evidence that the speed is not reasonable or prudent, and therefore an instruction that speed in excess of the limits prescribed by the statute constitutes negligence *per se* is error which is not cured by a correct instruction upon the question of proximate cause.

APPEAL by defendants from *Phillips, J.*, at November Term, 1939, of MECKLENBURG. New trial.

This was an action for damages for personal injury alleged to have been caused by the negligent operation of a taxicab by the defendants.

There was evidence that the speed with which defendants' taxicab was being operated at the time was a material element of the negligence alleged. In his instructions to the jury, the trial judge, after reading the several statutes regulating the operation of motor vehicles, including those relating to speed, charged the jury as follows: "Now, gentlemen of the jury, the violation of a criminal statute such as the court has read to you, is negligence *per se.*" Defendants noted exception to this instruction.

Verdict was rendered in favor of plaintiff, and from judgment predicated thereon, defendant appealed.

Helms & Mulliss for plaintiff, appellee.
H. L. Taylor and Joe W. Ervin for defendants, appellants.

DEVIN, J. The appellants' principal assignment of error related to the charge of the court below wherein the jury was instructed that the violation of a criminal statute "such as the court has read to you" was negligence *per se.* The court had just read to the jury the speed regulations prescribed by ch. 407, Public Laws 1937, the statute in force at the time of the injury complained of. Exceeding the speed limits mentioned in that act, however, is not made a substantive criminal offense but constitute merely "*prima facie* evidence that the speed is not reasonable or prudent and that it is unlawful."

While it has been uniformly held by this Court that the violation of a statute imposing a rule of conduct in the operation of a motor vehicle

and enacted in the interest of safety constitutes negligence *per se* and becomes actionable upon proof of injury proximately resulting therefrom (*Holland v. Strader,* 216 N. C., 436), this rule may not be held to apply to an act which the statute denominates merely *prima facie* evidence of want of due care.

Instructions to juries couched in language similar to that excepted to here have been held erroneous and new trials awarded in several recent cases. *Morris v. Johnson,* 214 N. C., 402, 199 S. E., 390; *Fleeman v. Coal Co.,* 214 N. C., 117, 198 S. E., 596; *Marsh v. Byrd,* 214 N. C., 669, 200 S. E., 389; *Woods v. Freeman,* 213 N. C., 314, 195 S. E., 812; *Latham v. Bottling Co.,* 213 N. C., 158, 195 S. E., 372; *Sebastian v. Motor Lines,* 213 N. C., 770, 197 S. E., 539; *S. v. Webber,* 210 N. C., 137, 185 S. E., 659; *S. v. Spencer,* 209 N. C., 827, 184 S. E., 835. See, also, *Wooten v. Smith,* 215 N. C., 48, 200 S. E., 921, and *Exum v. Baumrind,* 210 N. C., 650, 188 S. E., 200.

The fact that the court properly charged as to proximate cause did not remove the injurious effect of the instruction quoted. *Templeton v. Kelley,* 216 N. C., 487. The appellants' motion for judgment of nonsuit was properly denied. However, for the error in the judge's charge herein pointed out, there must be a new trial. This disposition of the appeal renders unnecessary discussion of other exceptions noted by defendants.

New trial.

M. G. O'NEIL v. C. C. BRASWELL, TRADING AND DOING BUSINESS UNDER THE NAME OF CAROLINA FIREWORKS COMPANY, AND MYERS PARK CLUB, INC.

(Filed 8 May, 1940.)

1. Negligence § 19a—

Defendant club attempted to put on a fireworks display. Plaintiff, a member of the club, while acting as a member of the committee in charge of the display, was injured when a bomb, which was supposed to ascend 600 feet in the air before exploding, failed to ascend properly and exploded on the ground. *Held:* There is no sufficient evidence of any negligent act committed by defendant from which it could foresee that injury was likely to occur, and defendant's motion to nonsuit was properly granted.

2. Evidence § 48—

The exclusion of opinion testimony based upon hypothetical questions cannot be held for error when the court does not find as a fact that the witness was an expert.

O'NEIL *v.* BRASWELL.

APPEAL by plaintiff from *Johnston, Special Judge,* at June Extra Term, 1940, of MECKLENBURG. Affirmed.

Civil action to recover damages for personal injuries resulting from alleged negligent conduct of defendant.

On 4 July, 1938, defendant undertook to put on a fireworks display. At the request of the club manager, one Heil, a member of the club, acted as chairman in charge, and at the request of Heil plaintiff, who was also a member, acted as one of the committee. The plaintiff's particular duty was to place the bombs in the mortars provided therefor. When lighted the bombs were supposed to ascend to a height of 600 feet before exploding. After several bombs had been set off another was lighted but failed to ascend the usual distance. Instead it fell to the ground before it exploded. Those in charge noticed that it was falling prematurely and gave warning. The plaintiff and others ran and the plaintiff was thereafter found 107 feet from the mortar momentarily unconscious and suffering from certain personal injuries caused by the explosion.

At the conclusion of the evidence for the plaintiff, upon motion for the defendant, the court entered judgment of nonsuit. The plaintiff excepted and appealed.

Robinson & Jones for plaintiff, appellant.
J. Laurence Jones for defendant, appellee.

PER CURIAM. The unusual happening about which plaintiff complains might have been produced by any one of several causes, but the sufficiency of the evidence does not depend upon the doctrine of chances. *S. v. Prince,* 182 N. C., 788, 108 S. E., 330. We concur in the conclusion of the court below that there is no sufficient evidence of any negligent act by defendant from which it could foresee that injury was likely to occur.

The court below did not find as a fact that the witness Braswell was an expert. The exclusion of his opinion testimony, based upon a hypothetical question, cannot be held for error.

The judgment of nonsuit is

Affirmed.

STATE v. SIMON GIBSON, ALIAS "COOCHIE" GIBSON.

(Filed 8 May, 1940.)

Criminal Law § 80—

The appeal in this case is dismissed upon motion of the Attorney-General for failure of defendant to file statement of case on appeal within time allowed, Rule of Practice in the Supreme Court, No. 17, but as defendant stands convicted of a capital felony the motion is allowed only after an inspection of the record fails to disclose apparent error.

MOTION by State to docket and dismiss appeal.

Attorney-General McMullan for the State.
No counsel contra.

PER CURIAM. Former appeal, 216 N. C., 535, 5 S. E. (2d), 717. Thereafter, defendant was tried at the January Term, 1940, of the Superior Court of New Hanover County upon a bill of indictment charging him with the crime of rape. There was verdict of guilty of rape as charged in the bill of indictment, upon which judgment of death by asphyxiation was pronounced and entered. Defendant gave notice, in open court, of appeal to Supreme Court, and was allowed to appeal *in forma pauperis,* and was given sixty days in which to serve statement of case on appeal. The assistant clerk of Superior Court certifies under seal of said court that no record of the case on appeal has been filed in the office of the clerk of the Superior Court; that the time allowed by the court for perfecting the appeal has expired and the appeal has not been perfected; and that the clerk has inquired of counsel for the defendant and has been informed by them that they do not intend to perfect the appeal. *S. v. Stovall,* 214 N. C., 695, 200 S. E., 426; *S. v. Page, ante,* 288, 7 S. E. (2d), 559.

The Attorney-General moves to docket and dismiss the appeal under Rule 17. After careful examination of the record now before us we find no apparent error. Hence the motion will be allowed. *S. v. Page, supra; S. v. Hopkins, ante,* 324, 7 S. E. (2d), 556; *S. v. Flynn, ante,* 345.

Judgment affirmed and appeal dismissed.

MRS. ORA GIBSON v. WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY.

(Filed 22 May, 1940.)

1. Insurance § 30d—Evidence of course of dealing between parties in making and accepting payment of premiums after due date held to take case to jury.

The by-laws of defendant mutual benefit society provided that any member suspended for failure to pay any installment of annual dues might be reinstated upon the payment of the delinquent installment within three months after his suspension, provided that at the time of such payment he should be in good health and remain in good health for thirty days thereafter. Plaintiff beneficiary's evidence tended to show that defendant insurer had theretofore accepted premiums on the policy after the expiration of the grace period, and that the last premium had been paid eight days after the expiration of the grace period and that insured died nine days after making the payment, and that at the time of the payment he was in good health. *Held:* The evidence is sufficient to be submitted to the jury upon the question of whether plaintiff had established a course of dealing between insurer and insured upon which insured had the right to rely in the payment of dues, and the granting of insurer's motion to nonsuit for nonpayment of dues is error.

2. Insurance § 28—

Where there is nothing in plaintiff beneficiary's evidence tending to show that insured died as the result of his violation of any law, defendant insurer's motion to nonsuit on the ground that the policy excluded liability if insured should meet his death as the result of the violation of any law, should be overruled.

APPEAL by plaintiff from *Olive, Special Judge,* at September Term, 1939, of MOORE. Reversed.

The plaintiff sued to recover of the defendant $2,000.00 which she claims was due her as beneficiary under an insurance policy issued to her husband. The policy was for $1,000.00, with a double indemnity clause promising to pay an additional thousand dollars for bodily injury through external, violent and accidental means resulting in death.

The policy was purchased in March, 1938. The plaintiff alleges her husband died on 17 December, 1938, in consequence of injury brought about solely through such external, violent and accidental means; that proof was duly made to the defendant and that defendant refused to pay the claim; and demands judgment for the $2,000.00 and costs.

The defendant, answering, admitted the issuing of the policy, and that the stipulated payment therein was $1,000.00, with an additional $1,000.00 to be paid in case the death was by accidental injury, as

described. It set up the defense that the policy was not in force at the time of the death, by reason of the nonpayment of the premiums.

The defendant alleges that it is now and was at the time complained of "a fraternal benefit society," with a lodge system, a ritualistic form of work and a representative form of government, without capital stock, transacting its business without profit and for the sole benefit of its members and their beneficiaries. That as such, defendant had a Constitution, Laws, and By-Laws, made a part of the certificate of insurance, which By-Laws were in full force and effect from the date of the application of membership of the insured till the time of his death, and that such By-Laws amongst other things provided that if the insured "should die while engaged in or in consequence of the violation of the laws of the State or of the United States, or any other province or nation, whether he is at the time sane or insane, the certificate shall be null and void and of no effect." Other sections of the By-Laws quoted in the answer refer to the payment of premiums and suspension from membership. It is provided in the By-Laws that "if he fails to make any such payment on or before the last day of the month he shall thereby become suspended, his beneficiary certificate shall be void, the contract between such person and the Society shall thereby completely terminate, and all moneys paid on account of such membership shall be retained by the Society as his liquidated proportionate part of the cost of doing business and the cost of the protection furnished on the life of said member from the delivery of his certificate to the date of his suspension."

It is further provided that should a person become suspended for not making annual payments or installments thereof, he is not entitled to any benefits of the Society, shall not receive the password, or participate in any of the business or social proceedings of the Camp.

Section 65 is quoted from the answer as follows: "Section 65. Any person who has become suspended for not making any annual payment or installment thereof may within three calendar months from the date of his suspension again become a member of the Society by the payment of the delinquent installment or installments, provided he is in good health at the time of such payment and remains in good health for thirty days thereafter. Whenever installments of payments are paid by or for a person who has become suspended for the purpose of again making him a member, such payment shall be held to warrant that he is at the time of making such payment in good health, and to warrant that he will remain in good health for thirty days after such attempt to again become a member, and to contract that such installments when so paid after he has become suspended for not making payments shall be received and retained without waiving any of the provisions of this section or of these laws until such time as the Secretary of the Society

shall have received actual, not constructive or imputed, knowledge that the person was not in fact in good health when he attempted to again become a member. Provided that the receipt and the retention of payment of such installments in case such person is not in good health shall not make such person a member or entitle him or his beneficiary or beneficiaries to any rights whatever."

Other provisions of the By-Laws make any payment of dues after suspension for nonpayment constitute a guaranty that the insured is in good health, and provide that no custom of the Camp shall have the effect of "changing, modifying, waiving, or foregoing such laws or requirements."

The defendant sets up a further defense that plaintiff's husband was at the time of his death driving an automobile in a reckless and unlawful manner, with only one headlight and on the left-hand side of the highway, was transporting a quantity of illicit liquor, and received his injury and death in consequence of such violation of law, and that recovery is, therefore, barred under the pertinent section of the By-Laws above cited.

The plaintiff offered in evidence the admissions made in the defendant's answer, after which plaintiff testified that her husband was dead and that the proper death certificate had been forwarded to defendant, and identified the receipts for the premiums.

The receipts showed that sometimes payments were made within the time specified in the policy, others a short time afterwards, and in one instance two payments were made at the same time and before one of them was due. The last payment appears to have been made on 8 December preceding the death of the insured on the 17th. Further testimony of the plaintiff showed that the grace days on this premium expired on 30 November.

The plaintiff was asked how her husband had died and what caused his death. This was excluded upon objection and the plaintiff excepted.

Plaintiff further sought to show by a Highway Patrolman what was the condition of the road, the car of the deceased, and all that he saw when he got to the point of the accident. On motion of defendant this was excluded and plaintiff excepted.

Another witness, Myron Barrett, was asked whether when he saw deceased he was in the car with his head hanging out. This was excluded on objection of defendant and plaintiff excepted.

Plaintiff did succeed in getting in evidence, however, from the Highway Patrolman that when he found the deceased he was in an old model Essex roadster, with his feet hanging between the clutch and brake and his shoulders lying on the hard surface; that the door was open and his feet were still in the car hanging on the foot pedals and his head "was busted across one side." He was dead. This was corroborated by another witness and by the coroner.

Plaintiff then introduced the insurance policy or certificate.

At the conclusion of the plaintiff's evidence the defendant moved for judgment as of nonsuit and the court allowed the same only as to the double indemnity clause, under which $1,000.00 was to be paid upon death by external accident. Plaintiff excepted.

The defendant put on evidence which, under the rules of the court relating to nonsuit, need not be here considered.

At the conclusion of all the evidence a further motion for judgment as of nonsuit was made and allowed, and plaintiff excepted and appealed, assigning errors.

Seawell & Seawell for plaintiff, appellant.
Mosley G. Boyette for defendant, appellee.

SEAWELL, J. It is apparent from the evidence in this case that the defendant had repeatedly accepted payments of installments of premiums from the insured after the same were overdue, and, in some instances, after the grace period had expired, and continued to retain them. We pass the question whether the defendant company could be bound by a custom of the local camp with regard to the acceptance and retention of these premiums or with regard to the manner in which they were transmitted to the defendant. The point pressed by plaintiff, in so far as we can see it, is whether or not the defendant itself, through its authorized agent or through its own receipt of premiums and retention of the same, had not adopted a course of dealing between itself and the insured upon which the plaintiff might have the right to rely.

It is to be noted here that apparently all the insured person had to do to restore himself fully to all the privileges of the local Camp, as well as the protection of the insurance, was to pay, while in good health, the installment for want of which he had been suspended. There seems to be no contention here by the defendant that insured was not in good health at the time he paid the last premium.

According to the evidence, this premium was overdue from 1 November to 8 December. The insured died nine days thereafter. It seems highly probable that except for the information of the death of the insured, contained in the proof of death, the defendant would have retained the payment in token of waiver of its nonpayment at the time when it was due, and in token of the automatic restoration of the insured to all the rights of the Order and the protection of the insurance.

Nothing in plaintiff's evidence would justify taking the case from the jury on the theory that insured met his death while in violation of law.

Ordinarily exceptions to the exclusion of evidence are not tenable here unless a record is kept of what the witness would have sworn, so that

the Court may judge of its materiality. Whether that rule is invariable we do not have to consider, since under a retrial a different mode of developing plaintiff's case may be adopted.

Considered in its most favorable light to the plaintiff, we think the evidence should have been submitted to the jury.

The judgment of nonsuit is, therefore,

Reversed.

MRS. J. V. D'ARMOUR, JR., v. BEESON HARDWARE COMPANY, INC.

(Filed 22 May, 1940.)

1. Principal and Agent § 7—

Neither the fact of agency nor its scope can be proven by acts and declarations of the alleged agent, and ordinarily such acts and declarations are not admissible until evidence of agency *aliunde* has been offered, but the order of proof rests largely in the discretion of the trial court.

2. Same—

The fact of agency and its scope may be proven by the direct testimony of the agent.

3. Trial § 13—

The order of proof rests largely within the discretion of the trial court.

4. Trial § 17—

Where evidence is competent for a restricted purpose, it is incumbent upon the adverse party to request that its admission be restricted, and in the absence of such request its general admission will not be held for error.

5. Same—

Where incompetent evidence is admitted over objection, and later during the trial such evidence becomes competent for the purpose of contradicting and impeaching a witness, it is incumbent upon the adverse party, upon the evidence becoming competent for the restricted purpose, to request that its admission be so restricted.

6. Principal and Agent § 7—Testimony of declarations of alleged agent relating to fact and scope of agency held competent to contradict agent's testimony.

In this action for malicious prosecution, testimony of declarations relating to the fact and scope of the alleged agency, made by the agent upon the trial of the criminal prosecution, was admitted over objection prior to the proof of agency by other evidence. Later the alleged agent testified that he had not made the declarations or that he did not remember having made them. Defendant principal made no request that the admission of the testimony be restricted. *Held:* Although the testimony of the declarations of the alleged agent was incompetent at the time of its admission, it

later became competent for the purpose of contradicting and impeaching the agent's testimony, and its admission will not be held for error.

7. Master and Servant § 21b: Principal and Agent § 10a—

A master or principal is liable for a tort of his servant or agent committed in the course of the employment or scope of the authority and in furtherance of the superior's business.

8. Principal and Agent § 10a—

In this action for malicious prosecution, the evidence, considered in the light most favorable to the plaintiff, *is held* sufficient to be submitted to the jury upon the question of whether the acts of defendant's agent in procuring the warrant and prosecuting plaintiff were done in the course of his employment and within the scope of his authority as agent of defendant.

9. Trial § 22b—

Upon motion to nonsuit, the evidence must be considered in the light most favorable to plaintiff, giving to her the benefit of every reasonable intendment thereon.

10. Principal and Agent § 10a—

The charge of the court on the question of the liability of a principal for the tortious act of his agent *held* in accord with the principles enunciated in *Dickerson v. Refining Co.*, 201 N. C., 90, and without error.

APPEAL by defendant from *Clement, J.*, at October Term, 1939, of GUILFORD.

Civil action to recover both compensatory and punitive damages for alleged malicious prosecution.

On 6 December, 1938, upon affidavit of J. Gurney Briggs charging that plaintiff aided and abetted J. V. D'Armour, Jr., in disposing of, and with removing to and secreting in the State of Georgia, a refrigerator on which Beeson Hardware Company had lien, with intent to prevent and hinder the enforcement of said lien, a warrant was issued under provisions of C. S., 4288, for the arrest of plaintiff. Pursuant thereto she was arrested and held to bail to answer said charge in the municipal court of High Point. Upon trial in said court on 29 January, 1939, there was verdict of "Not guilty." At this trial Attorney Waynick appeared in aid of the solicitor for the State in the prosecution of the action, and Briggs appeared as a witness for the State.

Plaintiff alleges that J. Gurney Briggs, in causing said warrant to be issued, was acting as the agent, employee and office manager of defendant and "within the scope of his authority"; that the "defendant employed a private prosecutor to assist the State in the effort to obtain a conviction of this plaintiff"; and that the prosecution was without probable cause and malicious "in that it was instituted and conducted for the purpose of extorting and extracting a sum of money from plaintiff."

Defendant denies these allegations and avers that it knew nothing of the prosecution until after the trial.

Upon the trial of the present action both parties introduced evidence. The case was submitted to the jury upon these issues which were answered as indicated:

"1. Did the defendant Beeson Hardware Company cause the arrest and prosecution of the plaintiff, as alleged in the complaint? Answer: 'Yes.'

"2. If so, was the arrest without probable cause? Answer: 'Yes.'

"3. If so, was the arrest malicious? Answer: 'Yes.'

"4. What amount of actual damages, if any, is the plaintiff entitled to recover of the defendant? Answer: '$1,000.00.'

"5. What amount of punitive damages, if any, is the plaintiff entitled to recover of the defendant? Answer: 'None.'"

From adverse judgment thereon, defendant appeals to Supreme Court and assigns error.

Gold, McAnally & Gold and J. Keith Harrison for plaintiff, appellee.
D. H. Parsons for defendant, appellant.

WINBORNE, J. Though there are many assignments of error on this appeal, the points stressed for error relate to the basic question as to whether J. Gurney Briggs, in procuring the warrant for and arrest of plaintiff and in employing an attorney to prosecute and in prosecuting her on the criminal charge specified, was acting in the course of his employment and within the scope of his authority as agent of defendant. Regarding this basic question it is urged that the court erred: (1) In the admission of incompetent evidence; (2) in refusing to grant motion for judgment as of nonsuit; and (3) in charge on pertinent principles of law. However, after careful consideration of the whole case, we find no prejudicial error.

1. It is well settled that neither the fact of agency nor its nature and extent can be proven by the acts and declarations of the agent. *Parrish v. Mfg. Co.,* 211 N. C., 7, 188 S. E., 817, and cases there cited. Ordinarily, such acts and declarations are not admissible against the principal until evidence of the agency *aliunde* has been offered. *West v. Grocery Co.,* 138 N. C., 166, 50 S. E., 565. However, "proof of agency, as well as of its nature and extent, may be made by direct testimony of the alleged agent." *Parrish v. Mfg. Co., supra,* and cases cited.

In this connection, plaintiff, over objection by defendant, was permitted to testify that in the municipal court on the trial of the criminal action she heard Briggs testify that Mr. Ragan, president of the Beeson Hardware Company, authorized him to sign the warrant, and that "they

arrested me to collect the money." While at the time this testimony was admitted it was incompetent, yet after Briggs as a witness for defendant had denied that he was so authorized by Mr. Ragan or any other officer of the company, and had stated that he did not remember that he testified in the criminal case that the warrant was to collect what he claimed plaintiff owed, the evidence of his declarations in those respects would have been competent for the purpose of contradiction and impeachment. Defendant would have had the right to have the court limit it to that purpose, but in the absence of request that it be so limited, defendant would waive right to objection to its admission generally. *S. v. Hawkins,* 214 N. C., 326, 199 S. E., 284. Moreover, when the evidence of the declarations became competent for the purpose of contradiction and impeachment, even though previously admitted, defendant could have then moved the court to limit it to the purpose for which it was competent. Failure to do so constitutes waiver of the right. Ordinarily, the order in which evidence is admitted in conduct of the trial rests in the discretion of the court. We are, therefore, of opinion and hold that the testimony incompetent when admitted, was subsequently rendered competent.

There are other objections to the admission of evidence which in the light of other evidence, admitted without objection, are harmless.

2. The principle is well established that where the relationship of master and servant exists the master is liable for the acts of his servant, whether negligent or malicious, which result in injury to third persons when the "servant is acting within the line of his duty and exercising the functions of his employment." *Dickerson v. Refining Co.,* 201 N. C., 90, 159 S. E., 446; *Robertson v. Power Co.,* 204 N. C., 359, 168 S. E., 415; *Parrish v. Mfg. Co., supra; Snow v. DeButts,* 212 N. C., 120, 193 S. E., 224; *West v. Woolworth Co.,* 215 N. C., 211, 1 S. E. (2d). 546; *Parrott v. Kantor,* 216 N. C., 584, 6 S. E. (2d), 40.

In *Dickerson v. Refining Co., supra,* it is said that "When the servant is engaged in the work of the master, doing that which he is employed or directed to do, and an actionable wrong is done to another, either negligently or maliciously, the master is liable, not only for what the servant does, but also for the ways and means employed by him in performing the act in question."

In *Parrish v. Mfg. Co., supra,* the Court said: "Thus, when a servant, acting with authority or within the scope of his employment, wrongfully procures the arrest of a person, the master is liable in damages for such arrest and imprisonment." Authorities supporting the principle are there assembled.

When all the evidence is considered under these principles and in the light most favorable to plaintiff, giving to her the benefit of every rea-

sonable intendment, as must be done in passing upon motion for judgment as in case of nonsuit at the close of the evidence, it is sufficient to take the case to the jury on the question of the fact of agency of J. Gurney Briggs, as well as its nature and extent.

There is evidence tending to show this factual situation: In 1936 J. V. D'Armour, Jr., husband of plaintiff, executed to defendant a conditional sale contract on the refrigerator in question to secure the balance of purchase price thereof, payable in monthly installments. Thereafter, in 1937, on account of illness, he entered United States Veterans' Hospital at Augusta, Georgia, and has since remained there. After he left High Point, plaintiff, who is a nurse, made certain payments on the refrigerator to General Motors Acceptance Corporation. Plaintiff contends that in December, 1938, there was nothing due Beeson Hardware Company for the refrigerator. However, a claim and delivery proceeding was instituted in the name of Beeson Hardware Company against J. V. D'Armour, Jr., to obtain possession of the refrigerator. J. Gurney Briggs testified: "We took out claim and delivery papers to take up the machine." Briggs was then and had been for twenty years employed by defendant, and had authority to issue claim and delivery papers whenever necessary and "different types of processes to assist Beeson Hardware Company in the recovery of money or property." Testimony of R. R. Ragan, president of defendant company. J. Gurney Briggs testified that "We had, I had" turned the account over to Attorney Waynick for collection; that Waynick "was just working with me on it"; that "the account was for Beeson Hardware Company, but it was an account on my list; I did not particularly have authority to go out and employ a lawyer to collect it; I have some authority. As to whether I have authority to hire lawyers to collect accounts, that depends—I am not an officer in the corporation. I am a bookkeeper. . . . I did not have *specific* authority"; that the attorney had "one or two accounts besides that," and was to be paid for his services by a credit on what he owed Beeson Hardware Company; that "I employed a lawyer to assist in the prosecution of the criminal case without *authorized* authority from the Beeson Hardware Company." Briggs further testified that, after the sheriff had talked with plaintiff regarding the claim and delivery, he talked with her. He said "she called me on the phone and said she did not owe but $31; I told her this wasn't a claim and delivery proceeding, that we did not want anything except what was due on it. . . . We claim it was $52."

Furthermore, without objection, T. S. Mason, an employee of and witness for defendant, speaking of the trial in the criminal case where he was a witness "in the prosecution of this woman," testified "Mr. Briggs told me to come down there. . . . I think they had some lawyers,

the Beeson Hardware Company, Mr. Waynick, and the State had Mr. Ben Herman. . . . I am a bookkeeper and do a little collecting. Do not occupy the same position of responsibility that Mr. Briggs does."

3. The charge of the trial judge clearly and fully sets forth the law applicable to the case in hand. When compared with numerous decisions of this Court, particular *Dickerson v. Refining Co., supra,* the charge follows with marked precision and accuracy established pertinent principles.

The judgment of the court below is

Affirmed.

RALPH GARDNER v. R. C. BLACK.

(Filed 22 May, 1940.)

1. Animals § 2—

The owner or person having charge of domestic animals is liable for injury or damage caused by such animals while running at large only if the animals are at large with his knowledge and consent or at his will or their escape is due to negligence on his part.

2. Same—

The person having charge of domestic animals is guilty of negligence in permitting them to escape only if he fails to exercise ordinary care and the foresight of a prudent person in keeping them in restraint, the ordinary rules of negligence being applicable.

3. Same—Fact that domestic animals are at large raises no presumption that owner permits them to run at large.

The provision of C. S., 1849, that any person who permits his livestock to run at large in territory in which the stock law is applicable shall be guilty of a misdemeanor, implies knowledge, consent or willingness on the part of the owner that the animals be at large, or negligence equivalent thereto, and the mere fact that animals are at large does not raise the presumption that the owner permits them to run at large, nor does the doctrine of *res ipsa loquitur* apply upon the establishment of the fact that the animals are found at large.

4. Same—Evidence held insufficient to show that the escape of defendant's mule was due to negligence, or that it was at large with defendant's knowledge and consent or at his will.

Plaintiff instituted this action to recover for injury to his person and damages to his car resulting when his car and a mule owned by defendant collided on a public highway within territory subject to the stock law. Plaintiff alleged that defendant negligently permitted the mule to run at large but plaintiff's only evidence upon the issue was to the effect that the mule was at large and that defendant stated he could not help the mule being at large and that he did not know it was out. Defendant's

evidence was to the effect that he kept his mules in the barn and within a wire enclosure attached to the barn, that the fence was high enough to keep the mules from getting out, that the night before the accident no defect was discovered in the fence, and that the morning after the mules got out the top strand of wire had been broken. *Held:* Defendant's evidence did not contradict plaintiff's evidence, but was in explanation and corroboration thereof, and the evidence fails to show that the mule causing the accident was at large with defendant's knowledge or consent, or at his will, or that its escape was due to any negligence on his part, and his motion to nonsuit should have been allowed.

5. Appeal and Error § 41—

Where it is determined that defendant's motion to nonsuit on the issue of negligence should have been granted, defendant's exception to the refusal of the court to submit an issue of contributory negligence becomes immaterial and need not be considered.

CLARKSON, J., dissents.

APPEAL by defendant from *Phillips, J.*, at 30 October, 1939, Regular Term, of MECKLENBURG.

Civil action for recovery of damages to person and property resulting from alleged actionable negligence.

Plaintiff, resident of Mecklenburg, alleges that on the night of 1 December, 1938, he was injured and suffered personal and property damage as the result of a collision between his automobile and a mule of defendant, which was negligently permitted by defendant to run at large on the highway within the limits of Mecklenburg County and Charlotte Township and in violation of section 1849 of the Consolidated Statutes of North Carolina.

Defendant denies the material allegations of the complaint, and pleads the contributory negligence of plaintiff. And, by way of counterclaim, defendant sets up cross action for recovery of the value of the mule killed in the collision with plaintiff's automobile as the result of alleged actionable negligence of plaintiff.

On trial below plaintiff in behalf of himself testified that: "On December 1, 1938, I had been to see a friend of mine about half a mile down the road from Mr. Black's on the Plaza Road. It was a clear, cold night. I was by myself. The road was hard surfaced and practically straight. I was coming to Charlotte. I was driving along probably between 40 and 45 miles an hour on the right-hand side of the pavement and all of a sudden I saw this mule start to lope across the highway and I slid into the other lane of the highway to my left. I was sliding my tires with my brakes on when the mule ran into the side of my car. It ran into the right-hand side of the car. The mule came from a little narrow field between two houses. When I first saw the mule, he was at the edge of the highway, running as hard as he could. There were two

mules. The mule that ran into me was probably 15 or 20 feet from my car when I first saw him. My lights did not show the field, they just showed the highway and the edge of the highway. . . . I talked to Mr. Black about the accident and he said as far as he was concerned it was just an accident and he would do nothing; that it was his mule; that he couldn't help it being out and that he didn't know that it was out. . . . I skidded my wheels every bit of ten feet before the impact occurred, possible more than that."

Defendant, reserving exception to the refusal of the court to grant his motion for judgment as in case of nonsuit, offered evidence as follows: R. C. Black, Jr., testified: "I am my father's assistant on the farm. The mules were kept in a horse barn which has two stalls on each side and a hall in the middle and a crib on each side and a gate at the back, a five strand barbed wire fence makes a square enclosure around the barn. The fence is strung on cedar posts. The fence was in good condition on December 1, 1938, when the mules were put in the lot, the wires were up and nailed to the posts and the gate was closed. . . . I investigated to see how it got out and found that they had broken a top strand of the wire. I do not know how long it had been broken. . . . There was nothing wrong with the doors to the barn. The doors to the barn were open so that the mules might run out into the lot. The mules are not confined to the stable but are enclosed inside the fence. The fence was approximately 4½ feet high. I have never seen a mule and I have never owned one that jumped the fence. When the top strand was broken, the fence was about four feet high."

R. C. Black, Sr., in behalf of himself, testified in part: "Immediately after the accident . . . I got up and went down there and the mule was lying there, dead. There were two tire marks on the highway approximately 50 feet long. I didn't measure them. They started approximately 50 feet from where the automobile was standing. . . . At night my mules are confined in the lot and in the barn, the doors to the stables are never closed but the mules are confined by the fence which is an ordinary barbed wire fence put up on cedar posts, five strands high, . . . approximately 5 feet high. The next morning I went to the barn lot and the gate was closed. I inspected the wire fence and at the corner I found that part of the wire was down. I had been out to the barn lot the afternoon before the accident. At that time the condition of the fence was all right. I didn't notice anything wrong. I did not especially examine the wire fence that afternoon. I don't close the barn doors at night but sometimes use the doors to catch a mule to harness it or something like that. . . . There was no plank above the wire on the fence. . . . I do not know how old the barbed wire fence is. It has been there several years but has been repaired several times. All five strands are barbed wire. We repair it whenever it needs it."

Defendant's motion for judgment as of nonsuit renewed at the close of all the evidence was denied. Exception.

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

"1. Was the plaintiff injured and his car damaged by the negligence of the defendant, as alleged in the complaint? Answer: 'Yes.'

"2. What sum, if any, is the plaintiff entitled to recover of the defendant? Answer: '$100.00.'"

Defendant tendered other issues relating to the contributory negligence of plaintiff, the negligence of plaintiff and damages as alleged in defendant's counterclaim, and excepted to refusal of the court to submit same.

From judgment on verdict defendant appeals to Supreme Court, and assigns error.

G. T. Carswell and Joe W. Ervin for plaintiff, appellee.
McDougle & Ervin for defendant, appellant.

WINBORNE, J. Defendant assigns for error in the main the refusal of the court below to grant motion for judgment as in case of nonsuit. We are of opinion that upon all the evidence, taken in the light most favorable to plaintiff, the motion should have been allowed.

The liability of the owner of animals for permitting them to escape upon public highways, in case they do damage to travelers or others lawfully thereon, rests upon the question whether the keeper is guilty of negligence in permitting them to escape. In such case the same rule in regard to what is and what is not negligence obtains as ordinarily in other situations. It is the legal duty of a person having charge of animals to exercise ordinary care and the foresight of a prudent person in keeping them in restraint. *Lloyd v. Bowen,* 170 N. C., 216, 86 S. E., 797; 2 Am. Jur., 740, subject Animals, section 62.

In the present case there is no evidence tending to show that defendant failed in such duty.

Plaintiff contends, however, that it being unlawful to permit livestock to run at large in Mecklenburg County, the very fact that defendant's mules were there running at large upon a public highway is sufficient in and of itself to establish a *prima facie* case of negligence on the part of defendant. The doctrine of *res ipsa loquitur* does not apply. And though the statute, C. S., 1849, upon which plaintiff relies, provides that "if any person shall allow his livestock to run at large within the limits of any county, township or district in which a stock law prevails or shall prevail pursuant to law, he shall be guilty of a misdemeanor, and fined not exceeding fifty dollars or imprisonment not exceeding thirty days," it does not provide that the mere fact that livestock is at large

raises a presumption that the owner permits same to run at large. Such a statute as this relating to allowing or permitting livestock to run at large "implies knowledge, consent, or willingness on the part of the owner that the animals be at large, or such negligent conduct as is equivalent thereto, but does not comprehend a case where, through some untoward circumstance, the owner is unable to watch and care for the animals in a particular instance, or where, notwithstanding the owner has taken precautions to restrain them, and is without fault or negligence, the animals escape from him. . . ." 3 C. J. S., 1231. 3 C. J., 180.

In the instant case the evidence for plaintiff fails to show that the mules of defendant were at large with his knowledge and consent, or at his will, or that their escape was due to any negligence on his part. The only evidence in regard thereto appearing at the close of plaintiff's evidence, other than the fact that the mules were at large, is the statement of plaintiff that defendant said "that he couldn't help it (the mule) being out and that he didn't know that it was out." Thus plaintiff's evidence exculpates defendant of the allegation that he negligently permitted the mule to run at large. Defendant's evidence merely enlarges upon and explains and corroborates the evidence of plaintiff.

In the light of the decision here made, it is unnecessary to consider the question of refusal to submit issue of contributory negligence, which is the only other assignment brought forward in brief filed by defendant.

The judgment below is

Reversed.

CLARKSON, J., dissents.

J. C. SCHWINGLE v. C. D. KELLENBERGER AND ELLA J. KELLENBERGER.

(Filed 22 May, 1940.)

Negligence § 4d—Evidence held insufficient to be submitted to the jury on the issue of defendant proprietor's negligence in maintaining stairs.

Evidence that plaintiff, after his assignment to a room in defendant's tourist inn, fell as he was descending the stairs which he had ascended a few minutes earlier, without any positive evidence raising more than a conjecture that there was any slippery substance on the stairs *is held* insufficient to be submitted to the jury on the issue of negligence, the burden being upon plaintiff to show the presence of a dangerous substance or article on the stairs and that defendant had express or implied notice thereof in time to have removed it or to have warned plaintiff of the danger.

SCHWINGLE *v.* KELLENBERGER.

APPEAL by plaintiff from *Rousseau, J.*, at 5 February Term, 1940, of GUILFORD. Affirmed.

This is an action for actionable negligence brought by plaintiff against defendants alleging damage. The defendants denied negligence and set up the plea of contributory negligence. The defendants are the owners of certain premises in Greensboro, N. C., which were known as "Shady Lawn Inn" and open to tourists. The plaintiff and his wife went to the Inn about 7:00 o'clock p.m., on Sunday, 26 March, 1939, "just becoming twilight," and were received as guests and assigned a room on the second floor. About two hours later plaintiff started down to the first floor to register, using the same stairway which he had ascended. The stairway was winding, with three landings and had a banister or railing. Plaintiff looked at the steps and observed them as he went up to his room, but did not observe anything abnormal about the type of construction of the stair-steps. He observed that the tread of the stairs was bare and that it was an ordinary stairway found in dwellings. He did not observe the steps as to whether there was any foreign substance, like trash or dirt, on them. There was a dim light in the hall and as plaintiff came down the stairs there was an electric light in front of him—not many inches above his head. Plaintiff weighed 200 to 210 pounds. He wore glasses and for 17 years had suffered with phlebitis in the calf of his left leg. He wore high shoes with rubber heels.

On plaintiff's direct examination, he testified, in part: "When I had made two or three or four steps down the staircase, my right foot slipped on the tread of the stairs and it shot forward at the same time my body shot forward, and before I could get my left foot firmly planted on the stairs, my left foot had slipped over the edge of the steps, catching the front edge of my heel on my shoe, thereby throwing the weight of my entire body on my left leg which was underneath me. I fell on my left leg. When I fell, my left hand struck the surface of the stair steps. My right hand was still gripping the railing. When my left hand struck the surface of the stair steps, I felt a slippery sensation—I don't know what it was but that was on my left hand, which was the only one touching the stairs as I tried to lift myself from this doubled-up position."

On cross-examination, plaintiff testified, in part: "When I got to the top of the stairs, that is, before I stepped off of the hall floor level of the upstairs of the house, I observed that my own shadow was in front of me. I would say it affected my clear sight of the steps. Before I touched a single step going downstairs, I observed that in front of me and knew that my own shadow interfered with my ability to see the steps in front of me. There was nothing I could do about it and I did nothing about it. I then continued to walk in the dark. I attempted to walk downward, down the stairway that I could not see. . . . The lights

in the reception room downstairs were lighted. I testified that the lights from the reception room sifted through the banister railing and cast some light on the stairs. I had gone three or four steps before I fell. I cannot be more positive than that; I know I fell on either the third or fourth step. I did not observe to see whether there was any distinction between the third and fourth steps and any other steps between the bottom and the top. So far as I know, even now, there was nothing about the third or fourth steps that was any different from conditions existing with respect to the other steps from the top to the bottom. When I got to either the third or fourth step I slipped on the ball of my right foot. If I had to say definitely whether the heel was off the floor, I could not do it, but this I do know: that you don't slip with rubber heels. If I had to draw a conclusion I would say that when I slipped with my right foot that my heel was not on the steps but that the ball of my foot was resting there; but as to actual knowledge of that I have no way of knowing. I am positive that I slipped with the right foot but whether on the ball or whether on the inside of foot I cannot say. There is certainly a difference between slipping with your right foot and the ball of your foot. All I can be accurate about is that I slipped with my right foot. I don't say that I slipped with the rubber heel. I wish to tell the jury that I do not know just how I slipped."

At the conclusion of all the evidence for the plaintiff and defendants, the court below granted a motion for judgment as of nonsuit. Plaintiff excepted, assigned error and appealed to the Supreme Court.

Harry R. Stanley for plaintiff.
Hines & Boren for defendants.

CLARKSON, J. At the close of plaintiff's evidence the defendants made a motion for judgment as in case of nonsuit. C. S., 567. The court below overruled this motion. At the conclusion of all the evidence the defendants renewed their motion, which the court below sustained. In this we can see no error.

Speaking to the subject of the duty imposed upon owners to invitees, in *Sams v. Hotel Raleigh,* 205 N. C., 758 (760), it is written: "In order to establish a breach of duty so imposed the injured party must offer evidence tending to show (a) defective or negligent construction or maintenance; (b) express or implied notice of such defects," citing authorities.

In *Brown v. Montgomery Ward & Co., ante,* 368 (370-1), we find: "The duty of proprietors of buildings with respect to invitees on their premises has been frequently stated in the decisions of this Court. . . . (citing authorities). The consensus of these authorities is that the occu-

pant of premises to which others are invited to come for business or pleasure owes to such persons the duty to exercise due care to keep the premises in a reasonably safe condition and to give warning of any hidden peril. The proprietor, however, is not an insurer of safety, and when claim is made on account of injury caused by some article or substance on the floor along and upon which customers may be expected to walk, in order to justify recovery it must be made to appear that the proprietor either placed or permitted the harmful substance to be there, or that he knew or by the exercise of due care should have known of its presence in time to have removed the danger or given proper warning of its presence. . . . (citing authorities). As was said in *Cummings v. R. R., ante,* 127, 'There must be legal evidence of every material fact necessary to support the verdict.' "

The injury to plaintiff was unfortunate and distressing, but we see no sufficient evidence for the case to be submitted to a jury. On the entire evidence there was no negligence on the part of defendants and perhaps contributory negligence on the part of plaintiff—from his own testimony.

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

Affirmed.

MAY WINDERS v. WALTER POWERS.

(Filed 22 May, 1940.)

1. Breach of Marriage Promise § 2—

The fact that at the time of the breach of promise of marriage, license for the marriage of the parties could not be lawfully issued, chapter 314, Public Laws of 1939, is a defense to an action for damages for breach of promise of marriage.

2. Same—

Unchastity of plaintiff is no defense to an action for breach of promise of marriage when the illicit conduct was solely with defendant himself.

3. Same—

The fact that plaintiff is suffering from syphilis which, although entailing no danger of infection to defendant because of its advanced stage, would probably result in children whose blood would be tainted with the disease if the contract were carried out, is a defense to an action for breach of promise of marriage.

4. Marriage § 1—

While marriage is essentially a civil contract, the status resulting therefrom is of profound importance to society and the State, and public policy is concerned therewith for the preservation of the purity and virility of the race.

WINDERS *v.* POWERS.

APPEAL by plaintiff from *Stevens, J.*, at October Term, 1939, of PENDER. Affirmed.

This was an action for damages for breach of promise of marriage. At the close of plaintiff's evidence, motion for judgment of nonsuit was allowed, and plaintiff appealed.

E. C. Sanderson and David Sinclair for plaintiff.
Clifton L. Moore and Rivers D. Johnson for defendant.

DEVIN, J. The sufficiency of the plaintiff's evidence to warrant its submission to the jury depends upon the effect to be given to the plaintiff's admission that during the time when the promise of marriage and its breach occurred she was afflicted with the disease of syphilis.

The plaintiff, who is now thirty-three years of age, testified that the promise of marriage was given in 1935, that sexual relations with defendant began in 1936, and that a baby was born in July, 1938. She testified that in September, 1938, her syphilitic condition, previously unknown to her, was discovered by a physician, and that fact was communicated to the defendant; that thereafter sexual relations between them, together with renewed promises of marriage, continued to January, 1939, when plaintiff's father caused the indictment of the defendant, who thereafter ceased all relations with her. Evidence of syphilis was also found in the blood of the baby. Plaintiff further testified that she had never had sexual intercourse with any other man than the defendant. The defendant did not have syphilis nor did the plaintiff contend that he had communicated the disease to her, and she was unaware how she had acquired it.

The physician testified that at the time he examined the plaintiff in September, 1938, she had a "four plus Wassermann," and that the baby had a positive Wassermann inherited through the blood of the mother; that in his opinion the plaintiff had been infected for as long a time as ten years. He further testified that at the time of his examination plaintiff's syphilitic condition would be classed as "latent second or early third stage. She would not be infectious as far as sexual intercourse, but if she had another child, the child would have it."

The breach of the promise of marriage occurred in 1939. No evidence of refusal of compliance appears until suit brought in May, 1939. At that time ch. 314, Public Laws 1939, was in effect. By this act it is provided that marriage licenses shall not be issued except upon presentation of a physician's certificate showing absence of any venereal disease in infectious or communicative stage, and, in addition, the act requires that this certificate be accompanied by a laboratory report showing the result of the Wassermann test to be negative. The act permits an excep-

tion to these requirements only, "when the applicant with syphilis has been under continuous weekly treatment with adequate dosage of standard arsenical and bismuth preparation given by a regularly licensed physician for a period of one year, and when such applicant also signs an agreement to continue such treatment until cured or probated."

The evidence fails to disclose that at the time of the breach of promise of marriage the plaintiff had brought herself within the exception to the statute so as to render the issuance of a marriage license lawful. If the plaintiff's condition was such as to prevent her lawful entry into the marriage relation, this would constitute a valid defense to an action for damages for breach of the contract.

The physician testified that in the present stage of the disease with which the plaintiff was afflicted sexual relations would not be dangerous to the defendant, but that any offspring would be affected with the inherited evil of syphilis.

The rule stated in *Gaskill v. Dixon,* 3 N. C., 350, that unchastity of the plaintiff would constitute a defense to an action for damages for breach of promise of marriage is inapplicable when the illicit conduct was only with the defendant himself, as the plaintiff testified was the case here. *Smith v. McPherson,* 176 Cal., 144; L. R. A., 1918-B, 66; *Barrett v. Vander-Muelen,* 264 Ky., 441.

It seems to be the rule, however, announced by this Court and in other jurisdictions, that a diseased condition of the body of one of the parties to an agreement to marry, such as would entail serious injury to the offspring if the contract were carried out, would release the other party from liability for failure to consummate the agreement to marry. *Allen v. Baker,* 86 N. C., 92; *Shepler v. Chamberlain,* 226 Mich., 112, 33 A. L. R., 1232, and cases cited in annotation; 8 Am. Jur., 862-864; *Re Oldfield,* 175 Iowa, 118; *Shackleford v. Hamilton,* 93 Ky., 80; *Grover v. Zook,* 44 Wash., 489.

While marriage is in essential respects a civil contract, it is something more. From it results a status, of profound importance not only to the parties, but also to society and to the State. Upon it largely depends the procreation of succeeding generations, and public policy is concerned with the preservation of the purity and virility of the race.

While the conduct of the defendant, as testified by the plaintiff, is not to be approved, we must hold that the failure to comply with a contract of marriage, for which license could not lawfully issue, and which would probably result in children in whose blood the inherited evil of syphilis would continue, would not give rise to an action for breach of the contract.

The ruling of the court below in allowing the motion and entering judgment of nonsuit is

Affirmed.

CAVARNOS-WRIGHT COMPANY v. BLYTHE BROTHERS COMPANY, A. H. GUION & COMPANY, CITY OF HIGH POINT, AND SOUTHERN RAILWAY COMPANY.

(Filed 22 May, 1940.)

1. Principal and Surety § 7—Codefendant of contractor is not entitled to joinder of surety on contractor's bond for public construction in action by third person to recover for alleged negligent injury.

A city, the State Highway and Public Works Commission, and a railroad company entered into a contract for the elimination of a grade crossing. The city and the commission each employed a contractor to do the work required of it, respectively, under the agreement. Plaintiff instituted this action against the city, the railroad company and both contractors to recover damages to his property resulting from alleged negligence in the performance of the work on the project. Defendant city moved that the State Highway Commission and the surety on the bond of its contractor be made parties defendant, claiming that its liability, if any, is secondary, and the liability of the commission's contractor is primary. The relevant provisions of the contractor's bond was that the commission should be saved harmless from any liability for negligent injury inflicted in the performance of the work. *Held:* The injured party may not hold the surety liable in damages, and defendant city has even less right to hold the surety liable, since it must first establish that its negligence is secondary and the negligence of the commission's contractor primary before it has a claim even against the contractor, and the city's motion that the surety be made a party defendant was properly denied, and moreover, ch. 260, Public Laws of 1925, prescribes the procedure and provides that only one action may be instituted on the bond for public construction.

2. Appearance § 2b—

Upon the hearing of a motion for the joinder of an additional party defendant, whether the appearance of such party for the purpose of resisting the motion is a general or special appearance is immaterial when the court refuses the motion and thereby takes such party out of court.

APPEAL by defendant city of High Point from *Olive, Special Judge,* at November Term, 1939, of GUILFORD. Affirmed.

Motion in the cause by the defendant city of High Point for an order making the United States Casualty Company of New York, contract surety of the defendant A. H. Guion & Company, a party defendant.

The city of High Point, the Southern Railway Company and the North Carolina State Highway and Public Works Commission entered into a contract or a series of contracts contemplating the elimination of the grade crossing of the Southern Railway Company at Main Street in the city of High Point. Pursuant thereto the city of High Point employed the defendant Blythe Brothers Company to do all the excavating

in connection with said project and the North Carolina State Highway and Public Works Commission contracted with A. H. Guion & Company to do all the work imposed upon it under such agreements.

The plaintiff alleges that in the performance of the work, particularly the excavation in connection with the completion of the project, the defendants were negligent and careless in the manner in which such work was done; that as a result thereof cave-ins of the embankment occurred and the water main of the defendant city was disrupted, causing a large amount of water to flow therefrom; and that as a result thereof the building occupied by it as a lessee was undermined and rendered useless and its business was destroyed and that the value of the personal property used in connection therewith was materially reduced. It seeks to recover damages caused by such negligent conduct.

The defendant city of High Point, after due notice, appeared and moved the court for an order making the United States Casualty Company of New York, surety for the defendant A. H. Guion & Company, and the North Carolina State Highway and Public Works Commission parties defendant. In response to the notice served the United States Casualty Company of New York entered its special appearance for the purpose of resisting the motion.

When the motion came on to be heard the court below concluded "that neither the United States Casualty Company of New York nor the North Carolina State Highway and Public Works Commission are necessary or proper parties to a final adjudication of the rights of the parties interested in this action." It thereupon entered an order denying the motion as to the United States Casualty Company of New York. The defendant city of High Point excepted and appealed.

G. H. Jones for defendant city of High Point, appellant.

Frazier & Frazier and R. G. Cherry for respondent United States Casualty Company of New York, appellee.

BARNHILL, J. The conditions of the contractor's bond of the defendant A. H. Guion & Company, upon which the United States Casualty Company of New York is surety, executed and delivered to the State Highway and Public Works Commission, are identically the same as those contained in the bond under consideration in *Lumber Co. v. Lawson,* 195 N. C., 840. There the contractor's surety was made an original party defendant by the plaintiff, whose action was based upon allegations of negligence of the contractor. The bonding company demurred. The order of the judge overruling the demurrer was reversed by this Court.

As the questions here presented are fully discussed and decided in the opinion in that case, which cites numerous authorities in support of the conclusion there reached, it is needless for us to again undertake to review the law or to extend the discussion.

It may be noted that the plaintiff in that action, which originally made the bonding company a party defendant, was the party injured and damaged by the alleged negligence of the contractor. Although it had stated a cause of action for damages caused by the negligent conduct of the contractor, it was held that as to the bonding company no cause of action was stated. Here the defendant is not the party injured. It denies liability and asserts that if it is liable then the contractor is primarily liable and it is secondarily liable. Thus, it appears that the appealing defendant does not now have and will not have, in any event, any claim against the contractor until and unless liability is established and the issue as to primary and secondary liability is answered in favor of the appellant. Surely its rights are no greater than were those of the plaintiff in the *Lawson case, supra.* Furthermore, the statute expressly provides that in no event shall more than one action be instituted against the bonding company, ch. 260, Public Laws 1925, and the procedure is expressly provided.

The appellant insists that the appearance of the bonding company was in fact general and not special. This is immaterial. The court below declined to make the bonding company a party defendant. If, by a general appearance, it came into court, it went out under the order of the court from which the appellant appeals.

The judgment of the court below is affirmed on authority of *Lumber Co. v. Lawson, supra,* and cases there cited.

Affirmed.

MINNIE KINLEY BROADHURST AND J. N. WRIGHT v. BLYTHE BROTHERS COMPANY, A. H. GUION & COMPANY, CITY OF HIGH POINT, AND SOUTHERN RAILWAY COMPANY.

(Filed 22 May, 1940.)

APPEAL by defendant city of High Point from *Olive, Special Judge,* at November Term, 1939, of GUILFORD. Affirmed.

Motion in the cause by the defendant city of High Point for an order making the United States Casualty Company of New York, contract surety of the defendant A. H. Guion & Company, a party defendant.

This is a companion action to that entitled *Cavarnos-Wright Co. v. Blythe Brothers Co., ante,* 583. The facts set forth in the complaint are substantially the same except that it is alleged that the plaintiffs herein are the owners of the property of which Cavarnos-Wright Company were the lessees and damage to the property, through the negligence of the contractor, is alleged. After hearing the motion of the defendant city of High Point the court below entered its order denying the same. Said defendant excepted and appealed.

G. H. Jones for defendant city of High Point, appellant.

Frazier & Frazier and R. G. Cherry for respondent United States Casualty Company of New York, appellee.

BARNHILL, J. The decision in the case of *Cavarnos-Wright Co. v. Blythe Brothers Co., ante,* 583, is determinative of this appeal.

The judgment below is

Affirmed.

MORENTO WILSON v. PAN-AMERICAN BUS LINES, INC.

(Filed 22 May, 1940.)

1. Carriers § 15—

A passenger on a bus does not lose his rights as such in having the bus stop at a filling station on the route and leaving the bus temporarily to go to the toilet.

2. Carriers § 21b—

Plaintiff, while a passenger of defendant bus company, was assaulted and injured by an unidentified person as plaintiff was nearing the bus to board same. *Held:* Conflicting evidence as to whether defendant's employees could have come to plaintiff's rescue, and negligently failed to do so, after discovering his peril, was properly submitted to the jury.

APPEAL by defendant from *Phillips, J.,* at October Term, 1939, of MECKLENBURG.

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

On 9 August, 1937, the plaintiff purchased a ticket from an agent of the defendant in New York and took passage on one of its buses for Charlotte, N. C. While traveling through the State of Virginia the plaintiff asked the driver to stop the bus and allow him to leave it for the purpose of relieving the pressure on his kidneys. Pursuant to this

request, the bus was stopped at a filling station on the side of the road about five miles south of Martinsville. As plaintiff was returning to the bus and while approximately fifteen feet away, he was assaulted by an unidentified person and injured in the fight which ensued.

It is in evidence that the porter and driver of the bus saw the fight but made no effort to assist the plaintiff. The defendant's evidence is to the effect that the assault was wholly unexpected and so quickly over that neither the porter nor the driver had time to go to plaintiff's assistance.

From verdict and judgment in favor of the plaintiff, the defendant appeals, assigning errors.

John A. McRae and B. F. Wellons for plaintiff, appellee.
Sims & Mason for defendant, appellant.

STACY, C. J. The plaintiff was a passenger on defendant's bus. He did not lose his rights as such in the circumstances disclosed by the record by leaving the bus temporarily for a lawful purpose. *Wallace v. R. R.*, 174 N. C., 171, 93 S. E., 731. His status was that of a passenger at the time of the assault. *Goodman v. Queen City Lines*, 208 N. C., 323, 180 S. E., 661.

Whether the employees of the defendant could have come to his rescue, and negligently failed to do so, after discovering his peril, was submitted to the jury under proper instructions from the court. *Mills v. R. R.*, 172 N. C., 266, 90 S. E., 221. The evidence on this issue was conflicting. *Pruett v. R. R.*, 164 N. C., 3, 80 S. E., 65.

We have discovered no reversible error. The verdict and judgment will be upheld.

No error.

MRS. KATE CRABTREE v. BURROUGHS-WHITE CHEVROLET SALES COMPANY, CURTIS BOULDIN AND BILL PHILLIPS.

(Filed 22 May, 1940.)

1. Appeal and Error § 37e—

The findings of fact by the trial court in respect to service of summons are conclusive on appeal when supported by evidence.

2. Process § 8—Evidence held to support finding that auto was under control, express or implied, of nonresident corporate defendant.

Averments in affidavits that the automobile causing the injury in suit, admittedly owned by the nonresident corporate defendant and driven in this State by its salesman, was being driven here with the corporation's permission for the purpose of effecting a sale, *is held* sufficient evidence to support the court's finding that the automobile was being driven at the

time of the injury for the corporation or was under its implied control and direction so as to support service of process on it by service on the Commissioner of Revenue under the provisions of ch. 75, Public Laws of 1929 (Michie's Code, 491 [a]).

APPEAL by defendant Burroughs-White Chevrolet Sales Company from *Olive, Special Judge,* at January Term, 1940, of GUILFORD. Affirmed.

Frazier & Frazier for plaintiff, appellee.
C. L. Shuping and G. C. Hampton, Jr., for defendant, appellant.

DEVIN, J. This case involves the validity of the service of summons upon the Burroughs-White Chevrolet Sales Company, a nonresident of the State, in an action to recover damages for a personal injury alleged to have been caused the plaintiff by defendant's automobile, on a highway in North Carolina.

The summons and complaint were served, in accordance with the provisions of chapter 75, Public Laws 1929 (Michie's Code, sec. 491 [a]), upon the Commissioner of Revenue of North Carolina, as the agent for service of the nonresident defendant. The Act of 1929 authorizes service of summons upon the Commissioner of Revenue as the agent for service of a nonresident who uses the highways of the State for the operation of a motor vehicle, in any action growing out of the operation of the motor vehicle "by him, for him, or under his control or direction, express or implied." *Wynn v. Robinson,* 216 N. C., 347.

In the court below the defendant entered special appearance and moved to quash the summons, on account of claimed invalidity of service resulting in want of jurisdiction over the defendant. The motion was denied and defendant excepted and appealed.

The court based its ruling upon the following findings of fact: "That at the times complained of the defendant Burroughs-White Chevrolet Sales Company was the owner of the Chevrolet automobile referred to in the complaint and the codefendants had the automobile in question in North Carolina for the purpose of effecting sales in and around Greensboro; that the said codefendants Bouldin and Phillips were employees of the defendant corporation, Phillips serving as an automobile salesman, and that at the time complained of the said salesman was in possession of the automobile in question as agent of the defendant corporation, and while engaged within the scope of his employment."

The findings of fact of the Superior Court upon the motion to dismiss the summons for lack of proper service are conclusive on appeal, if supported by evidence. *Lumber Co. v. Finance Co.,* 204 N. C., 285, 168 S. E., 219.

It was admitted that the automobile by which plaintiff was injured was the property of the appealing defendant, and that one of the persons operating the automobile at the time of the injury, Bill Phillips, was an employee of defendant company, serving as an automobile salesman. In the verified complaint, used as an affidavit, it was stated that "the said Bill Phillips and Curtis Bouldin were in possession of said car, in the prosecution of the business of the defendant Burroughs-White Chevrolet Sales Company to the end that they might sell automobiles for said Burroughs-White Chevrolet Sales Company." It further appeared from one of the affidavits that Bill Phillips, with the permission of the defendant, drove the automobile to the city of Greensboro for the purpose of attempting to sell it to a prospect there.

It would seem therefore that there was evidence presented by the affidavits sufficient to support the findings of fact by the court below, and the conclusion, based thereon, that the automobile, the negligent operation of which was alleged to have caused plaintiff's injury, was at the time being operated for the appealing defendant or under its implied control and direction.

The judgment of the court below denying the motion to dismiss the summons is

Affirmed.

STATE v. W. B. DOWLESS.

(Filed 22 May, 1940.)

Indictment § 20: Bills and Notes § 10g—

The indictment charged that defendant issued a worthless check knowing at the time that he did not have sufficient funds or credit for its payment. The proof was that defendant issued a check of a corporation of which he was an executive officer, and that the corporation did not have sufficient funds or credit for its payment. *Held:* There is a fatal variance between allegation and proof, and defendant's motion to nonsuit should have been allowed.

APPEAL by defendant from *Sinclair, Emergency Judge,* at March Term, 1940, of ROBESON. Reversed.

The defendant was charged with issuing a worthless check, in violation of ch. 62, Public Laws 1927 (Michie's Code, sec. 4283 [a]).

The warrant charged that the defendant, with intent to defraud, "did issue and deliver to this affiant (O. K. Kittrell) a worthless check in amount of $211.79 . . ., defendant knowing at the time of issuing and delivering said check that he did not have sufficient funds or neces-

sary credit arrangements with said bank whereby said check would be paid."

The check offered in evidence, and relied on by the State, was as follows:

WHITEVILLE, N. C., 7/24/1939.

WACCAMAW BANK & TRUST COMPANY.

Pay to order of O. K. Kittrell $211.79. Two Hundred and Eleven and 79/100 Dollars. For Tob. barn furnaces.

THE DOWLESS TOBACCO CURER, INCORPORATED.
By W. B. DOWLESS, *Pres. & Secy-Treas.*

Defendant's motion for judgment of nonsuit was denied. Verdict—guilty. From judgment imposing sentence, defendant appealed.

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

H. H. Clark and Edward B. Clark for defendant.

DEVIN, J. The defendant assigns as error the ruling of the court below denying his motion for judgment of nonsuit.

The warrant, upon which the defendant was tried and convicted, charged that defendant W. B. Dowless did issue and deliver a worthless check, knowing that he did not have sufficient funds or credit with the bank with which to pay same, whereas the proof shows a check issued by a corporation of which defendant Dowless was executive head, together with oral evidence that the corporation did not have sufficient funds or credit with the bank to pay same.

While the terms of the statute (Public Laws 1927, ch. 62) are broad enough to cover the utterance and delivery of the check of a corporation by an officer thereof with knowledge of the falsity of the check and the insufficiency of the funds or credit of the maker, here the charge is that W. B. Dowless, individually, issued the check with knowledge that he (Dowless) did not have sufficient funds or credit with the bank to pay the check. The proof does not conform to the charge contained in the warrant. There is a variance between allegation and proof. *S. v. Franklin,* 204 N. C., 157, 167 S. E., 569; *S. v. Corpening,* 191 N. C., 751, 133 S. E., 14; *S. v. Harbert,* 185 N. C., 760, 118 S. E., 6.

We conclude that, on this record, the defendant's motion for judgment of nonsuit should have been allowed.

Reversed.

STATE v. WOODROW SMITH.

(Filed 22 May, 1940.)

1. Seduction § 8—

It is not required that the "supporting evidence" of the promise of marriage coincide with the testimony of the prosecutrix as to the time the promise was made, since it is not required that the "supporting evidence" be direct, adminicular proof being sufficient.

2. Criminal Law § 81c—

Excerpts from the charge will not be held for reversible error when the charge, construed as a whole, is not prejudicial to defendant.

APPEAL by defendant from *Johnston, Special Judge,* at November Term, 1939, of STANLY.

Criminal prosecution tried upon indictment charging the defendant with seduction under promise of marriage in violation of C. S., 4339.

From conviction and judgment thereon the defendant appeals, assigning errors.

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

E. T. Bost, Jr., and W. E. Smith for defendant.

STACY, C. J. The sufficiency of the evidence to carry the case to the jury is challenged only on one point, *i.e.,* whether the promise of marriage rests alone on the "unsupported testimony of the woman." The time of the seduction is fixed at about the middle of March, 1939. The defendant says it took place in April. In two letters to the prosecutrix, one dated 18 May, 1939, the other 21 June, 1939, the defendant admitted the promise. In the last letter he speaks of the promise as having been made "long time ago." This, taken with the other evidence in the case, would seem to meet the requirements of the statute. C. S., 4339. *S. v. Raynor,* 145 N. C., 472, 59 S. E., 344; *S. v. Malonee,* 154 N. C., 200, 69 S. E., 786. The "supporting evidence" need not be direct. Adminicular proof will suffice. *S. v. Cooke,* 176 N. C., 731, 97 S. E., 171. Besides, there is evidence that the defendant and the prosecutrix were "going together over a period of two or three months" prior to the alleged seduction, and that the prosecutrix had no other boy friends. *S. v. Moody,* 172 N. C., 967, 90 S. E., 900; *S. v. Fulcher,* 176 N. C., 724, 97 S. E., 2. The evidence pertaining to the character of the prosecutrix is conflicting. *S. v. Patrick,* 204 N. C., 299, 168 S. E., 202.

There are two exceptions to the charge, which, standing alone, may be subject to some criticism, but viewed contextually they are not regarded as harmful to the defendant.

On the whole, the case appears to have been tried accordant with the applicable decisions, hence the verdict and judgment will be upheld.

No error.

B. V. RIVENBARK v. SHELL UNION OIL CORPORATION, SHELL EASTERN PETROLEUM PRODUCTS, INC., H. J. FARROW AND RAYMOND FARROW.

(Filed 22 May, 1940.)

1. Bill of Discovery § 9—

An application for an order for inspection of writings is sufficiently definite when it refers to papers under the exclusive control of the adverse party which relate to the immediate issue in controversy, and which cannot be more definitely described by applicant.

2. Bill of Discovery § 8—Fact that corporate defendant has liability insurance held competent as some evidence that individual defendants are its agents.

Plaintiff instituted this action to recover for injuries resulting when he slipped and fell on some oil or grease on the floor of a filling station, alleging that defendants were negligent in failing to keep the floor in a reasonably safe condition. The corporate defendants filed answer alleging that one of them had ceased to exist prior to the occurrence of the injury and that the other corporate defendant leased the filling station to one of the individual defendants and retained no control or supervision over the same. The individual defendants alleged that they were lessees of the station and operated the same independently as owners without control or supervision of the corporate defendants. Plaintiff filed affidavit averring that the corporate defendant had taken out a policy indemnifying it against liability to the public in the operation of the station, and requested that it be required to produce the said liability policy and letters and telegrams calling on the insurer to defend the action, and that plaintiff be allowed to inspect same. *Held:* The fact that the corporate defendant had taken out insurance indemnifying it for liability in the operation of the station, while not evidence of negligence, is some evidence that it retained supervision and control in the operation of the station and that the individual defendants were its agents, and the granting of plaintiff's application was not error. Michie's N. C. Code, 900, 1823, 1824.

APPEAL by defendants Shell Union Oil Corporation and Shell Eastern Petroleum Products, Inc., from *Hamilton, Special Judge*, at October Term, 1939, of NEW HANOVER. Affirmed.

The complaint alleges, in part:

"Plaintiff is informed, believes and alleges that the two corporate defendants, under some arrangement between themselves, own and operate said filling station, under the lease from Hughes Brothers, that the same is under their supervision and control, and that the defendants H. J. Farrow and Raymond Farrow operate the same for the said corporate defendants, as their agents, or managers or employees, or under some profit-sharing partnership arrangement between them and their codefendants; that the said individual defendants have long been employees of the Shell Oil Corporations—that is, of the corporation which at the time was handling and distributing Shell gasoline and oils.

"In conducting the business of said filling station and putting gasoline and oils and greases in the cars, some gasoline and oils and greases will drip and spill on the floor of said filling station and cause same to be slick and dangerous, unless special care and attention is used to prevent said spilling and dripping of gasoline and oils and greases, and unless the floor of said filling station is constantly washed up and cleaned, that some drippings will ordinarily occur in the usual run of business and it is necessary that the floor be frequently washed and cleaned of these slick substances.

"That on or about the 8th day of October, 1938, along during the afternoon of said day, the same being on Saturday, the plaintiff B. V. Rivenbark drove up in said filling station operated by the defendants at the southwest corner of 17th and Market Streets in the city of Wilmington, N. C., to buy some gasoline and have same put in his car. Upon stopping at the tank or pump, the plaintiff started to get out of his automobile, and the defendants had negligently left and permitted some grease and oil, or slick, greasy substance of some sort, to be dropped on the floor of said filling station, and to remain there, and unknown to the plaintiff, as he stepped out of his automobile he stepped on said substances and his feet and legs flew out from under him, and, on account of said negligence of the defendants in permitting the substances to be there, and not removing it and not warning the plaintiff that same was there, he was thrown violently onto the cement floor and against his automobile and against a concrete casement standing several inches up around the tank or pump, and with a sharp edge, and plaintiff was thrown suddenly and violently against said concrete casement, or platform, and his back and several ribs were broken, and his right arm severely injured around his elbow, causing the plaintiff great suffering and anguish, both of body and mind, and causing him to incur considerable expense for doctors and hospital bills and nurses. The plaintiff had to have his back and body put in a cast, and has been incapacitated, and is seriously and permanently damaged in the sum of $20,000.00.

"The defendants were negligent in that they dropped grease and oils

and slick substances on the floor of the filling station, where they knew customers would come and get out of their automobiles to have them serviced, and would likely step on same and cause them damage and injury; in that they permitted said greases and oils and slick substances to be and to remain on said floor; in that they did not take the proper precaution to keep said floor clean from these greases and oils and slick substances and to keep the floor safe for their customers, and in that the defendants did not warn the plaintiff of said danger, especially after they knew, or should have known that said greasy and slippery substance was on the floor. The defendants were also negligent in constructing and maintaining the concrete casement or raised place in said filling station near where people would get out of their cars when buying gasoline and oils, etc., and in having the same with a sharp and dangerous edge, and in not having the same protected, and in not taking the precautions necessary to prevent people from getting out of the cars and stepping on the slick and dangerous floor, and substance, permitted and maintained by the defendants; and in not maintaining a safe place for their customers to come and be served.

"Wherefore, plaintiff prays judgment against the defendants for $20,000.00 damages, and for costs and general relief."

Defendants Shell Union Oil Corporation and Shell Eastern Petroleum Products, Inc., answering the complaint herein, say, in part: "It is admitted that Shell Union Oil Corporation is a corporation duly created, organized and doing business in North Carolina; however, it is denied that Shell Eastern Petroleum Products, Inc., is a corporation duly created and existing. Further answering this article of the complaint, defendants say that Shell Eastern Petroleum Products, Inc., has ceased to exist, all its assets and business having been taken over by Shell Union Oil Corporation on or about 2 November, 1936; and that at the time of the matters and things complained of there was no such person or corporation as Shell Eastern Petroleum Products, Inc., in existence. . . . Further answering this article of the complaint, these defendants say that the defendant H. J. Farrow, at the time or times complained of, was lessee of the filling station referred to in said article, and that he and his brother, the defendant Raymond Farrow, were operating the same under their own exclusive control, supervision, and management, and that these defendants had no supervision, control, or management over the defendants H. J. Farrow and Raymond Farrow, on the premises referred to as the filling station at 17th and Market Streets, at the time complained of."

The defendants deny the material allegations of the complaint and in answer say:

"It is admitted that gasoline and oils are sold at the filling station

which is situated at the intersection of 17th and Market Streets, and it is also admitted that Shell products are sold there, but not exclusively; and it is admitted that Shell's signs are displayed there; but as to all other allegations contained in said paragraph the same are denied; and the defendants H. J. Farrow and Raymond Farrow, as a further answer to said paragraph, allege that they are lessees of said filling station property and that they are the sole owners and operators of said filling station business, and that they run said business freely and independently of any person, firm or corporation whomsoever. . . . That the floor of their said filling station is swept and cleaned numerous times daily, and that every precaution is taken to keep said filling station clean and safe at all times, and special care and attention is at all times used to keep the floors of said station in a perfectly clean and safe condition, and any allegation in this paragraph which by insinuation or otherwise alleges that these defendants did not keep their filling station in a proper and safe condition is untrue and is therefore denied. . . .

"And for a further defense, these defendants say that on the day and at the time plaintiff entered the filling station at 17th and Market Streets in the city of Wilmington, leased and operated by these defendants, plaintiff was driving a 1929, Model A, Ford truck, which was in a dilapidated condition; that he negligently and carelessly drove his said truck up to and against one of the pumps in said filling station, for the purpose of buying a soft drink and nothing more, and stopped, leaving insufficient room to alight from the truck with safety; that, having stopped his truck, plaintiff proceeded to alight from it without proper care and circumspection, with the result that he slipped on the running-board of said truck, which did not have adequate support and was improperly placed, and stumbled against the aforesaid pump, and that if plaintiff sustained injuries on the premises leased and operated as a filling station by these defendants, which is denied, said injuries were due to the negligence and carelessness of the plaintiff himself, as herein alleged, and these defendants plead such negligence and carelessness on the part of the plaintiff in bar of this action. Wherefore, having fully answered, these defendants ask judgment: That this action be dismissed and they go without day."

Notice, set out below, was founded on affidavit duly sworn to, as follows: "W. K. Rhodes, Jr., and I. C. Wright, each being duly sworn, says that they are of counsel for the plaintiff in the above entitled cause, and according to their information, there is a policy of liability insurance covering the filling station in question, and any and all operations thereunder, payable to, and for, the protection of the Shell Union Oil Corporation and Shell Eastern Petroleum Products, Inc., or one of them, and that after the injury in question occurred the liability company was

notified by the corporate beneficiary, and after this suit was brought that the said liability company was called upon to defend it, and the same is being defended by the liability carrier, and that this is material evidence for the plaintiff to show that the filling station in question was under the management and control of the corporate defendants, and that the Shell Union Corporation has recognized its responsibility and has taken this step to protect itself. Wherefore, plaintiff prays that the policy be produced, and that the letters and telegrams, or copies thereof, calling on the liability carrier to defend the case be produced. W. K. Rhodes, Jr.—I. C. Wright. (Duly sworn to 26 Oct., 1939.")

"NOTICE: To Shell Union Oil Corporation, Shell Eastern Petroleum Products, Inc., H. J. Farrow and Raymond Farrow, and to Messrs. Rountree & Rountree, and Mr. Addison Hewlett, Jr., their attorneys, take notice: That you are hereby notified and requested to produce at the hearing of this cause in the Superior Court in the courthouse in Wilmington, N. C., all policies of liability insurance for the protection of the Shell Union Oil Corporation, and/or the Shell Eastern Petroleum Products, Inc., and to let the plaintiff and his counsel have an inspection and take a copy thereof, and you will further take notice that the plaintiff will ask the court for an order requiring the production of all of these policies of insurance, or policies protecting you, or either of you, from liability or loss on account of the operation of the filling station at the southwestern intersection of 17th and Market Streets, in the city of Wilmington. This the 17th day of October, 1939. W. K. Rhodes, Jr.—I. C. Wright, Counsel for Plaintiff."

The reply to notice of application for order to produce is as follows: "Now come defendants, Shell Union Oil Corporation, and Shell Eastern Petroleum Products, Inc., through their counsel, Rountree & Rountree, and replying to the notice of the plaintiff's counsel of their intention to apply to the court for an order directing the defendants to produce all policies of insurance protecting them from liability or loss on account of operation of a filling station at the southwestern intersection of Seventeenth and Market Streets, in the city of Wilmington, N. C., and requesting an inspection of all such policies, and say: that they do hereby refuse the request of plaintiff's counsel to produce any policy or policies of insurance, and that they object to the court's granting any order to produce said policy or policies, or to permit an inspection thereof, for the reason that any such policy, or policies, of insurance are totally irrelevant to the matters and things in controversy in this cause; that no insurance company is a party to this cause and nothing that might be contained in any policy or policies of insurance is material to the trial thereof; that this application for an order to produce policies of insurance appears to be an effort on the part of plaintiff to bring in irrelevant,

incompetent, and prejudicial matters in the trial of this cause in order to influence the court and jury, and should not be allowed. Wherefore, defendants, Shell Union Oil Corporation, and Shell Eastern Petroleum Products, Inc., pray that plaintiff's application be refused."

The following order was signed by the court below: "It appearing that the policy of liability insurance in force at the time of the injury, and the letters and telegrams from the corporate defendant Shell Union Oil Corporation to the liability carrier calling on it to defend this case, are germane to the issues involved in this case, and that they are in possession of said company, or copies thereof, the company is ordered to produce same at the trial, and to furnish same to the plaintiff for inspection, and permit the plaintiff to take a copy not later than sixty days from this date. This the 26th day of October, 1939. Luther Hamilton, Judge Presiding."

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

W. K. Rhodes, Jr., and I. C. Wright for plaintiff.

Rountree & Rountree for defendants Shell Union Oil Corporation and Shell Eastern Petroleum Products, Inc.

CLARKSON, J. This is an action for actionable negligence brought by plaintiff against defendants for alleged injury to him by defendants, in keeping and maintaining at a gasoline or filling station, operated by defendants in Wilmington, N. C., a slick and dangerous place for customers to walk on, by allowing gasoline, oils and greases to drip and spill on the floor and approach to the filling station. Plaintiff alleged that he was seriously injured, without fault on his part, by defendants' negligence in not using due care to keep a safe place to walk on. The defendants Farrow in their answer say that they are the lessees of the filling station and run the business independently of the other defendants. The other defendant, Shell Union Oil Corporation, says that the Shell Eastern Petroleum Products, Inc., has ceased to exist. That the Farrows were operating the filling station under their exclusive control, supervision and management. Defendants set up the plea of contributory negligence.

It is well settled in this jurisdiction that in an action by an employee against an employer who is assured, the employee must actually sustain a loss before an action will lie upon the indemnifying policy taken out by the employer, as this is ordinarily expressly required by the terms of the policy. *Duke v. Children's Commission, Inc.*, 214 N. C., 570 (571).

In the present action plaintiff, who was injured, is a stranger and customer of the filling station, and in no way connected with defendants. He contends that the Farrow defendants are now and have long been employees of the corporate defendants and operated the gasoline or filling station for the corporate defendants. That they handled and distributed Shell gasoline and oils and that "Shell signs" are displayed there.

The question presented: Did the court err in requiring the corporate defendant Shell Union Oil Corporation to produce the policy of liability insurance together with letters and telegrams between said corporate defendant and its liability carrier, calling on the carrier to defend this case, as set forth in the order appealed from, upon the notice and affidavit of record? We think not.

N. C. Code, 1939 (Michie), sec. 900, is as follows: "A party to an action may be examined as a witness at the instance of any adverse party, and for that purpose may be compelled, in the same manner and subject to the same rules of examination as any other witness, to testify, either at the trial or conditionally or upon commission. Where a corporation is a party to the action, this examination may be made of any of its officers or agents."

Section 1823: "The court before which an action is pending, or a judge thereof, may, in their discretion, and upon due notice, order either party to give to the other, within a specific time, an inspection and copy, or permission to take a copy, of any books, papers, and documents in his possession or under his control, containing evidence relating to the merits of the action or of the defense therein. If compliance with the order be refused, the court, on motion, may exclude the paper from being given in evidence, or punish the party refusing, or both."

Section 1824: "The courts have full power, on motion and due notice thereof given, to require the parties to produce books or writings in their possession or control which contain evidence pertinent to the issue, and if a plaintiff shall fail to comply with such order, and shall not satisfactorily account for his failure, the court, on motion, may give the like judgment for the defendant, as in cases of nonsuit; and if a defendant shall fail to comply with such order, and shall not satisfactorily account for his failure, the court, on motion as aforesaid, may give judgment against him by default."

While a "roving commission for the inspection of papers" will not be ordinarily allowed, an application for an order for inspection of writings is sufficiently definite when it refers to papers under the exclusive control of the adverse party, which relate to the immediate issue in controversy, which could not be definitely described, and an order based thereon will

be upheld. *Bell v. Bank,* 196 N. C., 233; *Dunlap v. Guaranty Co.,* 202 N. C., 651.

The notice in this case is bottomed on the fact that a production of the policy of liability insurance in force at the time of the injury, and in possession of the Shell Union Oil Corporation, and the letters and telegrams from the defendant Shell Union Oil Corporation, to the liability carrier calling on it to defend this case, are germane to the issues involved in the action. If the Shell Union Oil Corporation is carrying liability insurance, this is some evidence for the jury to consider that the Shell Union Oil Corporation is interested in the control, supervision and management of the filling station and the Farrows are its agents or partners. The true facts should be known.

In *Davis v. Shipbuilding Co.,* 180 N. C., 74 (76-77), with his usual clarity, *Hoke, J.,* said: "It was chiefly urged for error that the court admitted, over defendant's objection, evidence tending to show that the shipbuilding company had taken out and held indemnity insurance in reference to employees engaged in this work, citing *Clark v. Bonsal,* 157 N. C., 270, in support of the objection. It is true that in *Clark v. Bonsal, supra,* the Court decided that an injured employee could not maintain an action for negligent injury against the insurance company on an indemnity policy as ordinarily drawn, taken out, and held by the employer for his own protection. Applying the principle, it has been held in several such cases that the existence and contents of such policy is not, ordinarily relevant on the question of damages, or on the issue as to negligence, but, in the present case, the defendant was endeavoring to maintain the position that it was not then operating the plant, and the intestate, at the time of the occurrence, was not in their employment. And the fact that the company had taken out and then held indemnity insurance for injuries to their employees was clearly relevant in that issue. The court was careful to restrict the evidence to the purpose indicated, and the exception must be overruled. In this connection it was earnestly insisted that there was error in permitting witnesses to speak of the policies in question when it appeared that they were in writing and not produced. The question chiefly pertinent here was not so much the contents of the policies as the independent fact that such policies were held, but, in any event, the policies not being the subject-matter in dispute between the parties nor their contents directly involved in the issue, they do not come within the rule which excludes parol evidence as to the contents of a written paper or document. *Miles v. Walker,* 179 N. C., 479-484; *Morrison v. Hartley,* 178 N. C., 618." *Keller v. Furniture Co.,* 199 N. C., 413 (416).

In *Perkins v. Rice,* 187 Miss., 28, 72 N. E. Reporter, at p. 323, it is held: "Where, in an action for injuries to plaintiff while seeking to use

an elevator in an apartment building, defendants admitted ownership of the building, but denied that they were in control of the elevator at the time of the accident, evidence that, shortly before the accident, defendants had procured an indemnity insurance policy against loss or damage from accidents arising in operating the elevator, and that such insurance was in force when plaintiff was injured, was admissible to prove that, in renting the apartment, defendants still retained control of the elevator."

In *Biggins v. Wagner* (S. D.), 245 N. W., 385, 85 A. L. R., 776, it is held: "The fact that a defendant in an automobile accident case carried liability insurance may, notwithstanding the incidental prejudice, be shown for its bearing on the issue whether the driver of the automobile was an employee of such defendant or an independent contractor." At p. 784, the annotation is as follows: "If an issue in the case is as to whether the plaintiff was a servant of the defendant or whether he was an independent contractor or servant of an independent contractor, evidence is admissible that the defendant carried indemnity insurance on his employees, including the plaintiff, such evidence having been treated in some cases as having a tendency to negative the independence of the contract, or, in other words, as having a tendency to show that the plaintiff was considered by the defendant as his employee." Twelve states follow this rule, including North Carolina, citing the case of *Davis v. Shipbuilding Co., supra.*

We think the affidavit of plaintiff is sufficient and the facts alleged show that the examination was necessary and material, as it sets forth with particularity the papers or documents essential as evidence to plaintiff's action. *Bell v. Bank, supra.*

The judgment of the court below is

Affirmed.

BEVERLY LITTLE ROSE v. THE BANK OF WADESBORO.

(Filed 22 May, 1940.)

1. Appeal and Error § 37e—

An assignment of error to the refusal of the court to sustain exceptions to the findings of fact by the referee cannot be sustained when the findings are supported by evidence.

2. Guardian and Ward § 22: Executors and Administrators § 29—

Where an administrator or guardian files the reports required by law, which are audited by the clerk, acts in good faith and with due diligence, exercises sound business judgment, and accounts for all funds received by

it in its fiduciary capacity, it is entitled to commissions allowed by law and approved by the clerk within the limits prescribed by statute, C. S., 157, 2190.

3. Guardian and Ward § 22—

Where a bank, acting as administrator and as guardian for one of the distributees, pays over to itself as guardian the distributive share of its ward, such amount is cash received by it as guardian, and it is entitled by law to commissions thereon. C. S., 157, 2190.

4. Same—

A guardian is entitled to commissions on the amount obtained by it for the ward's estate from its sale of the ward's inherited interest in lands.

5. Same—

Where a bank acting as administrator and as guardian for one of the distributees makes an advancement to its ward from the intestate's estate and uses the funds so advanced in making investments for the ward's estate and charges such funds against the distributive share of the ward, the bank is entitled to commissions on sums thus advanced, since such money in cash received by it as guardian.

6. Guardian and Ward § 23—

A guardian is not liable for penalties paid for failure to list the ward's personalty for taxes when no taxes were paid on the personalty for the years prior to five years before the property was listed, and the penalties amount to less than the taxes would have been for those years had the property been properly listed, since in such instance the ward's estate suffers no damage.

7. Appeal and Error § 25—

An exception which is not assigned as error is deemed abandoned.

8. Guardian and Ward § 22—

Where a guardian uses funds of its ward's estate in its own business and pays to the ward's estate interest on the funds so used, it is entitled to commissions on the amount of interest so paid.

9. Same—

A guardian is entitled to commissions on the sum received by it from the sale of stock belonging to its ward's estate.

10. Guardian and Ward § 23—

Where it is found that the rents collected by the guardian amount to the reasonable rental value of the realty of the estate for the time it was rented, and there is no finding that there was any contract for any specific amount of rent to be paid subsequent to the date the rent was paid in full, the guardian cannot be held liable for failure to collect rents in excess of that accounted for.

11. Appeal and Error § 40a—

An assignment of error to the court's failure to sustain exceptions to the referee's conclusions of law cannot be sustained when the conclusions are supported by the findings of fact.

12. Guardian and Ward § 21—

Where a guardian is permitted to get in evidence the fact that it had paid interest on guardianship funds which it had used in its own business, and the referee finds as a fact that the interest claimed had been paid, the exclusion of the reason why the guardian had made the payment is not prejudicial, evidence of the reason for the payment being immaterial.

13. Guardian and Ward § 13: Executors and Administrators § 28—

When a guardian or administrator uses funds of the estate in its own business it must pay to the estate interest on such funds at the highest legal rate, and the fact that the fiduciary is a bank and deposits the funds from its trust department in its commercial department does not relieve it of the duty to pay interest on such funds, the bank being but a single entity and the use of the funds by one department being for the benefit of the bank as a whole.

14. Appeal and Error § 29—

Exceptions not set out in appellant's brief or in support of which no authority is cited and no argument advanced are deemed abandoned. Rule of Practice in the Supreme Court, No. 28.

15. Guardian and Ward § 22: Executors and Administrators § 29—

Where a bank, acting as administrator and as guardian of one of the beneficiaries, comes into possession of certain stocks and bonds as administrator, subsequently delivers to itself as guardian the same stocks and bonds, and upon settlement with its ward delivers the same stocks and bonds to her upon her majority, the bank is not entitled to retain commissions on the stocks and bonds either as administrator or as guardian.

16. Guardian and Ward § 13—

A bank acting as guardian violates its fiduciary duties by depositing guardianship funds in its commercial department and commingling such funds with its general deposit funds.

17. Guardian and Ward §§ 21, 22: Reference § 14—

Where the facts are not in dispute, whether a guardian is liable for interest on guardianship funds used by it in its own business, and whether it is entitled to commissions on stocks received by it as guardian, are questions of law for the court, and not issues of fact for the jury, and the refusal of the court to submit such issues tendered upon appeal from the referee is not error.

APPEAL by plaintiff and by defendant from *Johnston, Special Judge,* at November Term, 1939, of ANSON. Affirmed.

Thomas H. Leath and Connor & Connor for plaintiff.
Rowland S. Pruette and B. M. Covington for defendant.

SCHENCK, J. The defendant was the guardian of the plaintiff, and upon becoming of age the plaintiff instituted this action for an accounting. The defendant was also the administrator of the estate of W. S. Little, father of the plaintiff.

At the March Term, 1938, upon motion of the plaintiff, the case was referred to U. L. Spence, Esquire, to which action the defendant excepted and reserved all rights.

On 5 July, 1938, in Wadesboro, the referee conducted a hearing of the cause, at which time and place evidence was taken and argument heard. On 10 June, 1939, the referee filed his report. To said report the plaintiff and defendant filed exceptions.

The case came on for hearing at the November Term, 1939, of Anson, upon the report and exceptions thereto, and the court overruled the exceptions both of plaintiff and defendant, with the exception of one of defendant's exceptions which it sustained, and after allowing a credit of $266.66 on the conclusion of the referee which was necessitated by the sustaining of the one exception, confirmed the report of the referee and entered judgment accordant therewith.

From the judgment of the court confirming the report of the referee as modified, both plaintiff and defendant appealed, assigning error. However, no exception was taken to the modification made by the court to the referee's report.

PLAINTIFF'S APPEAL.

Plaintiff's assignments of error 1, 2 and 3 are to the court's failure to sustain her exceptions 1, 2, 3, 4 and 5 to certain findings of fact by the referee. There is ample evidence to sustain the findings assailed by the assignments. "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." *Wimberly v. Furniture Stores,* 216 N. C., 732, and cases there cited.

Plaintiff's assignment of error 4 is to the court's failure to hold as a matter of law, as set forth in her first exception to the referee's conclusions of law (Exception No. 6), that the defendant had forfeited its rights to all commissions, both as administrator and as guardian. This assignment cannot be sustained, since the findings of fact by the referee, sustained by evidence and approved by the court, establish that the defendant both as administrator and as guardian has from time to time filed the reports required of it by law showing the conditions of the estates administered, and that said reports so filed have been audited by the clerk and each retention of commissions has been allowed by the clerk and is well within the amounts prescribed by the statutes, C. S., 157 and 2190, and that no excessive commissions have been allowed and that the defendant has acted in good faith and with due diligence in administering its trusts, and has exercised sound business judgment and accounted for all funds received by it in both fiducial capacities.

Plaintiff's assignment of error 5 is to the court's failure to sustain her second exception to the referee's conclusions of law (Exception No. 7), wherein it was concluded that the defendant was entitled to commissions on the sum of $24,724.98 cash received by it as guardian from itself as administrator, representing the distributive share of the plaintiff in the estate of her deceased father. This assignment cannot be sustained. C. S., 157 and 2190, provide that guardians shall be entitled to commissions not exceeding five per cent upon the amount of receipts. No exception is made of receipts received from itself in another capacity, and we see no logical reason why there should be, or how such an exception can be read into the statute. The commission retained and approved by the clerk, 2½%, is well within the statutory limitation and cannot be held as a matter of law to be excessive under the circumstances of the case.

Plaintiff's assignment of error 6 is to the court's failure to sustain her third exception to the referee's conclusions of law (Exception No. 8), that the defendant was entitled to commissions on money received by it as guardian from the sale of plaintiff's interest in lands inherited by her from her late father. This assignment cannot be sustained. The amount retained was 3 per cent—well within the statutory limitation—and was approved by the clerk. While this money may have been deemed real estate for the purpose of inheritance in the event of the death of the beneficiary thereof, still it was nevertheless money received and therefore a "receipt" when it came into the hands of the guardian, and as such was subject to the commissions allowed by the statutes.

Plaintiff's assignment of error 7 is to the court's failure to sustain her fourth exception to the referee's conclusions of law (Exception No. 9), that the defendant was entitled to commissions on $3,584.31 advanced by the defendant as administrator to itself as guardian and used to purchase bonds for the plaintiff. This assignment cannot be sustained. The finding of fact upon which the conclusion of law is predicated is to the effect that the money so advanced was applied on the distributive share of the plaintiff in her father's estate and was for the purpose of purchasing bonds for the plaintiff. Such money when it came into the defendant's hand as guardian was a receipt and as such under the statutes, C. S., 157 and 2190, was subject to a commission within the limitations of the statutes when approved by the clerk. The 3% retained was within such limitations and was so approved.

Plaintiff's assignment of error 8 is to the court's failure to sustain his fifth exception to the referee's conclusions of law (Exception No. 10), that the plaintiff was not entitled to recover the penalties and costs which the defendant, as guardian, was required to pay to the town of Ansonville and county of Anson by reason of its failure to list the property of the plaintiff for taxes. This assignment cannot be sustained for the reason that the conclusion is supported by the findings of fact. The

facts found divulge that the cash balances of the plaintiff held by the defendant as guardian were not listed for a number of years prior to the year 1928, as well as thereafter, and that the penalties imposed were for failure to list for the years 1928, 1929, 1930, 1931 and 1932, and that no taxes were paid for the years prior to 1928, and that had such taxes been paid they would have amounted to far more than the penalties paid for failing to list for the year 1928 and subsequent years, and that therefore "the failure to list the cash balances and pay taxes thereon for the whole period of failure, resulted, it is manifest, to the advantage of plaintiff and she was not damaged thereby." If "she was not damaged thereby," it follows as a matter of law she cannot recover by reason thereof.

NOTE: The plaintiff does not make an assignment of error of the court's failure to sustain her sixth exception to the referee's conclusions of law (Exception No. 11), that the plaintiff was not entitled to recover $149.78 claimed for alleged negligence in failing to insure the property of plaintiff against damage by fire. Therefore, this exception is abandoned.

Plaintiff's assignment of error 9 is to the court's failure to sustain her seventh exception to the referee's conclusions of law (Exception No. 12), that the plaintiff was not entitled to recover $434.80 retained by defendant as commissions on $8,696.00 interest paid by the defendant on cash balances which the defendant, as guardian, had on deposit in defendant's commercial department. This assignment cannot be sustained, since, although where a guardian uses the funds of his ward in his own business he is chargeable with the highest rate of interest allowed by law, still where he uses the funds of his ward, and makes regular annual settlements, charging himself with the interest thereon, he is entitled to his commissions on the interest so charged. *Fisher v. Brown,* 135 N. C., 198.

Plaintiff's assignment of error 10 is to the court's failure to sustain her eighth exception to the referee's conclusions of law (Exception No. 13), that the plaintiff was not entitled to recover $25.00 commissions retained by the defendant as guardian on the sale of stock of the Roberdel Manufacturing Company for the sum of $500.00. This assignment cannot be sustained, since the $500.00 received for the stock was money received by the guardian and as such was a receipt subject to the provisions of the statutes, C. S., 157 and 2190, as to commissions.

Plaintiff's assignment of error 11 is to the court's failure to sustain her ninth exception to the referee's conclusions of law (Exception No. 14), that the plaintiff is not entitled to recover of the defendant the sum of $1,315.00, or any part thereof, by reason of the failure to collect rent on a garage belonging to the estate of her late father. This assignment cannot be sustained for the reason that the conclusion is supported

by the findings of fact. It is specifically found that the sum collected amounted to the reasonable rental value of the garage for the time it was rented, and that one-half thereof was received by the defendant as guardian of the plaintiff. There is no finding that there was any contract for any specific amount of rent to be paid after August, 1928, to which date the rent was paid in full.

Plaintiff's assignment of error 12 is to the court's failure to sustain her tenth exception to the referee's conclusions of law (Exception No. 15), that the defendant is entitled to commissions on receipts and disbursements allowed it in its accounts filed as administrator and as guardian, except in certain instances indicated. This assignment presents the same question presented by assignment 4, namely, has the defendant by its conduct forfeited its right to all commissions both as administrator and as guardian, and for the same reasons there set forth must be answered in the negative.

The plaintiff's assignment of error 13 is to the court's failure to sustain her eleventh and twelfth exceptions to the referee's conclusions of law (Exceptions Nos. 16 and 17), that plaintiff is entitled to recover only those amounts named. This assignment cannot be sustained since the findings of fact support the conclusions of law.

On the plaintiff's appeal the judgment of the Superior Court is

Affirmed.

DEFENDANT'S APPEAL.

Defendant's assignments of error 1 to 10, inclusive, are to the failure of the court to sustain its exceptions (Exceptions Nos. 1 to 10, inclusive), to certain findings of fact by the referee. These assignments cannot be sustained, for the reason that such findings are supported by the evidence, and are approved by the judge of the Superior Court. *Wimberly v. Furniture Co.*, 216 N. C., 732.

Defendant's assignment of error 11 is to the sustaining by the court of the referee's ruling allowing the motion of the plaintiff to strike out an answer made by the witness Robinson as to why the defendant, as administrator, paid certain interest on the funds of the estate of its intestate. (Exception No. 11.) This assignment cannot be sustained, since the answer stricken from the record tended to show (1) what the witness knew, or thought he knew, the law was relative to charging administrators with interest, which was irrelevant and immaterial to the issue involved; and (2) that interest was paid on $40,000.00 at the rate of 4% at the suggestion of an uncle of the plaintiff. Why the defendant made the payment was immaterial. If the fact that 4% interest was paid on $40,000.00 was material, and evidence tending to establish such fact was erroneously stricken out, such error was harmless since evidence of that fact appears elsewhere in the record, and such fact is virtually found by the referee.

Defendant's assignment of error 12 is to the failure of the court to sustain its first exception to the referee's conclusions of law (Exception No. 12), that inasmuch as the defendant used in its business, in its commercial department, funds received by it as administrator, made itself liable for interest on deposits remaining in its custody at the rate of 6% per annum, and defendant should have accounted for interest so accumulated in its final account as administrator, and defendant is liable to plaintiff for her share of such interest as a distributee of the estate of defendant's intestate, and defendant should have credited her with such sum in its accounts as her guardian. This assignment cannot be sustained, since the facts found support the conclusions reached.

When a bank is an administrator or guardian and deposits money belonging to the estate of its intestate or ward with itself to the credit of itself as administrator or guardian, such deposit is a general deposit, and the money thereby becomes mingled with the general funds of the bank and constitutes a use in the general business of the bank for its general benefit, *Roebuck v. Surety Co.,* 200 N. C., 196, and cases there cited, and when an administrator or guardian uses the money belonging to the estate of its intestate or ward in his own business he is chargeable with the highest rate of interest allowed by law. *Fisher v. Brown,* 135 N. C., 198.

While ordinarily an administrator is not chargeable with interest, still, if he collects interest he must account therefor, *Chambers v. Kerns,* 59 N. C., 280, or, if he uses the money of the estate of his intestate in his own business he is chargeable with interest, *Smith v. Smith,* 101 N. C., 461, and this irrespective of the fact that the administrator is a bank and the money is made use of in its commercial department. The fact that the bank has two departments, a trust department and a commercial department, does not alter the fact that it is a single entity, doing business under one charter, and the use of money in one department inures to the benefit of the other department, and constitutes a use in its general business.

Such being the law, it was incumbent upon defendant as guardian to collect from itself as administrator such interest when its final account as administrator was filed.

Defendant's assignment of error 13 is to failure of the court to sustain its second exception to the referee's conclusion of law (Exception No. 13), that sums appropriated to itself as administrator for commissions prior to the filing of final account are deemed in law to be sums remaining in its hands as balances, upon which the defendant is liable to the estate for interest at 6%. This assignment is not set out in the defendant's brief and is therefore taken as abandoned. Rule 28, Rules of the Supreme Court, 213 N. C., 825.

Defendant's assignment of error 14 is to failure of the court to sustain

its third exception to the referee's conclusion of law (Exception No. 14), that by reason of having retained in its custody and used in its commercial department over certain periods of time certain moneys of the estate of its intestate which came into its hands as administrator, the defendant became liable to the plaintiff for her share, as a distributee, of interest at the rate of 6% on said moneys for said periods, less credits for the interest actually paid by the defendant as administrator on said moneys during said periods. This assignment cannot be sustained for the reasons set forth under assignment of error No. 12.

Defendant's assignment of error 15 is to the failure of the court to sustain its fourth exception to the referee's conclusion of law (Exception No. 15), that the defendant is not entitled to any reduction in its liability to plaintiff for interest by reason of an item contained in its final account as administrator filed 2 January, 1925, denominated "interest paid by the Bank of Wadesboro on administration account from July 18, 1923, to December 30, 1924, including interest collected on U. S. certificate of indebtedness, $2,193.46," since it does not appear what portion of said amount was paid as interest on balances or what portion was collected from U. S. certificates of indebtedness. No reason or argument is stated or authorities cited in support of this assignment in the defendant's brief, and therefore it will be taken as abandoned. Rule 28, *supra*.

Defendant's assignment of error 16 is to the failure of the court to sustain its fifth exception to the referee's conclusions of law (Exception No. 16), that the plaintiff was entitled to recover one-third of the amount which the defendant retained as commissions on stocks and bonds received by it as administrator. This assignment cannot be sustained, since the conclusion is supported by the facts found.

It is found that at the death of its intestate the defendant, as administrator, came into possession of certain stocks and bonds, and that one-third of these stocks and bonds were received by the defendant as guardian from itself as administrator, and that the selfsame one-third of the stocks and bonds were turned over by the defendant as her guardian to the plaintiff—that said stocks and bonds were never sold but held by the defendant in unchanged form from the time of its qualification as administrator to the time of filing its final account as guardian. An administrator is not entitled to commissions on specific articles of personal property delivered to it and by it delivered to the distributees. Property specifically received and delivered over in the course of distribution is not usually burdened with a charge of commissions. *Spruill v. Cannon*, 22 N. C., 400; *Scroggs v. Stevenson*, 100 N. C., 354. Such being the law, it was the duty of the defendant as guardian to collect from itself as administrator when it filed its final account as administrator the commissions retained by it upon these stocks and bonds.

Defendant's assignment of error 17 is to the failure of the court to

sustain its six exception to the referee's conclusions of law (Exception No. 17), that the defendant as guardian having deposited the moneys of its ward, the plaintiff, in the commercial department of its bank and used the same therein for its benefit, without otherwise investing the same, made itself liable to the plaintiff for 6% compound interest on the moneys so deposited; and that the plaintiff was entitled to recover of the defendant the sum of $6,495.11, the difference between such 6% compound interest and the interest actually paid by the defendant. This assignment cannot be sustained, since the facts found support the conclusion reached.

Where a bank is authorized by its charter to act as guardian, it owes the same duty to its ward as an individual would owe to keep the ward's funds separate from other funds of the guardian, and to invest the same as the law applicable to investments requires, and where funds of the ward are accepted by the bank in its banking department and commingled by it with its general deposit funds it violates its fiduciary duties as guardian and is liable to the ward for loss occasioned thereby. *Roebuck v. Surety Co., supra.* Where a guardian uses funds of its ward in its own business it is chargeable with the highest rate of interest. *Fisher v. Brown, supra.*

Defendant's assignment of error 18 is to the court's failure to sustain its seventh exception to the referee's conclusions of law (Exception No. 18), that the defendant as guardian was not entitled to commissions on stocks and bonds received by it from itself as administrator, and by it as guardian turned over to its ward, the plaintiff, and that the plaintiff was entitled to recover such commissions so retained. This assignment cannot be sustained, since the facts found sustain the conclusion reached. What was said in the discussion of assignment of error 16 as to the retention of commissions on specific articles of property by an administrator applies to the retention of such commissions by a guardian, and the authorities there cited are applicable here.

Defendant's assignments of error 19, 20, 21 and 22 are to the refusal of the court to submit to the jury four issues tendered. In defendant's brief assignment 20 is not set out and is therefore taken as abandoned. Rule 28, *supra.*

The issue tendered to which assignment 19 refers is: "What amount, if any, is the plaintiff entitled to recover of the defendant for interest on moneys handled by the Bank of Wadesboro while acting as administrator of the estate of the late Walter S. Little?" This issue relates to interest. The facts upon which the referee concluded that the interest referred to in the issue tendered should be recovered are not in dispute. Whether upon these facts interest should be recovered, and the amount thereof if recovered, were questions of law for the court, and not issues of fact for

the jury. Therefore the court was correct in refusing to submit to the jury the issue tendered.

The issue tendered to which assignment 21 refers is: "What amount, if any, is the plaintiff entitled to recover of the defendant for interest on moneys handled by the Bank of Wadesboro while acting as guardian of the estate of the plaintiff herein?" What is said upon assignment 19 is here applicable, and the assignment cannot be sustained for the reason there given.

The issue tendered to which assignment 22 refers is: "Is the plaintiff entitled to recover of the defendant the sum of $442.50, with interest thereon from February 15, 1937, on account of commissions heretofore allowed by the clerk of the Superior Court of Anson County to the Bank of Wadesboro while acting as guardian of the estate of the plaintiff, for commissions on stocks and bonds received by it as such guardian?"

This issue is not based upon any disputed facts—no issue of fact which arises on the pleadings and the evidence is presented. The only controversy arising is one of law, namely, if under the facts as shown by all the evidence, the plaintiff is entitled to recover the item involved. Therefore, the court was correct in refusing to submit to the jury the issue tendered.

Defendant's assignment of error 23 is to judgment of the Superior Court, as entered. This assignment cannot be sustained for the reason that the judgment is supported by the findings of fact and conclusions of law of the referee, confirmed by the judge.

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

Affirmed.

SALLY HERNDON v. MRS. JOHN M. MASSEY, MRS. JOHN C. KILGO, JR., MRS. WILSON WALLACE, MRS. JOE BLYTHE, MRS. CARRIMAE BAILEY, MRS. B. E. BARTHOLOMEW, MRS. C. S. BRITT, MRS. GERALD A. COOPER, MRS. FRANCIS CLARKSON, MRS. W. AUBREY DAVIS, MRS. ERNEST FRANKLIN, JR., MRS. THAD L. HARRISON, MRS. DONALD FOLLMER, MRS. GARY HEESEMAN, MRS. CHARLES C. LUCAS, MRS. THOMAS F. KERR, MRS. W. E. MEARES, MISS HATTIE McRAE, MRS. J. J. PIERCE, MRS. E. W. NICOLL, MRS. CLAUDE SQUIRES, MRS. CLYDE STANCILL, MRS. W. B. SULLIVAN, MISS GLADYS TEMPLETON, MRS. HARRY WINKLER, MRS. H. B. WOLFE, MRS. LLOYD WITHERS, JR., AS DIRECTORS AND TRUSTEES OF THE YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF CHARLOTTE, NORTH CAROLINA.

(Filed 22 May, 1940.)

1. Charities § 4—

A person injured while enjoying the benefits provided by a charitable institution may not hold the institution liable for the negligence of its

agents or employees if the institution has exercised reasonable care in their selection and retention.

2. Pleadings § 29—

Allegations in plaintiff's reply to new matter set up in the answer are properly stricken out upon motion when evidence in support of such allegations would not be competent upon the hearing, C. S., 537, and a motion to have irrelevant matter stricken from a pleading is a matter of right and does not rest in the trial court's discretion.

3. Charities § 4—

The fact that a charitable institution procures insurance indemnifying it for liability does not enlarge its liability for negligence of its agents or employees.

4. Pleadings § 29—Allegations that charitable institution had obtained indemnity insurance held irrelevant in action against it for negligent injury.

Since a charitable institution is liable to a person enjoying the benefits provided by the institution for injuries resulting from the negligence of its agents and employees if the institution is negligent in the selection and retention of the agents or employees, evidence that it had procured indemnity insurance is incompetent upon the question of its liability, and in an action to recover for negligent injury, allegations to this effect in plaintiff's reply are properly stricken out on motion. The rule of nonliability of a charitable institution for tort if recovery would result in the impairment of funds held by it for its charitable purpose, does not obtain in this jurisdiction.

5. Same—Fact that charitable institution had obtained indemnity insurance held irrelevant upon contention that activity in suit was not charitable enterprise.

Since a charitable institution is liable to a person enjoying the benefits provided by the institution for negligent injury inflicted by its agents or employees if it is negligent in the selection or retention of its agents and employees, the fact that it procures indemnity insurance does not tend to show that in the operations resulting in injury it was not in fact conducting a charitable enterprise, and allegations that it had obtained indemnity insurance are properly stricken from the plaintiff's reply on its motion aptly made.

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

APPEAL by plaintiff from *Grady, J.*, at 27 November, 1939, Extra Term, of MECKLENBURG.

Civil action to recover damages for injuries allegedly resulting from actionable negligence.

Plaintiff in her complaint, briefly stated, alleges: That defendants are the duly elected, qualified and acting directors and trustees of the Young Women's Christian Association of the city of Charlotte and as such are vested with the title to and are in possession and control of a certain lot in said city and the building thereon, known as the Young Women's

Christian Association building, with the authority, power and duty to maintain and operate in said building a swimming pool, in connection with which there are shower, locker and dressing rooms; that an instructor is employed to give swimming lessons; that through newspaper advertisement defendants caused to be offered to the general public a course of instruction in swimming in consideration of the payment of a stated fee or price; that plaintiff, having accepted the offer and enrolled in the swimming class, and paid the required fee, and after attending one of the swimming classes on or about 24 March, 1939, and at completion of the course of instruction for the day, and after taking a shower bath in the shower room, proceeded to walk from the shower room to the locker room through the hall customarily used for that purpose, and while so walking through said hall she slipped and fell to the floor and sustained injuries; and that such injuries proximately resulted from the negligence of defendants (a) in failing to cover the floor in the hallway with a mat or other suitable covering; (b) in allowing water and soap, mold and other foreign matter to accumulate and remain on the floor, and (c) in failing to light the hallway.

Defendants, answering, deny negligence and for further defense aver that the Young Women's Christian Association is an unincorporated, religious and charitable organization, not organized for profit; that the land and building in question are held to be used and are used, and the swimming classes were conducted solely for the promotion of the religious and charitable objects of the association; and that defendants caused to be employed persons competent to conduct the said swimming classes and to keep the floor and other parts of the premises in proper condition, and if there were any negligence on the part of any of the employees which resulted in the injury to the plaintiff, which is expressly denied, neither the defendants nor the association would be liable because said organization is a non-profit religious and charitable organization.

Plaintiff, replying to the further defense of defendants, alleges:

"1. That this plaintiff is informed and believes that the ladies named as defendants do not as individuals receive any pecuniary profit from the Young Women's Christian Association of Charlotte. Except as herein admitted, the allegations of paragraph one are denied and in this connection the plaintiff is informed, believes, and alleges that a recovery in this suit will not impair or diminish the property held by the defendants for the purpose of the association for the reason that the defendants have made special arrangements to pay any and all judgments which might be rendered against them on account of their negligence or the negligence of their servants and agents in connection with the operation of the swimming pool and the building referred to in the complaint."

And for a further reply, the plaintiff alleges:

"1. That the plaintiff is informed, believes, and alleges that in consideration of the payment of the premiums required by it, the Maryland Casualty Company issued a policy of insurance insuring the defendants against liability arising out of the operation of the swimming pool and building referred to; that the said Maryland Casualty Company had received the annual premium and the said policy of insurance was in full force and effect at the time of the injury to the plaintiff; the amount for which the defendants are insured as above set forth is greater than the amount claimed by the plaintiff as damages, and any sum recovered by plaintiff against defendants in this case will, in accordance with said contract of insurance, be paid by the Maryland Casualty Company; and the property held by the defendants for the purpose of the association will not be decreased or diminished because of any judgment recovered in this action."

Pursuant to provisions of C. S., 510, and C. S., 537, defendants moved to strike the quoted portion of paragraph 1 of plaintiff's reply beginning with the words: "In this connection," and the whole of paragraph 1 of plaintiff's further reply. The motion was allowed. Plaintiff reserving exception thereto, appeals to the Supreme Court and assigns error.

David J. Craig, Jr., for plaintiff, appellant.
Robinson & Jones for defendants, appellees.

WINBORNE, J. We are of opinion that the court properly ruled in striking out as irrelevant or redundant the matter inserted by plaintiff in the paragraphs designated and as quoted in the foregoing statement of facts.

It may be noted that the authorities are extremely divergent on the subject of liability of charitable institutions for injuries resulting from the negligence of their agents or employees. See Annotations 14 A. L. R., 572; 23 A. L. R., 923; 30 A. L. R., 455; 33 A. L. R., 1369; 42 A. L. R., 971; 62 A. L. R., 724; 67 A. L. R., 1112; 86 A. L. R., 491; 109 A. L. R., 1199. (a) The courts of some jurisdictions deny all liability. (b) Some hold such institutions as much subject as others to the doctrine of *respondeat superior*. (c) But the majority hold that in relation to those who receive benefits provided by it, a charitable institution is not liable for the negligence of its agents or employees if it has exercised reasonable care in their selection and retention. See Annotations 109 A. L. R., 1199, at 1201.

It is noted also that the decisions of this Court are in harmony with the view of the majority. *Green v. Biggs*, 167 N. C., 417, 83 S. E., 553; *Hoke v. Glenn*, 167 N. C., 594, 83 S. E., 807.

The complaint should contain "a plain and concise statement of the facts constituting a cause of action, without unnecessary repetition." C. S., 506. In reply to answer of defendant, plaintiff "may allege in ordinary and concise language, without repetition, any new matter not inconsistent with the complaint, constituting a defense to the new matter in the answer." C. S., 525. But the statute, C. S., 537, provides that "if irrelevant or redundant matter" be inserted in a pleading, upon motion of the party aggrieved thereby, it may be stricken out. Where such motion has been made in apt time, "it is not addressed to the discretion of the court, but is made as a matter of right." *Hosiery Mills v. Hosiery Mills,* 198 N. C., 596, 152 S. E., 794; *Bank v. Atmore,* 200 N. C., 437, 157 S. E., 129; *Patterson v. R. R.,* 214 N. C., 38, 198 S. E., 364.

In *Pemberton v. Greensboro,* 203 N. C., 514, 166 S. E., 396, this Court said: "It is readily conceded that nothing ought to be in a complaint, or remain there over objection, which is not competent to be shown on the hearing. C. S., 506; 21 R. C. L., 452." This principle as stated has been quoted and paraphrased in numerous more recent decisions. *Patterson v. R. R., supra; Trust Co. v. Dunlop,* 214 N. C., 196, 198 S. E., 645; *Duke v. Children's Commission,* 214 N. C., 570, 199 S. E., 918; *Wadesboro v. Coxe,* 215 N. C., 708, 2 S. E. (2d), 876; *Hildebrand v. Tel. Co.,* 216 N. C., 235, 4 S. E. (2d), 439.

In *Duke v. Children's Commission, supra,* reversing ruling of the court in refusing to strike out a paragraph of the complaint in which matter similar to that first in question here was inserted, *Schenck, J.,* said: "It has been repeatedly held by this Court that in an action for damages for a personal injury evidence that the defendant's liability for the act complained of has been insured by a third person, is ordinarily incompetent. *Lytton v. Mfg. Co.,* 157 N. C., 331; *Luttrell v. Hardin,* 193 N. C., 266 (269), and cases there cited. *Scott v. Bryan,* 210 N. C., 478, and cases there cited. By the same token that evidence that the defendant is insured in a casualty company is incompetent, evidence that 'the defendant has made special arrangements to pay any and all judgments that might be rendered against it on account of its negligence or the negligence of its servants and agents' is incompetent—both are 'entirely foreign to the issues raised by the pleadings.' *Lytton v. Mfg. Co., supra,* and other cases cited."

See, also, *Revis v. Asheville,* 207 N. C., 237, 176 S. E., 738, where the ruling of the court below in striking out allegations in reply of plaintiff to the effect that defendant carried accident liability insurance was affirmed on appeal to this Court.

However, the attorney for plaintiff in brief filed in this Court makes these two contentions: (1) That the allegations stricken from plaintiff's

reply are relevant to meet the defenses set up by the defendants; and (2) that the stricken portions of the reply are relevant upon the issue of whether the swimming pool of the defendants is in fact conducted as a charitable enterprise.

1. While heretofore the exact question as applied to charitable institutions has not been passed upon by this Court, it has been held in the case of *Borders v. Cline,* 212 N. C., 472, 193 S. E., 826, that, since deputies sheriff are not employees of the sheriff within the meaning of the North Carolina Workmen's Compensation Act, the fact that a sheriff purchases insurance to cover his compensation liability does not have the effect of enlarging or extending the language of the act so as to cover such deputies sheriff.

However, the prevailing rule in other jurisdictions, with the exception of Tennessee, is that the fact that a charitable institution procures indemnity insurance indemnifying it from liability will not impose liability on it for the torts of its agents where it would not otherwise be liable. 14 C. J. S., 550, Charities Section 75; 10 Am. Jur., 701, Charities Section 152. See Annotations: 42 A. L. R., 971; 62 A. L. R., 724; 67 A. L. R., 1112, and 109 A. L. R., 1199. *Enman v. Trustees of Boston University* (Mass.), 170 N. E., 43; *McKoy v. Morgan Memorial Co-Op. Industries and Stores, Inc.* (Mass.), 272 Mass., 121, 172 N. E., 68; *Levy v. Superior Court* (Cal.), 239 P., 1100; *Stonaker v. Big Sisters Hospital* (Cal.), 2 P. (2d), 520; *Williams v. Church Home,* 223 Ky., 355, 3 S. W. (2d), 753; 62 A. L. R., 721; *Mississippi Baptist Hospital v. Moore* (Miss.), 126 So., 465; 67 A. L. R., 1106; *Greatrex v. Hospital* (Mich.), 261 Mich., 327, 246 N. W., 137; 86 A. L. R., 487.

In fact, in *McLeod v. St. Thomas Hospital* (1936), 170 Tenn., 423, 95 S. W. (2d), 917, the Supreme Court of Tennessee adhered to the above rule. However, in the case of *Vanderbilt University v. Henderson,* 127 S. W. (2d), 284, *certiorari* denied by Supreme Court 1 April, 1939, upon which plaintiff here relies, the Court of Appeals of Tennessee said: "It is generally held that a charitable institution is not liable for the negligence of its agents and servants. . . . It is likewise held that the rule of nonliability of a charitable institution is not changed by the reason of the fact that it carries liability insurance to protect it against liability which the law imposes upon it. *McLeod v. St. Thomas Hospital,* 170 Tenn., 423, 427, 95 S. W. (2d), 917, 918, and cases there cited: *Greatrex v. Evangelical Deaconess Hospital,* 261 Mich., 327, 246 N. W., 137, 86 A. L. R., 487; *McKoy v. Morgan Memorial Co-Op. Industries and Stores,* 272 Mass., 121, 172 N. E., 68. But we think that in this State this rule of nonliability extends no further than the protection of the trust property of the charitable institution from being diverted from the purposes of the charity to the satisfaction of a tort liability."

Thus it appears that that Court still adheres to the principle of total immunity as contradistinguished from the principle of partial immunity recognized and adopted by this Court. Hence, in the light of the prevailing rule in other jurisdictions and of pertinent principles enunciated in this jurisdiction the reasoning and analogous authority set forth for the conclusion reached by the Court of Appeals of Tennessee are not sufficiently persuasive for application and adoption to the case in hand.

2. In support of her second contention plaintiff relies upon decision of this Court in *Davis v. Shipbuilding Co.*, 180 N. C., 74, 104 S. E., 82. The factual situation there is, however, distinguishable from that here. There, the defendant having denied the allegation that plaintiff's intestate, while employed by the defendant, came to his death by negligence of defendant, and speaking to defendant's objection to admission of evidence tending to show that defendant had taken out and held indemnity insurance in reference to employees engaged in work, and referring to *Clark v. Bonsal,* 157 N. C., 270, 72 S. E., 954, relied upon by defendant, the Court said: "It is true that in *Clark v. Bonsal, supra,* the Court decided that an injured employee could not maintain an action for negligent injury against the insurance company on an indemnity policy as ordinarily drawn, taken out, and held by the employer for his own protection. Applying the principle, it has been held in several such cases that the existence and contents of such a policy is not, ordinarily, relevant on the question of damages, or on the issue as to negligence, but, in the present case, the defendant was endeavoring to maintain the position that it was not then operating the plant, and the intestate, at the time of the occurrence, was not in their employment. And the fact that the company had taken out and then held indemnity insurance for injuries to their employees was clearly relevant in that issue. The court was careful to restrict the evidence to the purpose indicated, and the exception must be overruled."

In the case in hand, taking out and carrying liability insurance is not inconsistent with defenses set up by defendant in that under the law as declared in this State a charitable institution has tort liability under certain circumstances, that is, to a beneficiary of its charity for injury resulting from the negligence of its agents, servants and employees in the selection or retention of whom it has failed to exercise due care, *Green v. Biggs, supra; Hoke v. Glenn, supra,* and for negligent injury to a servant or employee. *Cowans v. Hospitals,* 197 N. C., 41, 147 S. E., 672.

Therefore, in the present case if it be conceded that defendants had taken out and, at the time of the alleged injury to plaintiff, had in effect a policy of insurance against liability arising out of the operation of the swimming pool and building referred to, in an amount sufficient to pay

any sum recovered by plaintiff against defendant that fact would no more tend to prove that defendants were operating the swimming pool and building as a business enterprise for profit than it would tend to show that they were operating same as a charitable institution.

The judgment below is

Affirmed.

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

E. R. SNYDER, DOING BUSINESS UNDER THE NAME OF SNYDER TIRE COMPANY, v. A. J. MAXWELL, COMMISSIONER OF REVENUE OF THE STATE OF NORTH CAROLINA.

(Filed 22 May, 1940.)

1. Taxation § 2c—

The classification of subjects for taxation must be based upon reasonable distinctions and must apply equally to all within each class defined.

2. Same—

Classifications made by the Legislature for the purpose of taxation will not be disturbed by the courts unless the distinctions which are the bases for the classifications are arbitrary and unreasonable, and in passing upon the question the courts will take judicial notice of conditions within common knowledge pertaining to the particular subject of the classification.

3. Same—Subclassification of mechanical vending machines may be based on difference of merchandise sold therefrom.

While vending machines may be put into a class, the classification being based upon the economic advantage in the method of sale thus brought about, a further classification of such machines may be made based upon the kind of merchandise to be sold therefrom as affording a greater opportunity for profitable exercise of the privilege. Such subclassification may be made the basis of a tax without illegal discrimination.

4. Same—Classification of soft drinks sold by vending machines for tax at different rate than other merchandise sold by this method held valid.

The provision of chapter 158, section 130, Public Laws of 1939, imposing a license tax of $30.00 on the privilege of operating a vending machine selling soft drinks at the retail price of five cents while imposing a smaller tax on vending machines selling other kinds of merchandise at the same price, *is held* to prescribe classifications based upon real and reasonable distinctions, since it is a matter of common knowledge that the sale of soft drinks has obtained a unique commercial place, affording unusual opportunities for gainful returns, thus justifying the imposition of a higher license tax upon the privilege of selling this kind of merchandise by vending machine.

5. Taxation § 30—

All of the subsections of section 130, chapter 158, Public Laws of 1939, must be construed *in pari materia*, and upon such construction *it is held* that the section discloses the legislative intent to impose a license tax of $30.00 on slot machines vending soft drinks as an exception to the general classification of mechanical vending machines.

STACY, C. J., dissenting.

WINBORNE, J., joins in dissenting opinion.

APPEAL by plaintiff from *Williams, J.*, at January Term, 1940, of WAKE. Affirmed.

The plaintiff brought this action against the defendant Commissioner of Revenue to recover the sum of $30.00 paid under protest as a tax on the privilege of operating a vending machine selling soft drinks upon a deposit of five cents, under section 130, chapter 158, of the Public Laws of 1939. He complains that the tax "constitutes an illegal classification, lacks uniformity and is arbitrary, unreasonable, discriminatory and unjust and is illegal and invalid." Plaintiff further contends that in this section of the Revenue Act the General Assembly has created as a class, for the purpose of taxation, "persons, firms, and corporations operating for gain or profit machines or devices operated upon the coin-in-the-slot principle" and has levied a tax of one dollar per year upon all such machines and devices requiring a deposit of five cents, and has, therefore, illegally levied upon "all such persons, firms, or corporations selling, through such machines or devices, soft drinks at five cents, a tax of $30.00 a year." Plaintiff further complains that the State has made a classification of all vending machines operated on the coin-in-the-slot principle which vend merchandise at five cents and has taxed the same at one dollar, has taxed those selling soft drinks at a soft drink stand at $5.00, whereas the statute imposes a tax of $30.00 upon a vending device selling soft drinks solely. Plaintiff complains that the imposition and collection of the tax is in violation of section 17 of Article I of the Constitution, in that it deprives plaintiff of his property, contrary to the law of the land, and makes an arbitrary and unreasonable discrimination against him in the classification aforesaid; that it is also repugnant to section 3 of Article V of the Constitution of North Carolina in that the tax is not uniform, but on the contrary is arbitrary and discriminatory; and that it violates also section 1 of the 14th Amendment of the Constitution of the United States in depriving the plaintiff of his property without due process of law, and denying to him equal protection of the law.

Judgment was rendered against plaintiff in the justice's court, from which he appealed to the Superior Court. The cause was there heard

and judgment rendered against the plaintiff, from which he appealed to this Court.

Frank P. Hobgood, William A. Lucas, and S. G. Bernard for plaintiff, appellant.

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

SEAWELL, J. Under the admissions of the parties, the only thing left for consideration in this Court is the constitutionality of the statute levying the tax.

The challenge of the plaintiff to the validity of the privilege tax imposed on mechanical vendors of soft drinks may be succinctly stated as follows: (a) Because it is based on an unjustifiable distinction between mechanical devices selling soft drinks and other similar devices selling other merchandise, thus leading to an unreasonable classification; and (b) because the law itself has selected as a classification, for the purpose of taxation, mechanical devices selling "merchandise" (excepting certain products, as to which no controversy exists), and has attempted to discriminate within that class against devices which vend soft drinks solely, the said "soft drinks" being included within the term "merchandise." There are variations and distinctions in the attack made upon the statute, but we think they all may be resolved into the propositions laid down. We cannot agree that they are sound.

The breadth of the classification insisted upon as representing the limit of legislation in that direction leads us to consider the purpose and effect of classification in bringing about a just and equitable distribution of the tax burden as required by Article V, section 3, of the Constitution. Manifestly such classification is essential to any orderly system of taxation, and the lack of it is as likely to do injustice as an improper classification is to produce unfair discrimination. Loose and general classification will neither serve the Government nor protect the individuals to be taxed. Privileges especially are so varied in the subjects to which they relate, and the opportunities they afford for profitable exercise differ so widely, that extensive classification is imperative.

There are two rules by which the Legislature must be governed in classifying subjects for taxation: First, the classification itself must be based upon a reasonable distinction. Cooley on Taxation, section 344, pp. 746, 747; *American Sugar Refining Co. v. Louisiana,* 179 U. S., 89, 45 L. Ed., 102. Second: The tax must apply equally to all those within the class defined. Cooley on Taxation, 4th Ed., section 269, p. 575, section 352, p. 750; *Dalton v. Brown,* 159 N. C., 175, 75 S. E., 40;

State Tax Comrs. v. Jackson, 283 U. S., 527, 75 L. Ed., 1248, 75 A. L. R., 1536.

Upon review here, the widest latitude must be accorded to the Legislature in making the distinctions which are the bases for classification, and they will not be disturbed unless capricious, arbitrary, and unjustified by reason. *Brown-Forman Co. v. Kentucky,* 217 U. S., 563, 54 L. Ed., 833; *Sproles v. Binford,* 286 U. S., 374, 76 L. Ed., 1167; *Whitney v. California,* 274 U. S., 357, 71 L. Ed., 1095.

The Legislature is not required to preamble or label its classifications or disclose the principles upon which they are made. It is sufficient if the Court, upon review, may find them supported by justifiable reasoning. In passing upon this the Court is not required to depend solely upon evidence or testimony bearing upon the fairness of the classification, if that should ever be required, but it is permitted to resort to common knowledge of the subjects under consideration, and publicly known conditions, economic or otherwise, which pertain to the particular subject of the classification.

Since the economic advantage derived from the use of a mechanical vendor may be regarded as the same in the sale of all merchandise capable of delivery in that way, this factor, as a basis of classification, may be considered as canceled out. We are left to consider whether a distinction between the kinds of merchandise sold through such devices, or similar devices, may justify a further classification for the purpose of taxation, and whether such further classification is within the intent of the statute and has been therein effectively expressed.

The contention of the plaintiff that commodities comprehended in the general term "merchandise" may not be further classified for the purpose of imposing a privilege tax on their sale, through a mechanical device similar to that through which other merchandise is sold, is opposed to both theory and practice.

Under our own Revenue Act, chapter 158, Public Laws of 1939, various license taxes are imposed for the privilege of engaging in business involving sales based upon the distinction both as to the quantity of the commodities sold under the privilege and as to the character and kind of the commodities. Peddlers selling merchandise are taxed accordingly as they sell on foot, with a horse-drawn vehicle or motor car; section 121. Merchants pay one dollar for the privilege under section 405, and, in addition, 3% of the total gross sales. Other articles, unquestionably merchandise, require privilege taxes at varying rates according to the kind of merchandise sold, as, for instance, adding machines, automatic sprinklers, bowie knives, cash registers (and a list of other merchandise included under section 119), sewing machines,

cartridges, pistols, radio instruments, records for musical instruments, refrigerating machines, victrolas and records, and a host of other classified merchandise. Dealers in coal and coke are taxed at a different rate from that imposed on other commodities and, generally speaking illustrations may be added almost without limit of the universal practice obtaining in this and other states involving a distinction in the privilege tax according to the different kind of commodities sold. It is also true that if the merchant sells soft drinks he pays at a different rate of tax from that imposed upon him for selling candy and chewing gum perhaps within a yard of the stand.

The classification of privilege taxes, as illustrated, is abundantly justified, both in texts on the subject and decisions of the courts. Cooley on Taxation, section 353, p. 752; *Brown-Forman Co. v. Kentucky, supra,* affirming 125 Ky., 402, 101 S. W., 321; 12 Am. Jur., p. 193, and cases cited; 26 R. C. L., p. 228; *S. v. Danenberg,* 151 N. C., 718, 66 S. E., 301, 26 L. R. A. (N. S.), 890; *Drug Co. v. Lenoir,* 160 N. C., 571, 76 S. E., 480. See annotations 6 A. L. R., 1417; *Mercantile Co. v. Mount Olive,* 161 N. C., 121, 76 S. E., 690; *Leonard v. Maxwell,* 216 N. C., 89, 93, 3 S. E. (2d), 316.

It is clear that the Legislature has not exhausted its power of classification by making a distinction as to the manner in which an article is sold—as, for example, through mechanical devices—but it may make a further classification or sub-classification within reasonable limits with reference to the kinds of goods, wares, and merchandise which are so sold from them; and the fact that they are all sold in a similar manner will not defeat the further classification of the privilege.

These distinctions imply a difference in the commodities which may reasonably affect the value of the privilege because of the expectancy of its more profitable exercise. We think it will be unquestioned that the soft drink trade has achieved a unique place in the commercial world, both as to the volume of business, the certainty of sale in comparatively large volume and, therefore, the opportunity for gainful return attending the privilege of selling such merchandise. There is an economic advantage to one who exercises such privilege which vindicates the classification made by the Legislature as to the devices through which the sale may be made.

The act is criticized because the tax imposed on coin-slot machines selling soft drinks seems to have been put out of its place and is made to keep company with machines making intangible returns, whereas, taxes upon coin-slot devices selling merchandise generally are placed in another section—an anatomical misfit, like having a heart on the wrong side or an upside-down stomach. But it is still there and we see no reason why it may not function. A statute is not to be condemned

for its informality when its intent can be reasonably discerned. *Belk Brothers Co. v. Maxwell, Comr. of Revenue,* 215 N. C., 10. The whole statute must be considered *in pari materia,* and the imposition of the tax on coin-slot machines vending soft drinks must be regarded as an exception to the more general classification under subsection 3, forming of itself a sub-classification, which is valid if reasonable. As to the reasonableness of the classification, we have already given expression.

The judgment of the court below is

Affirmed.

STACY, C. J., dissenting: Two vending machines stand side by side. One sells a package of chewing gum or other merchandise for five cents and is taxed $1.00. The other sells a bottle of Coca-Cola or other soft drink for five cents and is taxed $30.00. What is the relevantly rational basis of distinction between the two vending machines which justifies a differentiation in classification? *Leonard v. Maxwell,* 216 N. C., 89, 3 S. E. (2d), 316. The events upon which the taxes are laid, to wit, the method and amount of each sale, are the same in both instances. Change either, and, regardless of the character of the article sold, the tax would not apply.

It will be noted that the subjects of the levies are not the different businesses, but the manner and value of each transaction. The tax in each case is on a designated use of the vending machine and nothing else. In the one it is thirty times greater than in the other. Thus the same thing is taxed at different rates and results in discrimination. It is only when the article of merchandise or the soft drink is sold through the vending machine and at the price of five cents that the tax is applicable.

The classification seems arbitrary. *Kenny Co. v. Brevard, ante,* 269, 7 S. E. (2d), 542.

WINBORNE, J., joins in this opinion.

STATE v. BULLY RODGERS, PETER LOCKLEAR AND WEALTHY LOWRY.

(Filed 22 May, 1940.)

Criminal Law §§ 58, 81a—

A motion for a new trial for newly discovered evidence, made in the trial court after decision of the Supreme Court affirming the judgment of conviction, is addressed to the discretion of the trial court, and its refusal of the motion is not appealable.

APPEAL by defendants from *Nimocks, J.*, at January-February Criminal Term, 1940, of ROBESON.

Motion by defendants for new trial on ground of newly discovered evidence.

At the May Criminal Term, 1939, Robeson Superior Court, the defendants herein were tried and convicted of conspiracy, burglary in the second degree, and robbery with firearms. From judgments entered, the defendants appealed to the Supreme Court. The judgments were affirmed in an opinion filed 13 December, 1939.

At the succeeding term of Robeson Superior Court following affirmance of the judgments on appeal, the defendants lodged a motion for new trial on the ground of newly discovered evidence on authority of *S. v. Casey,* 201 N. C., 620, 161 S. E., 81, and *S. v. Starnes,* 97 N. C., 423, 2 S. E., 447. The motion was duly considered and denied.

Defendants appeal, assigning errors.

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

J. E. Carpenter, E. J. & L. J. Britt, and D. M. Stringfield for defendants.

PER CURIAM. The motion of the Attorney-General to dismiss the appeal for the reason that no appeal lies to this Court from a discretionary determination of an application for a new trial on the ground of newly discovered evidence must be allowed on authority of *S. v. Ferrell,* 206 N. C., 738, 175 S. E., 91, and *Jarrett v. Ins. Co.,* 208 N. C., 343.

The case is not like *Crane v. Carswell,* 204 N. C., 571, 169 S. E., 160, where the "newly discovered evidence," as this phrase is defined in the law, was insufficient to invoke a discretionary ruling in favor of the movant.

Appeal dismissed.

BANK OF BLOWING ROCK, THROUGH ITS DULY ELECTED AND ACTING TRUSTEE. H. P. HOLSHOUSER; H. E. COFFEY AND J. E. HOLSHOUSER, TRUSTEES FOR H. E. COFFEY, v. C. R. MCIVER AND HENRY S. DUNCAN.

(Filed 22 May, 1940.)

Judgments § 39—

Where, in an action on a judgment which had been assigned by the judgment creditor to a trustee for the benefit of another, the judgment creditor, the trustee and the person for whose benefit the judgment had been assigned are all parties, the judgment debtor may not resist recovery

on the ground that the assignment is invalid or irregular, since to whom the money shall be paid does not materially affect him so long as all parties concerned are parties to the action and are bound by the judgment rendered.

APPEAL by defendant McIver from *Olive, Special Judge,* at November Term, 1939, of GUILFORD. No error.

Civil action upon a judgment for the renewal thereof.

At the August Term, 1939, Watauga Superior Court, judgment was rendered in favor of the plaintiff bank and against the defendants in the sum of $10,000 with interest and cost. In March, 1937, the Bank of Blowing Rock consolidated with the Watauga County Bank. There were certain assets which were not transferred to the consolidated bank. By action of the board of directors these assets, including the judgment sued upon, were delivered to a liquidating committee for collection and disbursement. The liquidating committee designated H. P. Holshouser trustee with power to take charge of the assets remaining after the transfer to the consolidated bank, with full power to collect and disburse. On 4 August, 1938, H. P. Holshouser, trustee, transferred and assigned the judgment in controversy to J. E. Holshouser for the use and benefit of H. E. Coffey.

At the conclusion of the evidence for the plaintiffs, the defendants having offered none, the jury, under instructions of the court, in answer to the issue submitted, found that the defendant McIver is indebted to the plaintiff Holshouser, trustee for Coffey, in the sum of $10,025. From judgment thereon defendant McIver appealed.

Glidewell & Glidewell for appellant.

Hoyle & Hoyle and Eugene Trivette for appellees.

PER CURIAM. Although the record is short the defendant makes thirty assignments of error. After an examination of each assignment we find no sufficient cause for disturbing the judgment.

If the transfer from the plaintiff bank to the plaintiff Holshouser, trustee for H. E. Coffey, is invalid or irregular, as contended by the appellant, it must be noted that the bank and J. E. Holshouser, trustee, are parties plaintiff. To whom the money due shall be paid does not materially affect the defendant so long as all parties concerned are parties to the action and are bound by the judgment rendered.

No error.

STATE v. L. A. HODGES.

(Filed 22 May, 1940.)

Bastards § 7—

Where the defendant acknowledges paternity, a prosecution for his failure to support his illegitimate child must be instituted within three years from the date of an acknowledgment of paternity made within three years from date of the birth of such child. Chapter 217, Public Laws of 1939.

APPEAL by defendant from *Johnston, Special Judge,* at March Term, 1940, of CUMBERLAND. Reversed.

Upon appeal from a recorder's court of Cumberland County, the defendant was convicted at March Term, 1940, of Cumberland County Superior Court, upon a warrant charging that "on or about the 5th day of October, 1938, L. A. Hodges did unlawfully, willfully and failed and neglected to provide for his two illegitimate children, L. A. Hodges, Jr., age nine years, and Dorothy Mae Hodges, age six years, and has not provided for their support in any way since the above date against the form of the State in such cases made and provided and contrary to the law and against the peace and dignity of the State." No objection was made to the form or substance of the warrant.

The evidence was substantially as follows:

Cleo M. Young, an unmarried woman, testified that while she had never lived with the defendant, she had had two children, of which the defendant was the father. They are aged nine years and six years, respectively. Defendant, beginning with the time that the older child was born, supported the boy at birth and all the way through, and paid the doctor's bill and supported the boy until October, 1938. When the little girl was born, the defendant was serving a term in the penitentiary. When he got back he started to take care of this child, just like the boy. This little girl was about two years old when he started to support her. He clothed the two children, sending money every month, sometimes $10.00 and sometimes $20.00. He was also taking care of the mother. He discontinued support about 5 October, 1938.

The defendant acknowledged to the mother that he was the father of the children, and would come to see them every two or three months, or oftener, taking the mother and children down the street and buying clothes.

The evidence discloses the fact that the defendant had money and gave money to the mother of the children while he was serving his penitentiary term.

The evidence further discloses that the defendant, just prior to his incarceration, had taken the witness to Florida, after the boy had been born and while she was pregnant with the little girl. They lived together in the same apartment in Florida as man and wife.

At the conclusion of the State's evidence, the defendant moved for a directed verdict, which was denied, and defendant excepted.

Defendant announced that he would offer no evidence and renewed his motion for a directed verdict, which was denied, and defendant again excepted.

In his charge to the jury, the judge instructed them that defendant's counsel had, in the presence of the jury, entered an admission that the defendant was the father of the bastard children and, therefore, under the plea of not guilty, the one issue was submitted to the jury: "Has the defendant willfully refused to support the two illegitimate children born to Cleo Young?" The jury answered the issue "Yes" and, thereupon, judgment was rendered that the defendant pay to the clerk of the court on the 10th day of each month the sum of $30.00, to be used in support of the two children, and that at the June Term of the Superior Court the defendant should appear before the court and show the judge presiding at that time what might be his ability to pay, and it was suggested that this allowance be adjusted to the ability of the defendant to pay a larger or smaller sum, if necessary, according to his earning capacity.

From this judgment the defendant appealed, assigning as errors, (a) the refusal of the court to allow the motion for a directed verdict of not guilty at the close of the State's evidence; (b) the refusal of the court to allow the motion for a directed verdict of not guilty upon a renewal of the motion at the close of all of the evidence; (c) the refusal of the court to set aside the verdict and allow a new trial upon motion made upon a return of the verdict and prior to signing of judgment; and (d) the pronouncement of the judgment.

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

John H. Cook and LeRoy Scott for defendant, appellant.

PER CURIAM. Chapter 217, Public Laws of 1939, section 3, amending the Bastardy Act, provides as follows: "Proceedings under this act to establish the paternity of such child may be instituted at any time within three years next after the birth of the child, and not thereafter: Provided, however, that where the reputed father has acknowledged the paternity of the child by payments for the support of such child within three years from the date of the birth thereof, and not later, then, in

such case, prosecution may be brought under the provisions of this act within three years from the date of such acknowledgment of the paternity of such child by the reputed father thereof."

Under this statute, as construed by the Court—*S. v. Killian, ante,* 339—where acknowledgment has been made of the paternity of the child by payments for its support *within three years from the date of the birth,* prosecution for non-support may be brought within three years thereafter, but a later acknowledgment, made more than three years from the birth, will not avail to prevent the running of the statute. Comparing the dates in the record with those disclosed in the evidence, the prosecution was begun too late, and the judgment of the court below is

Reversed.

M. H. RHODES, INCORPORATED, AND VEHICULAR PARKING, LIMITED, v. CITY OF RALEIGH.

(Filed 8 June, 1940.)

1. Appeal and Error § 40g—

The Supreme Court will not decide the constitutionality of an ordinance when the appeal may be determined on the ground of want of statutory power in the municipality to establish the regulation, unless strong considerations of public necessity appear.

2. Municipal Corporations § 36—

A municipality has only that police power given it by statute, and since such statutes involve matters of common right, they must be strictly construed.

3. Municipal Corporations § 39—

A municipality may enact ordinances providing reasonable regulations for the use of its streets for the parking of motor vehicles, but the restrictions imposed must have some reasonable relation to the conditions sought to be remedied.

4. Same—

There is no reasonable relationship between the imposition of a meter charge for use of parking spaces within the time limits allowed by ordinance and the prevention of the use of a parking space by the same car for an unreasonable time to the detriment of the rights of others.

5. Same—

A meter charge for the use of parking space cannot be upheld on the ground that the charge is an inspection fee, since the object of the charge is solely to prevent the violation of parking ordinances or to detect and prove such violations, and bears no relation to fees imposed to defray the expense of inspecting a business or merchandise, the inspection of which is necessary to the public health, safety and welfare.

6. Same—

A meter charge imposed by a municipality for the parking of motor vehicles is in effect a revenue measure imposing an excise tax for the privilege of using parking space, and the municipality is without authority to impose such tax, municipalities being limited by the Motor Vehicle Act, chapter 2, section 29, Public Laws of 1921; Michie's Code, 2612 (a), to the imposition of a $1.00 license fee upon each local vehicle.

DEVIN, J., dissents.

APPEAL by defendant from *Harris, J.*, at May Criminal Term, 1940, of WAKE. Reversed.

This is an action brought by the plaintiffs to secure a declaratory judgment construing certain ordinances of the city of Raleigh relating to parking meters, passing upon their validity, and declaring the relation of the parties thereto.

The plaintiffs complained that they had sold to the city of Raleigh a number of parking meters under certain ordinances relating to their establishment enacted by the City Council.

The parking meters are described as coin-slot devices permanently fixed at the street curb line in front of the space marked for the parking of motor vehicles. They are operated by the insertion of an appropriate coin according to the time during which the car is permitted to remain parked. Their operation, the parking privilege thus secured, and the general purport of the ordinances and procedure thereunder may be better understood by the citation of pertinent parts of the ordinances.

These provide for the establishment of parking meter zones, wherein motor vehicles may be parked during certain periods of time on every day except Sunday, and provide for the installation of "parking meters" in spaces designated on the streets. They further provide: "When any vehicle is parked in any space . . . in front of which is located a parking meter, the . . . driver of said vehicle shall, upon entering the said parking space, immediately deposit a five-cent coin, or a one-cent coin, depending upon the length of time said . . . driver shall require, in the parking meter . . . in front of said parking space, and shall set said meter in accordance with instructions contained thereon; and the said parking space may then be used by such vehicle during the parking limits provided. . . . If said vehicle shall remain parked in such parking space beyond the period of one hour upon the deposit of a five-cent coin, or a period of twelve minutes upon the deposit of a one-cent coin, the said parking meter shall display a sign indicating illegal parking, and in that event such vehicle shall be considered parked over-time."

The ordinances provide penalties for parking over-time and for other violations of their provisions, limit the consecutive depositing of coins, provide for loading zones, etc.

It is provided: "The five and one-cent coins required to be deposited as provided in this Ordinance are hereby levied as police regulation, traffic control, and inspection fees to cover the cost of inspection and regulation involved in the inspection, installation, operation, control and use of the parking spaces, parking meters and traffic control described herein and involved in checking up and regulating traffic and the parking of vehicles in the parking meter zone created hereby."

"This Ordinance being a police and traffic regulation and in the interest of the public safety, shall take effect from and after the date of its passage."

The complaint states that the zone marked out for parking under this plan was under an ordinance prescribing the general one-hour parking limit prior to the revision brought about by the cited ordinances.

Plaintiff company and the city of Raleigh entered into contract for the sale and installation of parking meters distributed by plaintiffs, under which the meters and installation thereof should be paid for by the city. The contract was not to come into effect until the validity of the ordinances and the right of the city, under the Constitution of North Carolina and appropriate statutes, to install and operate the parking meters, should be passed upon by the Court.

The defendant agreed with the plaintiffs for the installation of other parking meters under the ordinances cited, or similar ordinances, and the defendant has refused to go further with the contract until the ordinances have been made the subject of a declaratory judgment of the Court sustaining their validity.

Upon the hearing of the matter before Judge Harris, the power of the municipality to purchase, install, and operate parking meters, as described in the pleadings and in the ordinances, was sustained, and the ordinances held to be valid. From the judgment, the defendant appealed.

Royall, Gosney & Smith for plaintiffs, appellees.
Bunn & Arendell for defendant, appellant.

SEAWELL, J. The appellant contends that the defendant city had no constitutional or statutory authority to enact an ordinance imposing a charge for parking in the streets. The appellees contend that the city does have such power under the following statutes: C. S., 2787 (11), authorizing municipalities "to adopt such ordinances for the regulation and use of the streets as it may deem best for the public welfare of the citizens of the city; C. S., 2787 (31), authorizing municipalities "to provide for the regulation, diversion, and limitation of vehicular traffic on public streets and highways" for public safety; C. S., 2793, relating to streets, giving the municipality authority to "regulate and control the

use thereof by vehicle"; C. S., 2789, declaring that the particular powers given by the act shall not be deemed exclusive, but that the city shall have and exercise all other powers which are now or may be hereafter granted to cities under the laws of the State; C. S., 2787 (29), authorizing the municipality "to provide for all inspections which may be expedient, proper, or necessary for the welfare, safety and health of the city and its citizens and regulate the fees for such inspection"; C. S., 2787 (7), authorizing the municipality "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 the performance of all municipal functions"; C. S., 2623 (5), giving the city authority to make such orders for the use of its property "as the interests of the town require"; C. S., 2623 (7) (9), conferring general powers to provide for municipal government and to do what is necessary therefor; C. S., 2673, authorizing the municipality to enact such ordinances, not inconsistent with the statutes, as the governing body may deem necessary for the better government of the town; C. S., 2787 (5), giving authority for a municipality to "regulate" all public works and improvements; and C. S., 2787 (1), authorizing abatement of nuisances on public property.

The list of statutes upon which plaintiffs rely seems to be exhaustive.

It is a settled policy of this Court not to pass upon the constitutionality of a measure, when its validity may be decided upon other questions presented, unless strong considerations of public necessity appear.

A careful examination of the statutes called to our attention leads us to the conclusion that none of them confers upon the city the necessary authority to enact ordinances imposing a parking fee, or charge for a parking space, or an inspection fee in connection with the administration and enforcement of the law.

Ordinances passed under authority of any or all of the statutes mentioned must be referred to the exercise of the police power. We think it is recognized by the litigant parties that the police powers of municipalities are not implied from sovereignty imparted to them for governmental purposes. Such as they have are conferred by statute, and their exercise, where matters of common right are involved, are subject to strict construction. *Slaughter v. O'Berry,* 126 N. C., 181, 35 S. E., 241; *S. v. Burbage,* 172 N. C., 876, 878, 99 S. E., 795.

The powers conferred by the statutes cited are broad enough to cover the exercise of the police power in the regulation of traffic on the streets, undoubtedly, and authorize the enactment of ordinances providing reasonable regulations for their use in parking, subject to the principle we have just stated—that the exercise of police power in this regard must be strictly construed. But the mere fact that such activity—that is, use of

the streets in parking—is a proper subject of police regulation, does not mean that any sort of restriction, whether appropriate or inappropriate, may be applied at discretion.

We do not attempt to make a choice of remedies for the municipality where both may be legitimate, but there must be some reasonable relation between the restriction applied and the condition sought to be remedied, otherwise the restriction must be held to be invalid. *S. v. Harris,* 216 N. C., 746, 759; *Leggetts v. Baldridge,* 278 U. S., 105, 111; *Meyer v. Nebraska,* 262 U. S., 390, 67 L. Ed., 1042, 29 A. L. R., 1446.

Parking, generally speaking, is not the thing at which the corrective regulation is aimed. It is the occupation of the parking space by the same car for an unreasonable length of time, to the detriment of the rights of others. Fairly considered, we can find no substantial relation between the meter charge and the correction of this evil. The ordinances themselves discount such a claim, since their effectiveness does not depend in any way on the meter charge, but, as heretofore, upon a specification of the period during which it is lawful to park.

The validity of the ordinances is hardly to be sustained on the theory that the meter charge is a proper inspection fee which, in part at least, is its declared purpose. One who parks a motor vehicle is not, in that particular act, engaged in any business or enterprise demanding inspection, nor is he offering anything to the public the inspection of which is necessary to the public health, safety, or welfare. Under such a view of the meter charge, and its purpose, the person subjected to it is merely being forced to pay for the means used to prevent his violating the law, or for the detection and proof of such violation. On the same principle a charge might be made against any person in connection with his use of the streets in ordinary travel, to defray the expenses of supervising him personally, the expenses of the watch kept by the police to prevent his violation of any other traffic laws, or to facilitate his conviction for an infraction of the criminal law. Such an inspection we do not consider within the contemplation of the statute.

On examination of the whole record, and especially in view of the want of relation of the meter charge to the regulation sought to be effected, we do not find it free from suggestion that the meter charge is, in reality, an excise tax for the privilege of using the parking space, and, hence, a revenue measure. There is, of course, no statutory authority for the imposition of such a tax. On the contrary, any imposition which the city might make in that regard is, no doubt, limited by the Motor Vehicle Act, chapter 2, section 29, Public Laws 1921 (2612 a, Michie's Code), which provides a license fee of one dollar for such vehicle, applicable to local cars, presumably already imposed.

"A municipality cannot, under the guise of a public regulation, impose a revenue tax when it has no authority to impose a revenue tax." Cooley on Taxation, 4th Edition, section 1680; 3 McQuillin Mun. Corp., section 987. Nor does the mere power to regulate authorize the imposition of a tax on the privilege sought to be regulated. A municipal power to regulate an occupation does not include the power to compel the payment of an occupation tax as a method of police regulation. 3 McQuillin Mun. Corp., sections 986-990; Cooley on Taxation, 4th Ed., sec. 1680. We are of the opinion that the same principle applies to a statute authorizing the regulation, but not the taxation, of a privilege of the kind considered in the case at bar.

Whether constitutional laws may be enacted to give municipalities authority for the power here sought to be exercised, we do not attempt to determine. Other questions may be involved which can be met only when they arise. We only say that we find no such authority in the cited statutes, or others to which our research has extended.

The contracts made between the parties are made to depend upon the validity of the ordinances as declared by the Court. Since the ordinances are held to be invalid, the contracts are not enforceable.

The judgment of the court below is

Reversed.

DEVIN, J., dissents.

SIR WALTER LODGE, No. 411, INDEPENDENT ORDER OF ODD FELLOWS, v. JOHN P. SWAIN ET AL.

(Filed 8 June, 1940.)

1. Charities § 1—

An organization empowered by its charter to hold real and personal property for commercial purposes provided the profits therefrom, if any, are used for the benefit of widows and orphans of deceased members or for such charitable and benevolent purposes as it may deem necessary or expedient, with further provision that its funds, property and income should not be divided in any manner among its members except as provided by law *is held* to hold the *corpus* of its property for business or commercial purposes.

2. Taxation § 20—

The Legislature in exempting property from taxation, Art. V, sec. 5, is required to observe the basic principle of equality, and exemptions allowed by it must be uniform within the class as required by Art. V, sec. 3, both before and after its amendment.

3. Same—

Taxation is the rule; exemption the exception.

4. Same—Legislature may not exempt from taxation property held by charitable organization for commercial purposes.

The power granted the Legislature to exempt property from taxation is limited by the language of Art. V, sec. 5, to property held for educational, scientific, charitable or religious purposes, the purpose for which the property is held and not the character of the corporation or association holding the property being the basis for the grant of permissive power to exempt, and the Legislature has no power to exempt property held by a religious or charitable corporation or organization for business or commercial purposes.

5. Same—

The provisions of the Revenue Acts exempting property from taxation must be considered in connection with Art. V, sec. 5, of the Constitution, since the General Assembly has no power to exempt property from taxation beyond the permissive power granted it by this section.

6. Same—Property held by charitable organization for commercial purposes is not exempt from taxation.

Plaintiff association was empowered by its charter *inter alia* to hold real estate provided the profits therefrom, if any, were used for the benefit of widows and orphans of deceased members or for such charitable and benevolent purposes as it deemed necessary or expedient to the successful prosecution of its charter provisions. During the years 1934 through 1939 it owned a building in which it maintained its lodge rooms and rented the remainder of the building for use as offices and stores on the basis of a commercial enterprise and used the entire rents therefrom for repairs and the payment of the mortgage indebtedness on the building. *Held:* Since the building is held for business or commercial purposes it is subject to the assessment of *ad valorem* taxes of the city and county in which it is situate for the years in question. Public Laws of 1933, chapter 204, section 304 (4-A); Public Laws of 1935, chapter 417, section 304 (4-A); Public Laws of 1937, chapter 291, section 600 (7); Public Laws of 1939, chapter 310, section 600 (7); Constitution of North Carolina, Art. V, sec. 5.

APPEAL by defendants from *Williams, J.*, at February Term, 1940, of WAKE.

Civil action to restrain tax sale and to have listing and assessment of plaintiff's property declared illegal and of no effect.

The plaintiff is a corporate entity chartered by the Secretary of State on 7 July, 1933, and owns a ten-story office building situate at the southeast corner of Hargett and Salisbury Streets in the city of Raleigh. The local taxing authorities, defendants herein, caused this property to be listed and taxes levied against it for the years 1934 to 1939, inclusive, which the plaintiff protests on the ground that it is not subject to taxation, or that it is exempt from an *ad valorem* assessment.

A jury trial was waived and the controversy submitted to the court for final determination, both as to the law and the facts, which, in summary, follow:

1. As set out in its charter, the plaintiff was incorporated to promote the common welfare of its members; to advance the cause of humanity;

to create greater interest in the cause of benevolence and charity; to promote friendly and social intercourse; to protect the widows and orphans of deceased members, and to secure for themselves and their successors the blessings of friendship, love and truth.

2. The plaintiff was chartered with a membership of five. It now has a membership of forty-three. Each member is required to pay dues in the amount of $6.00 annually, and is entitled to sick and death benefits. Two-thirds of these dues goes to the Grand Lodge of the Order of Odd Fellows, and the remaining one-third is retained by the plaintiff for the expenses of its lodge.

3. The plaintiff is given authority to purchase, lease and otherwise acquire, hold, mortgage, convey and otherwise dispose of all kinds of property, both real and personal, provided the profits arising therefrom shall be used for the benefit of widows and orphans of deceased Odd Fellows in North Carolina, or for such charitable and benevolent purposes as may be deemed necessary or expedient for the successful prosecution of the objects and purposes for which the corporation is created.

4. It is set out in the by-laws of the plaintiff corporation that its funds, property and income "having been raised for the purpose of relieving sick and distressed brethren and for other charitable purposes in the Order are not to be divided in any manner among the members or used for any purposes except as provided by law."

5. The plaintiff acquired the ten-story office building described in the pleadings, on 28 May, 1934, by assignment from the highest bidder at commissioner's sale and agreed to assume the mortgage indebtedness of its predecessors in title, amounting to $315,000.00. Plaintiff owns no other property.

6. Thereafter, on 2 August, 1937, the plaintiff refinanced its indebtedness on the building executing a first mortgage in the sum of $215,000.00 and a second mortgage in the amount of $22,500.00. All rent, interest or income previously received was used exclusively in the payment of interest on its indebtedness, and since the refinancing, all rent, interest or income has been, and still is, used exclusively in the payment of principal and interest on the mortgage indebtedness. This indebtedness now amounts to approximately $212,000.00.

7. In 1936, the plaintiff remodeled its lodge rooms and converted a portion thereof into offices at a cost of approximately $12,500. This was done in order to increase its income from the property and to provide additional funds for payment on its indebtedness. The expenditure was made possible by the bondholders waiving interest accrued and payable on two interest payment dates, which amounted to $15,750.00.

8. Other repairs and improvements on the property have been made from time to time in order to render it self-supporting, which the court

finds were necessary for its preservation and to provide income for the liquidation of the bonded indebtedness.

9. The plaintiff maintains its lodge rooms on a part of the tenth floor of its building, and rents the remainder of the building for use as offices and stores on the same basis as other properties similarly situated, *i.e.*, on the basis of a commercial enterprise.

10. The plaintiff has at no time made any payments, donations or contributions to any charitable purpose from the operation of its building.

Upon the foregoing determinations, the trial court concluded that the plaintiff is a nonprofit, benevolent and charitable corporation, and holds the property in question for the benefit of a charitable, benevolent and patriotic institution or order.

Whereupon, it was adjudged that the listing and assessment of taxes against the plaintiff's property for the years 1934 to 1939, inclusive, was invalid and contrary to law.

From this conclusion and adjudication, the defendants appeal, assigning errors.

W. H. Yarborough, Jr., and Bunn & Arendell for plaintiff, appellee.
Jones & Brassfield for defendants, appellants.

STACY, C. J. The question for decision is whether the ten-story office building situate at the southeast corner of Hargett and Salisbury Streets in the city of Raleigh and owned by the plaintiff is subject to an *ad valorem* assessment and taxation for the years 1934 to 1939. The record suggests an affirmative answer.

First. It is provided by the Revenue Act of 1933, ch. 204, sec. 304 (4-A), Public Laws 1933, that the following real property, and no other, shall be exempted from taxation: "Property belonging to or held for the benefit of . . . charitable . . . or benevolent institutions or orders, where the rent, interest or income from such investment shall be used exclusively for . . . charitable . . . or benevolent purposes, or (to pay) the interest upon the bonded indebtedness of said . . . charitable or benevolent institutions." This same provision was brought forward in the Revenue Act of 1935, ch. 417, sec. 304 (4-A), Public Laws 1935, and was therefore in force from 1933 through 1936.

It is the position of the plaintiff that for the years 1934 and 1935 its real property was not subject to an *ad valorem* assessment and taxation, under the revenue acts then in force, because the rent, interest or income from its investment was used exclusively to pay the interest on its bonded indebtedness.

Plaintiff concedes that for the year 1936 its position in this respect is somewhat imperiled by the fact that a part of its income for that year,

to wit, $12,500, was used in converting some of its lodge rooms into offices for rent. It is pointed out, however, that this was made possible by the bondholders waiving interest in the amount of $15,750.00, so that in the end, it is contended, the result was the same as paying interest on its bonded indebtedness. Hence, plaintiff says its property ought not to be taxed for the year 1936.

It is also found as a fact that other necessary repairs and improvements have been made from time to time and paid for out of the income derived from the building. What effect, if any, this would have upon the case is regarded as incidental in view of the matters hereafter to be considered.

It is provided by the Revenue Act of 1937, ch. 291, sec. 600 (7), Public Laws 1937, that the following real property, and no other, shall be exempted from taxation: "Property beneficially belonging to or held for the benefit of . . . charitable . . . benevolent, patriotic . . . institutions or orders, where the rent, interest or income from such investment shall be used exclusively for . . . charitable . . . or benevolent purposes, or to pay the principal or interest of the indebtedness of said institutions or orders." This same provision was brought forward in the Revenue Act of 1939, ch. 310, sec. 600 (7), Public Laws 1939, and was therefore in force from 1937 through 1939.

It is the position of the plaintiff that for the last three years—1937 to 1939, inclusive—its real property was not subject to an *ad valorem* assessment and taxation, under the revenue acts then in force, because the rent, interest or income from its investment was used exclusively to pay principal and interest on its indebtedness.

Whether the plaintiff is a charitable organization as respects the dues of its members may be put aside as inapplicable to the present controversy, for it is quite apparent from its charter provisions that the real estate holdings, which alone are here involved, stand upon a different footing. *Dakota Lodge of Odd Fellows v. Yankton County,* 56 S. D., 234, 228 N. W., 238. Indeed, the by-laws of the plaintiff corporation culminating with the provision that its funds, property and income "are not to be divided in any manner among the members or used for any purposes except as provided by law," would seem to indicate a beneficial organization for the mutual protection of its members and the widows and orphans of deceased members, with the benefits to be paid to them as a matter of right rather than as a matter of charity. *S. v. Dunn,* 134 N. C., 663, 46 S. E., 949; *Merrick Lodge v. Lexington,* 175 Ky., 275, 194 S. W., 92. The statute has reference to a charity in fact as distinguished from one in theory or promise. *People v. Rockford Lodge,* 348 Ill., 528, 181 N. E., 432.

However, without definite determination of the character of the plaintiff in this respect, and passing the question for the moment, it will be observed there is no limitation on the plaintiff's power to engage in commercial activities with all kinds of property, both real and personal, provided the profits arising therefrom, if any, are used for the benefit of widows and orphans of deceased Odd Fellows in North Carolina, or for such charitable and benevolent purposes as may be deemed necessary or expedient to the successful prosecution of its charter provisions. *Merrick Lodge v. Lexington, supra.* Its funds, property and income are not to be divided in any manner among its members, or used for any purposes, "except as provided by law." Thus it appears that the *corpus* of plaintiff's real estate is held for business or commercial purposes. *Latta v. Jenkins,* 200 N. C., 255, 156 S. E., 857; Annotations: 22 A. L. R., 907. and 83 A. L. R., 773. At no time has any of the rent or income derived from the operation of its building been devoted to a charitable purpose.

Second. The people of the State, speaking through the Constitution, have expressed their will on the subject as follows:

1. "Laws shall be passed taxing by a uniform rule . . . all real and personal property, according to its true value in money." Art. V, sec. 3. By amendment adopted at the general election in 1936, this was changed to read: "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." Ch. 248, Public Laws 1935. Reference is made to the section before and after the amendment only because the time in question extends across the period of change, albeit the principle for which it is cited—uniformity within the class—remained the same. *Leonard v. Maxwell,* 216 N. C., 89, 3 S. E. (2d), 316.

2. "Property belonging to the State or to municipal corporations shall be exempt from taxation. The General Assembly may exempt . . . property held for educational, scientific, literary, charitable, or religious purposes," etc. Art. V, sec. 5.

In interpreting these provisions of the Constitution, it has been adjudged that the basic principle, as expressed therein, is equality, and that discrimination is to be eschewed. *Comrs. v. Webb,* 160 N. C., 594, 76 S. E., 552; *Warrenton v. Warren County,* 215 N. C., 342, 2 S. E. (2d), 463. Fair play is the main thesis of the Constitution. 26 R. C. L., 332. Taxation is the rule; exemption the exception. *Benson v. Johnston County,* 209 N. C., 751, 185 S. E., 6; *Loan Assn. v. Comrs.,* 115 N. C., 410, 20 S. E., 526; *Redmond v. Comrs.,* 106 N. C., 122, 10 S. E., 845.

The power to grant exemptions under authority of the second sentence in Art. V, sec. 5, which may be exercised in whole, or in part, or not at all, as the General Assembly shall elect, is limited to property held for one or more of the purposes therein designated. *Southern Assembly v. Palmer,* 166 N. C., 75, 82 S. E., 18; *United Brethren v. Comrs.,* 115

N. C., 489, 20 S. E., 626. Property held for any of these purposes is supposed to be withdrawn from the competitive field of commercial activity, and hence it was not thought violative of the rule of equality or uniformity, to permit its exemption from taxation while occupying this favored position. But when it is thrust into the business life of the community, it loses its sheltered place, regardless of the character of the owner, for it is then held for profit or gain. *Trustees v. Avery County,* 184 N. C., 469, 114 S. E., 696. The test to be applied in determining the validity of exemptions granted under this provision of the Constitution is the purpose for which the property is held. *Davis v. Salisbury,* 161 N. C., 56, 76 S. E., 687; *Corp. Com. v. Construction Co.,* 160 N. C., 582, 76 S. E., 640. Note, the language is not that the General Assembly may exempt property *held by* educational, scientific, literary, charitable, or religious institutions, but the grant is in respect of property *held for* one or more of the designated purposes. *Latta v. Jenkins, supra.* It is true that property held for one or more of these purposes is usually held by an institution of such like character, still it does not follow that an institution of a given kind necessarily holds all of its property for a kindred purpose, or for any of the purposes enumerated in this section of the Constitution. *Warrenton v. Warren County, supra.* It is not the character of the corporation or association owning the property which determines its status as respects the privilege of exemption, but the purpose for which it is held. *Grand Lodge, F. A. M., v. Taylor,* 146 Ark., 316, 226 S. W., 129. This is the plain meaning and intent of the Constitution. *Corp. Com. v. Construction Co., supra.*

The revenue acts, therefore, and the exemptions contained therein, must be read in the light of the constitutional grant under which they were enacted, and they should be interpreted accordingly. In this respect, the General Assembly is confined to the circumference of its powers. *Southern Assembly v. Palmer, supra.*

Conceding that the General Assembly may have placed a broader interpretation upon Art. V, sec. 5, of the Constitution than is warranted by its language, induced no doubt by *dicta* contained in some of our decisions, it does not follow that the pervading principle of the Constitution, which is equality, should *ergo* be abandoned, or that the discretionary power of exemption, contained therein, should be extended to property held and used for purposes other than those specifically mentioned. The grant is limited in its terms, and the power to exempt stops at the boundary of the grant.

On the record as presented, it would seem that, for the years in question, the plaintiff's office building is subject to an *ad valorem* assessment and taxation.

Reversed.

J. R. THAMES AND O. W. CLARK v. GRACIE WILKINS GOODE.

(Filed 8 June, 1940.)

1. Wills § 33c—Word "heir" held to mean issue, and devisee took fee defeasible upon death without issue.

Testator had more than two children, and devised the land in question to two of them, with provision that if either should die without "an heir that his share of said property be the property of the surviving brother." *Held:* Each of the devisees took a one-half interest in fee as tenant in common, subject to be defeated upon death without issue, and a contingent remainder interest in his brother's share, it being apparent that the word "heir" in the devise was not used in its technical sense, but that the testator intended it to mean issue or lineal descendants.

2. Wills § 46—Where person who is to take contingent remainder is certain, he may convey such interest.

A devisee having a one-half interest in lands subject to be defeated upon his death without issue and a contingent remainder in the other one-half interest should his co-tenant die without issue, may convey his contingent as well as his present interest in the lands. The rule that the devisee of a contingent limitation over cannot convey his interest prior to the happening of the contingency because until that time who will take cannot be known, is not applicable when the person who is to take by way of contingent remainder is certain.

3. Estoppel § 1—Warranty deed conveying present interest and contingent remainder held to estop grantor and those claiming under him.

Testator devised the land in question to two of his sons with provision that upon the death of either without issue the other should take his interest. One of the devisees conveyed to the other by warranty deed "any and all of his interest present as well as prospective." *Held:* The deed estops the grantor and those claiming under him from asserting any title in the lands as against the grantee or those claiming under him.

4. Same—Deed with covenant to defend the title against lawful claims of all persons claiming under grantor held to estop grantor's heirs.

The land in question was devised to two of testator's sons with provision that if either should die without issue the other should take his interest. One of them conveyed his present and contingent interest to the other by warranty deed. The one who thus acquired the entire title to the land under the will and by the deed, conveyed to defendant all his right, title and interest in the land, one-half interest in fee simple and the other one-half interest subject to the will, and his deed to defendant warrantied title in fee subject to the terms of the will, and covenanted to defend the title to one-half interest against the claims of all persons, and to defend the title as to the other one-half interest against all persons claiming by, through or under him. The grantor in the deed to defendant later died without issue, and the surviving devisee then attempted to convey one-half interest to plaintiff. *Held:* Although the deed to defendant purported to convey the fee only in one-half interest and to convey the

other one-half interest subject to the will, which interest terminated upon the death of the grantor without a lineal descendant, the deed expressly covenanted to defend the title to the said one-half interest against the grantor and those claiming under him and therefore estops the heirs of the grantor, and since plaintiffs' grantor was estopped by his prior deed to defendant's grantor, and further had no interest in the land at the time of the conveyance to plaintiff, defendant is the owner of the fee simple title to the entire tract.

APPEAL by plaintiffs from *Harris, J.*, at April Term, 1940, of GRANVILLE. Affirmed.

Special proceedings before the clerk for the partition of land.

Plaintiffs filed their petition before the clerk for the partition of a certain tract of land in Granville County, alleging tenancy in common with the defendant. The defendant filed answer denying tenancy in common and pleading sole seizin. Thereupon, the cause was transferred to the civil issue docket as required by statute.

N. A. Pool died domiciled in Granville County seized of the land in controversy. By his last will and testament he devised said land to two of his sons, Stephen P. Pool and John A. Pool, in the following language: "I then will to my sons Stephen Pool and John A. Pool my dwelling house with the surrounding outhouses with one hundred acres of land attached thereto, to be laid off according to their, Stephen Pool and John A. Pool's wish, I then will that in case that either Stephen Pool or John A. Pool should die without an heir that his share of said property be the property of the surviving brother, either Stephen Pool or John A. Pool as the case may be." There is no controversy as to the identity of the property thus devised.

In December, 1906, John A. Pool (with the joinder of his wife), by warranty deed, granted and conveyed to Stephen P. Pool "any and all of his interest present as well as prospective, in and to the said land devised as aforesaid under the terms of the said last will and testament of the said N. A. Pool, deceased." The land in controversy is particularly described in the deed which includes the covenant and agreement "that they will warrant and defend the title to the share of John A. Pool, in and to the said tract of land against the claims and demands of any and all persons whomsoever, claiming by, through or under them."

Thereafter, on 30 December, 1936, Stephen P. Pool (unmarried) conveyed to the defendant, her heirs and assigns, "all of his right, title and interest in and to a certain tract or parcel of land," etc., which it is admitted is the tract of land in controversy.

This deed contains the following provisions:

"It is intended hereby to convey a one-half interest in fee simple to

said land, and the other one-half interest in said land subject to the terms of the will of N. A. Pool, which is recorded in the office of the clerk of the Superior Court of Granville County, in Book 24, page 84. See also deed from J. A. Pool to S. P. Pool recorded in the office of the Register of Deeds for said county in Book 60, at page 496.

"TO HAVE AND TO HOLD a one-half interest in said land together with all and singular the rights, privileges and appurtenances thereunto belonging to herself, the said Grayce Wilkins Goode, in fee simple forever, and to have and to hold the other one-half interest in said land in fee simple, subject, however, to the terms and provisions of the will of said N. A. Pool as hereinbefore referred to.

"And the party of the first part for himself, his heirs and assigns, covenants and agrees to and with the party of the second part, her heirs and assigns, that he is seized and possessed of said lands in fee and has the lawful right to convey the same in fee simple, subject to the terms and provisions of the will of said N. A. Pool, that the same is free and clear of any and all encumbrances whatsoever, and that he will forever warrant and defend the title to a one-half interest in said land against the lawful claims of all persons whomsoever and that he will forever warrant and defend the title to the other one-half interest in said land against the lawful claims of all persons whomsoever, claiming the same by, through or under him, subject, however, as hereinbefore set out to the terms of the will of said N. A. Pool."

Stephen P. Pool died intestate on or about 9 July, 1937, without ever having married and without issue. On 28 July, 1939, John A. Pool and wife executed and delivered to the plaintiffs a deed conveying or attempting to convey a one-half undivided fee simple interest in said tract of land. It is under this deed that plaintiffs claim a one-half interest in said tract of land as tenants in common with the defendant.

When the cause came on to be heard in the court below the parties waived trial by jury and agreed that the court could hear the evidence, find the facts and render judgment thereon. After hearing the evidence the court entered its judgment finding the facts and adjudging "that the petitioners have no interest of any kind and that the defendant is sole seizin of said tract or parcel of land" and dismissing the action. The plaintiffs excepted and appealed.

T. Lanier and R. W. Winston for plaintiffs, appellants.
Royster & Royster for defendant, appellee.

BARNHILL, J. In the devise to Stephen Pool and John A. Pool there is an ulterior limitation which provides that upon the death of either without an heir his share shall be the property of the surviving brother.

Upon the happening of this contingency—the death of either without heir—the estate is to be taken out of the first line of descent and then put back into the same line, in a restricted manner, by giving it to one, but not to all, of those who presumably would have shared in the estate as being potentially among the heirs general of the first taker, and it appears that the testator had other children and the survivor would be only one of those entitled to take, as heir, should either of the brothers die without lineal descendants. This is a circumstance which may be used as one of the guides in ascertaining the paramount intention of the testator, and, with other *indicia,* it has been held sufficient to show that the word "heirs" was not used in its technical sense. *Edwards v. Faulkner,* 215 N. C., 586, 2 S. E. (2d), 703; *Brown v. Mitchell,* 207 N. C., 132, 176 S. E., 258; *Doggett v. Vaughan,* 199 N. C., 424, 154 S. E., 660; *Pugh v. Allen,* 179 N. C., 307, 102 S. E., 394. Under the terms of the will Stephen Pool and John A. Pool each took a moiety in fee as tenants in common with the other, subject to be defeated upon death without issue, and a contingent remainder interest in his brother's share.

Ordinarily, when the remainder is contingent a fee simple title will not pass by the deed of the parties prior to the happening of the contingency upon which the limitation depends for, until the event has occurred, it cannot be known who will take. *Woody v. Cates,* 213 N. C., 792, 197 S. E., 561; *Mercer v. Downs,* 191 N. C., 203, 131 S. E., 575; *Irvin v. Clark,* 98 N. C., 437, 4 S. E. (2d), 30.

But when the limitation is by way of contingent remainder or an executory devise and the person who is to take is certain, an assignment of the contingent interest, being what is termed a "possibility coupled with an interest," will be upheld in equity upon the happening of the event and the devolution of the property. *Woody v. Cates, supra,* and cases cited.

Thus it was held in *Foster v. Hackett,* 112 N. C., 546, 17 S. E., 426, that a warranty deed by one having only a contingent remainder in land passes the title, by way of estoppel, to the grantee, as soon as the remainder vests by the happening of the contingency upon which such vesting depends. See also *Woody v. Cates, supra.*

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. *Williams v. R. R.,* 200 N. C., 771, 158 S. E., 473. *Crawley v. Stearns,* 194 N. C., 15, 138 S. E., 403, and *Woody v. Cates, supra,* are to the same effect.

Speaking to the subject in *Weeks v. Wilkins,* 139 N. C., 215, 51 S. E., 909, it was said: "Where the conveyance purports, as in this case, to pass a title in fee to the entire body of land, the grantor is estopped thereafter to say it does not. The consensus of all the authorities is to the effect that where the deed bears upon its face evidence that the entire estate and title in the land was intended to be conveyed, and that the grantee expected to become vested with such estate as the deed purports to convey, then, although the deed may not contain technical covenants of title, still the legal operation and effect of the deed is binding on the grantors and those claiming under them, and they will be estopped from denying that the grantee became seized of the estate the deed purports to vest in him."

Thus it appears that under these principles of law which prevail in this State John A. Pool, by his deed to Stephen P. Pool, conveyed all of his interest in the tract of land in controversy, both present and contingent, and that both he and his grantees are estopped to deny that title thereto vested in Stephen P. Pool. The plaintiffs, grantees of John A. Pool, may not now assert that the said deed did not divest John A. Pool of all of his title and interest in the land.

But, notwithstanding this fact, by reason of the phraseology of the deed from Stephen P. Pool to the defendant, may she now claim title to the land in controversy? Under her deed one-half interest in the land is conveyed subject to the provisions and conditions in the will of N. A. Pool. Nothing else appearing, her title to a one-half interest terminated upon the death of Stephen P. Pool without a lineal descendant. But, by reason of the deed of John A. Pool, it could not vest in him or in his grantees. Both he and they were estopped to assert ownership thereof under the terms of the will. Consequently, title to this one-half would remain in Stephen P. Pool and descend to his heirs as such.

However, this is not the full import of the language in the deed to the defendant when the instrument is considered as a whole. Her grantor—in whose heirs title would rest except for the deed—expressly covenants and agrees with the defendant to forever warrant and defend the title to said one-half interest against the lawful claims of all persons whomsoever, claiming the same by, through or under him. Thus the heirs of Stephen P. Pool, by the act of their ancestor, are estopped to assert title to the premises as against the defendant.

At the time John A. Pool attempted to convey the land in controversy to the plaintiffs he had divested himself of all interest therein by his deed to his brother. His deed to plaintiffs conveyed nothing. Independent of this fact, he and his grantees, the plaintiffs, are estopped by the deed to Stephen P. Pool to assert title to the land. Stephen Pool,

as against himself, his heirs, and any and all other persons claiming by, through or under him, has conveyed his title—acquired both under the will and under the deed from John A. Pool—to the defendant. Furthermore, they and each of them are estopped to assert title thereto by virtue of the language warranting title to the defendant as against them. The defendant is the sole owner of the land described in the pleadings, by estoppel at least. The judge below so concluded and the judgment entered must be

Affirmed.

JOHN SAIEED v. B. G. ABEYOUNIS AND A. RICHARD.

(Filed 8 June, 1940.)

1. **Bills and Notes § 20—Relative liability of principals and surety inter se remains same, even after judgment on the note.**

One of defendants admitted that he was a principal on the note in question, and the verdict of the jury established that the other defendant was also a principal. Plaintiff was a surety on the note, and after judgment was obtained by the payee, plaintiff drew his check to one of the principals to be used in partial satisfaction of the judgment. *Held:* Although upon the rendition of the judgment the note merged therein and the judgment became the only legal evidence of the indebtedness, the relative liability of defendants as principals and plaintiff as surety, as between themselves, remained the same as on the note, and plaintiff, even in the absence of an assignment of the judgment to a trustee for his benefit, became the contract creditor of defendants to the extent of the money advanced by him.

2. **Limitation of Actions § 12a—Partial payment by one principal starts the statute running anew as to both principals.**

Defendants were liable as principals on the note in question, which had been reduced to judgment by the payee. Plaintiff, surety on the note, drew his check in favor of one of the principals to be used in discharging the judgment, and some four years after making the payment instituted this action against defendants. Defendants pleaded the three-year statute of limitations. Plaintiff introduced evidence that he owed one of the principals a sum on an open account and that this principal, upon a settlement made some two years prior to the institution of the action, advised plaintiff to credit the amount of the account on the check. *Held:* Partial payment by one of the principals would start the running of the statute anew as to both, and the evidence of partial payment was properly submitted to the jury under correct instructions from the court upon the issue of the bar of the statute of limitations.

3. **Limitation of Actions § 16—**

The charge of the court construed contextually as a whole *is held* to properly place the burden upon plaintiff to prove by the greater weight of the evidence that his claim was not barred by the statute of limitations pleaded by defendants.

4. Appeal and Error § 39e—

An excerpt from the charge will not be held for reversible error when the charge construed contextually as a whole is not prejudicial to appellant.

5. Trial § 39—

The refusal to submit issues tendered will not be held for error when the issues submitted are sufficient to present to the jury all determinative facts in dispute and afford the parties opportunity to introduce all pertinent evidence and to apply it fairly.

APPEAL by defendants from *Bone, J.*, at January Term, 1940, of PITT.

Civil action commenced 2 May, 1939, to recover for money allegedly expended for use and benefit of defendants.

Plaintiff alleges these facts: That prior to 17 January, 1929, plaintiff became surety on note for $2,000 bearing interest from date, executed by defendants to one Isaac Kannan; that upon failure to pay the note at maturity, Kannan instituted an action and obtained judgment in Superior Court of Wake County against plaintiff and defendants for the principal sum of said note, with interest from its date, which judgment was duly docketed in Superior Court of Pitt County, North Carolina, on 30 June, 1933; that prior to 1 August, 1935, upon Kannan commencing to press defendants and plaintiff for payment of said judgment, plaintiff paid by check to defendant B. G. Abeyounis for the use and benefit of defendants and for the purpose of satisfying said judgment, the sum of $500, which, together with a certain mortgage then executed by defendant A. Richard to said Kannan, paid and satisfied said judgment and same was duly canceled on 1 August, 1935; that though plaintiff has made frequent demands upon defendants for reimbursement of said amount of $500, defendant Richard has failed and refused to pay any part thereof, but defendant Abeyounis, recognizing his liability to plaintiff in said amount, authorized plaintiff to credit on the back of the check, as of 30 November, 1936, the sum of $117.24 representing the value of merchandise theretofore sold to plaintiff by Abeyounis; and that there is due and owing to plaintiff by defendants the balance of $422.76 with interest from 30 November, 1936.

Defendant B. G. Abeyounis in answer filed denies the material allegations of the complaint and avers: That both he and plaintiff signed the note of A. Richard to Isaac Kannan as sureties; that plaintiff thought that he was relieved of the effect and lien of the Kannan judgment on account of certain bankruptcy proceedings filed by him, but that it turned out that he was not released and discharged therefrom; that thereupon plaintiff, becoming anxious to have the judgment canceled, approached the defendant and "agreed that he would pay $500 on said judgment if he could be released and discharged from the same"; and

asked this defendant to negotiate for compromise and cancellation of the judgment; that pursuant thereto he took the matter up with Kannan, who finally agreed to accept $500 and a second mortgage on land from A. Richard for $1,750 in settlement and cancellation of the judgment; that thereupon plaintiff turned over to this defendant his check for $500 and this defendant paid Kannan $500 and A. Richard executed the mortgage; and that thereupon the judgment was canceled on 1 August, 1935.

Defendant Abeyounis further denies that he is liable to and that he has recognized any liability to plaintiff on account of said payment of $500 on the Kannan judgment. Furthermore, the defendant Abeyounis pleads the three-year statute of limitations in bar of any recovery by plaintiff in this action, and sets up counterclaim for the recovery of $117.24 with interest from 30 November, 1937, alleged to be due for merchandise sold by him to plaintiff from time to time.

Defendant A. Richard by answer filed admits that he was principal in note to Kannan, but denies any liability to plaintiff by reason of the payment of the $500. He likewise pleads the three-year statute of limitations in bar of plaintiff's right to recover in this action.

The parties introduced evidence tending to support their respective contentions.

Upon the issues submitted the jury rendered verdict as follows:

"1. Did the defendant B. G. Abeyounis sign the Kannan note as principal, as alleged in the complaint? Answer: 'Yes.'

"2. Is the plaintiff's cause of action barred by the three-year statute of limitations? Answer: 'No.'

"3. What amount, if any, is the plaintiff entitled to recover of the defendants? Answer: '$422.76, plus interest.'

"4. What amount, if any, is the defendant B. G. Abeyounis entitled to recover of the plaintiff on his counterclaim? Answer: 'Nothing.'"

From judgment in favor of the plaintiff against the defendants in the sum of $422.76 with interest from 30 November, 1936, the defendants appeal to Supreme Court and assign error.

Albion Dunn for plaintiff, appellee.

Julius Brown for defendant Abeyounis, appellant.

Gaylord & Harrell and Chas. H. Whedbee for defendant Richard, appellant.

WINBORNE, J. These questions present in the main the points for decision on this appeal:

1. Where judgment is rendered on a debt evidenced by note for which judgment debtors—two as principals and one as surety—are liable, is

paid in part with money advanced for the purpose by the surety and is canceled without assignment *pro tanto* to a trustee for his benefit as provided by statute, Public Laws 1919, ch. 194; C. S., 618, may the surety maintain an action against principals for recovery of money advanced?

2. If so, will a payment made by one of the principals to surety in partial reimbursement for moneys so advanced have the effect of tolling the three-year statute of limitations, C. S., 441, as to either or both principals?

3. Are the issues submitted sufficient?

The answer is "Yes" as to all questions and both parties.

1. The rule is that a judgment merges the debt upon which it is based and becomes the only evidence of the existence of the debt that can be used in court. *Gibson v. Smith,* 63 N. C., 103; *Trust Co. v. Boykin,* 192 N. C., 262, 134 S. E., 643. However, when in an action to recover on contract for an indebtedness evidenced by note, judgment is rendered against both principals and surety thereto, the relative liability thereon of the principals and surety *inter sese* continues the same as on the note.

As a general rule the surety who pays the principal debt on which he is himself bound, either by judgment or otherwise, without procuring an assignment to a trustee for his benefit, thereby satisfies the original obligation and can sue only as a creditor by simple contract. *Bank of Davie v. Sprinkle,* 180 N. C., 580, 104 S. E., 477, and cases cited.

In the case before us defendant Richard admits that he signed the note to Kannan as principal. The verdict of jury establishes that defendant Abeyounis was also principal thereto. All parties appear to concede that plaintiff was surety to the indebtedness represented by that note. Therefore, applying the above principle to this factual situation, upon rendition of judgment, the note merged therein and, while the judgment became the only legal evidence of the indebtedness, the status of liability of defendants as principals and plaintiff as surety *inter sese* remains the same. Hence, when the judgment was paid in part by money advanced by plaintiff and in part by mortgage security of defendant Richard, and canceled without assignment thereof as provided by statute, Public Laws 1919, ch. 194; C. S., 618, the original debt, which merged into the judgment, was extinguished and plaintiff as surety became the contract creditor of the defendants as principal debtors to the extent of the amount of money advanced by him.

2. The decisions of this Court adhere to the principle that a part payment by one joint debtor before the applicable statute of limitations has run against the demand will start the statute anew as well against the co-obligor as against him who made the payment. *McKeethan v. Atkinson,* 46 N. C., 421; *Wilfong v. Cline,* 46 N. C., 500; *Lowe v. Sowell,*

48 N. C., 67; *Green v. Greensboro Female College,* 83 N. C., 449; 35 Am. Rep., 579; *Campbell v. Brown,* 86 N. C., 376; 41 Am. Rep., 464; *Wood v. Barber,* 90 N. C., 76; *Moore v. Goodwin,* 109 N. C., 218, 13 S. E., 772; *Moore v. Beaman,* 111 N. C., 328, 16 S. E., 177, from the date of the payment. *Supply Co. v. Dowd,* 146 N. C., 191, 59 S. E., 685. See, also, *Battle v. Battle,* 116 N. C., 161, 21 S. E., 177, and *Kilpatrick v. Kilpatrick,* 187 N. C., 520, 122 S. E., 377.

However, such "partial payment is allowed this effect only when it is made under such circumstances as will warrant the clear inference that the debtor recognizes the debt as then existing and his willingness, or at least his obligation, to pay the balance." *Battle v. Battle, supra.* See, also, *Hewlett v. Schenck,* 82 N. C., 234; *Supply Co. v. Dowd, supra.*

In applying these principles to the present case it is pertinent to note these uncontroverted facts: Plaintiff advanced the $500, by check dated 1 August, 1935, payable to defendant Abeyounis, for the use of defendants in paying off the Kannan judgment and the judgment was canceled on the same day. In a settlement on 20 April, 1937, plaintiff owed defendant Abeyounis a balance of $117.24 for goods bought on account, the last item of which was on 30 November, 1936. This action was commenced on 2 May, 1939.

It is further noted that in this connection and on the trial below plaintiff on the one hand offered evidence tending to show that at the time of the settlement on 20 April, 1937, the defendant Abeyounis agreed that said balance should be applied as of 30 November, 1936, on the check plaintiff gave in advancing the $500. The defendants on the other hand offered evidence tending to show and contended that no such agreement was made, and that plaintiff still owed the balance to defendant Abeyounis.

In the light of these facts and these contentions and regarding the second issue, the court charged the jury in compliance with the above principles as applicable to the facts as the jury should find them to be. Defendant, however, contends that the court erred in a portion of the charge on the *quantum* of proof required on this issue. When the detached portion of the charge to which exception is taken is read in connection with that which preceded and with that which followed, it is patent that the jury could not have misunderstood the rule that burden of proof was upon the plaintiff to satisfy the jury by the greater weight of the evidence.

3. Defendant Abeyounis also assigns as error the refusal of the court to submit issues tendered by him. The issues submitted are sufficient to present to the jury proper inquiries as to all determinative facts in dispute as well as to afford the parties opportunity to introduce all pertinent evidence and to apply it fairly. Hence, there is no error in refusing to

submit the issues so tendered. *Hill v. Young, ante,* 114, 6 S. E. (2d), 830, and cases cited.

All other exceptions, after careful consideration, are likewise found to be without merit. The case appears to have been fairly presented to the jury. In the judgment thereon we find

No error.

J. N. GREENE, M. H. GREENE AND MRS. SENATH McINTYRE v. H. P. GREENE.

(Filed 8 June, 1940.)

1. Deeds § 2a—Failure to submit issue of mental incapacity held not error upon the evidence in absence of tender of issue.

The owner of lands, in order to divide his property among his children, deeded a share to each, reserving a life estate and the timber rights for a term of ten years after his death, with provision that the timber should be sold after his death and the proceeds divided equally among the children. This action was instituted by three of the children against a fourth child after the death of their father to compel the sale of the timber on the land deeded to defendant. Defendant alleged that the clause reserving the timber interest and providing for its sale was inserted in the deed through undue influence and also alleged mental incapacity of the grantor. *Held:* In the absence of any sufficient evidence of mental incapacity and the failure of defendant to tender an issue relating thereto, he may not complain that the court submitted but one issue, which related to undue influence, and *held further*, the evidence fully sustains the jury's negative finding on that issue.

2. Trial § 37—

Where the issue submitted is determinative of the controversy and embraces all real matters in dispute and enables the parties to present every material phase of the controversy, it is sufficient, and a party may not complain because a particular issue was not submitted when he has not tendered such issue.

3. Deeds § 2c—Undue influence which will vitiate an instrument is a fraudulent influence.

Undue influence which will vitiate a deed or a clause thereof is a fraudulent influence, and therefore an instruction that the burden is upon the party asserting undue influence to show that the clause attacked was inserted in the deed as a result of fraudulent acts and that the jury should answer the issue in the affirmative if they found by the greater weight of the evidence that the grantor was motivated by undue influence, and to answer the issue in the negative if the jury should not be so satisfied, *is held* without error when construed as a whole.

4. Trial § 36—

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

5. Parties § 9—

In an action to compel a grantee to sell certain timber for distribution among the grantor's children in accordance with reservations and directions in the deed, the fact that all the children are not parties will not preclude recovery by the children instituting the action when defendant does not request the joinder of the others and raises no objection until after verdict.

6. Deeds § 2c—

The owner of lands deeded to each of his children a certain part thereof reserving the timber rights, with provision that after his death the timber be sold and the proceeds of sale be divided equally among his children in order to make an equal division of his property. Defendant attacked the timber reservation on the ground of undue influence. *Held:* The value of the timber was some evidence upon the issue, the probative force being for the jury.

APPEAL by defendant from *Sink, J.*, at November Term, 1939, of RICHMOND. No error.

B. B. Greene lived in Richmond County, N. C., and owned about 400 acres of land in said county, on which he resided. He had 7 children—three are plaintiffs in this action and one the defendant. Before he died he conveyed his land to his 7 children and reserved a life interest and the timber. He afterwards divided same and gave a portion to each of his 7 children, including plaintiffs and defendant. He had a survey and three of his neighbors to aid in laying off his land. At the time of said division the home place, including 30 acres, was set aside by said B. B. Greene for the use of and to go to his daughter, Senath Greene, now Senath McIntyre, one of the plaintiffs in this action, and the other six parcels were drawn by lot by his other 6 children, the defendant drawing Lot No. 7.

Lot No. 7 was deeded to defendant on 26 April, 1926, and contained 122.6 acres, with the following in it: "This deed is made by the grantor and accepted by the grantee with the understanding and upon the condition that it is to take the place of any and all interest which the said grantee has in and to the first tract of land described in a deed from the said B. B. Greene to Arthur Braxton Greene and others, dated March 1, 1907, and recorded in the office of the register of deeds for Richmond County, in Book XXX, at page 563. The grantor reserves unto himself during the term of his natural life all of the timber of every kind and description on said tract of land, and for a period of ten years after the death of said grantor, all of the timber of every kind and description now growing or hereafter grown on said land during said time, is to be sold by the said Hugh Pate Greene and the money equally divided between the children of the said B. B. Greene."

This is an action brought on 13 September, 1938, by plaintiffs to sell the timber set forth in the deed made to defendant by B. B. Greene, and to divide the proceeds of said sale. Plaintiffs made demand on defendant to sell same, but he refused to do so. He set up mental incapacity of B. B. Greene at the time of the execution of the deed and that the timber reservation was fraudulently inserted, that undue influence was used and the division was inequitable.

The issue submitted to the jury and their answer thereto, were as follows: "Was the execution reserving the timber rights for a period of 10 years, in the deed from B. B. Greene to Hugh Pate Greene, dated 26 April, 1926, and recorded in Book 194, at page 176, procured by the undue influence of the plaintiffs, or either of them? Answer: 'No.'"

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.

Fred W. Bynum for plaintiff.
Jones & Jones for defendant.

CLARKSON, J. This is an action brought by plaintiffs against defendant to have defendant sell certain timber. B. B. Greene owned about 400 acres of land in Richmond County, N. C., and had 7 children. He was growing old, and on 4 March, 1907 (recorded in Book XXX, at p. 563), conveyed the land to his children with a provision in the deed reserving a life estate and the timber on the land.

Thereafter B. B. Greene had the land surveyed and divided into seven parts by three appraisers, who were neighbors. After the surveying had been done, the lots were numbered on little pieces of paper. Senath Greene (now McIntyre) was allotted the "home place," and six pieces of paper with the numbers on them were put in a hat and drawn out by his children. B. B. Greene was to reserve the timber on certain tracts and this was to be sold after his death. He wanted every child to get an equal share. The defendant H. P. (Hugh Pate) Greene, drew Lot No. 7, which was for 122.6 acres, and a deed was made in lieu of what was heretofore deeded the children but undivided. The timber was reserved for a period of 10 years after the death of B. B. Greene, which was to be sold and the proceeds equally divided among his children.

The defendant charged that the ten-year timber provision was inserted by fraud and undue influence on the part of the plaintiffs. Mental incapacity of B. B. Greene was also pleaded.

The attorney who drew the deed testified, in part: "Mr. Greene showed me from the map the lots he wanted to go to each child, and he especially

said that he wanted the home place to go to his daughter. And then he told me how to fix the deeds about the timber and I wrote the deeds exactly in accordance with his instructions. In my opinion, he had a perfectly clear and lucid mind at that time, and in fact, at all times I ever saw him. In respect to two or three of the deeds carrying the provision about the timber for ten years after his death, he said he would have to do that to make the division equal in his opinion."

The defendant complains that only the single issue of undue influence was submitted to the jury. From the evidence, this was the only material issue raised by the pleadings. The defendant did not object to the issue and submitted no other issue, but in fact agreed upon the issue submitted.

It is well settled that the issue is sufficient if it enables the parties to present every material phase of the controversy. *Vaughan v. Parker,* 112 N. C., 100; *Ives v. Lumber Co.,* 147 N. C., 306.

In *Greene v. Bechtel,* 193 N. C., 94 (99-100), is the following: "If the defendant did not consider the issues submitted by the court proper or relevant, it was his duty to tender other issues, and having failed to do so, he cannot now complain. In *Gross v. McBrayer,* 159 N. C., at p. 374, citing numerous authorities, it is said: 'Plaintiff objected to these issues, but tendered no issues himself. It seems to us that the issues submitted by the court were those made by the pleadings, and if the plaintiff desired any other issue, he should have tendered it. When issues embrace the real matters in dispute and afford an opportunity for the parties to present and develop their contentions, and, when answered, are sufficient to determine the rights of the litigants and to support the judgment, they are sufficient within the requirement of the statute.' *Erskine v. Motor Co.,* 187 N. C., p. 826; *Hooper v. Trust Co.,* 190 N. C., 423." *Teseneer v. Mills Co.,* 209 N. C., 615.

In *Falkner v. Pilcher,* 137 N. C., 449 (450), we find: "It may be conceded as a general proposition that a party cannot complain because a particular issue was not submitted to the jury unless he tendered it, but the rule is subject to this qualification, that the issues submitted must in themselves be sufficient to dispose of the controversy and to enable the court to proceed to judgment, for in that respect the duty of the court to submit issues is mandatory. *Tucker v. Satterthwaite,* 120 N. C., 118; *Burton v. Mfg. Co.,* 132 N. C., 17."

There was no sufficient evidence to submit an issue to the jury that B. B. Greene did not have mental capacity to execute the deed he gave to defendant, nor was there sufficient evidence of fraud. The evidence of undue influence was circumstantial and not strong, and the jury was warranted in rendering the verdict they did on the evidence.

The defendant could read and write. The deed he accepted from his father was dated 26 April, 1926, with the timber reservation in it. He regularly paid the taxes on the land. The acreage was large compared with that deeded to the others—to make an equal share. So far as the record discloses he made no objection until this action was brought on 13 September, 1938. His father died on 28 June, 1929. All these years he acquiesced in the terms of the deed without objection. The court below charged, to which exception and assignment of error is made to that part in brackets: "[The court charges you that the burden of this particular issue rests upon him who pleads it, to wit: the defendant. Fraud is obnoxious to the law and it is seldom presumed. The burden is upon the defendant to satisfy you in the manner the court has described to you from all of the testimony and the evidence that you have heard in this case that this clause is the outgrowth of the fraudulent act or acts of the plaintiffs, one or more of them, or someone in their behalf, and it is incumbent upon him, as I say, to prove that. It is your duty to determine whether or not he has done so.] If, when you have analyzed all of the testimony and evidence—and the documentary matter being evidence—you shall be convinced by the greater weight of the evidence and testimony in the case, that Mr. B. B. Greene, in having prepared, or preparing, this clause in his deed before he signed it, was motivated by the undue influence of these plaintiffs, any of them, or any one of them, then it would be your duty to answer the issue 'Yes.' If, on the contrary, after you have so analyzed the testimony, considering it all, and the relationship of the parties, you shall fail to be satisfied by the greater weight of the evidence, then it would be your duty to answer that issue 'No.'"

Taking the charge as a whole, and not disconnectedly, we cannot say that it was prejudicial or reversible error.

It is said in *Marshall v. Flinn,* 49 N. C., 199 (204): "The only influence which the law condemns, and which destroys the validity of a will, is a fraudulent influence, controlling the mind of the testator, so as to induce him to make a will which he otherwise would not have made." *Myatt v. Myatt,* 149 N. C., 137 (140); *In re Abee's Will,* 146 N. C., 273; *In re Craven's Will,* 169 N. C., 561; *In re Mueller's Will,* 170 N. C., 28; *In re Cross' Will,* 173 N. C., 711; *In re Creecy's Will,* 190 N. C., 301.

We think the case of *Harrison v. Ray,* 108 N. C., 215, cited by defendant, not applicable to the facts in this action.

To be sure the plaintiffs only claim $\frac{3}{4}$ undivided interest in the timber, but the defendant did not request that the others interested be made parties to the action. He agreed to the issue, and we think after verdict it is too late for this contention to be made.

We think the court below did not impinge C. S., 564. We think the value of the timber some evidence—the probative force was for the jury. The admission and exclusion of evidence on the trial below we cannot hold as prejudicial to defendant. The case was not a complicated one and we think the contentions given and charge sufficient. As said in *Davis v. Long,* 189 N. C., 129 (137): "The case is not complicated as to the law or facts. The jurors are presumed to be men of 'good moral character and sufficient intelligence.' They could easily understand the law as applied to the facts."

For the reasons given, we find

No error.

JANE MONTGOMERY v. GRACE M. BLADES, ADMINISTRATRIX OF WILLIAM B. BLADES, DECEASED; SOUTHERN RAILWAY COMPANY, AND CITY OF DURHAM.

(Filed 8 June, 1940.)

1. Pleadings § 10—Cross action against codefendant must be founded upon or necessarily connected with plaintiff's cause.

A defendant may file a cross action against a codefendant only if such cross action is founded upon or is necessarily connected with the subject matter and purpose of plaintiff's action, and while C. S., 602, permits the determination of questions of primary and secondary liability and the right to contribution as between joint tort-feasors, it does not permit cross actions between defendants which are independent of the cause alleged by plaintiff.

2. Same—In passenger's action for negligent injury, driver's administratrix may not set up cause for wrongful death against codefendant.

This action was instituted by a passenger in an automobile against the administratrix of the driver, a municipality and a railroad company to recover for injuries sustained as the result of alleged concurrent negligence when the car in which she was riding struck supporting columns maintained in the center of the street at a railroad overpass. Defendant administratrix filed a cross complaint against her codefendants, alleging negligence on their part resulting in the wrongful death of her intestate. *Held:* The demurrer to the cross complaint was properly sustained since the subject matter of the cross action for wrongful death is not founded upon and has no relationship to the subject matter of plaintiff's action against all three defendants for negligent injury. *Powell v. Smith,* 216 N. C., 242, cited and distinguished.

APPEAL by defendants, Southern Railway Company and city of Durham, from *Harris, J.,* at November Term, 1939, of DURHAM. Reversed.

The plaintiff Jane Montgomery instituted her action against the Southern Railway Company, city of Durham, and Grace M. Blades,

administratrix of William B. Blades, deceased, and filed complaint setting up a cause of action for damages for personal injury alleged to have been caused her by the concurring negligence of the three defendants. She alleged that the defendant Southern Railway Company constructed and maintained with the consent and approval of the city of Durham an underpass on Chapel Hill Street in the city of Durham and placed concrete supports along the center of Chapel Hill Street under the defendant Railway Company's tracks, thereby constituting an obstruction in said street which was negligently maintained without sufficient lights, with the knowledge of the city. Plaintiff further alleged that she was a passenger in an automobile driven by the defendant's intestate, William B. Blades, on the evening of 21 February, 1939, and was injured when the automobile was negligently driven by said Blades against the concrete supports so negligently constructed and maintained in the center of the street under the Railway Company's tracks. She alleged the amount of her damages to be fifty thousand dollars.

The corporate defendants filed answers denying the allegations of negligence as to them, alleging that the sole proximate cause of plaintiff's injury was the negligence of William B. Blades, and set up the contributory negligence of plaintiff as a bar to her action, and asked, if recovery be had as against them, that the question of primary and secondary liability between them be determined.

Thereafter the defendant Blades filed answer denying the allegations of negligence as to her intestate, and, as an affirmative cross-complaint against her codefendants, alleged that the death of her intestate was caused by the negligence of the corporate defendants, and prayed that she recover of her codefendants damages therefor in the sum of two hundred thousand dollars.

The corporate defendants moved to dismiss the cross action of the defendant Blades against them. These motions were denied and defendants appealed.

Fuller, Reade, Umstead & Fuller and R. E. Whitehurst for Grace M. Blades, defendant, appellee.

Hedrick & Hall for Southern Railway Company, defendant, appellant.

C. V. Jones and S. C. Brawley for city of Durham, defendant, appellant.

DEVIN, J. The corporate defendants appealed from the order of the court below denying their motions to dismiss the cross action against them set up in the answer or cross-complaint of their codefendant Grace M. Blades, administratrix of William B. Blades, deceased.

Upon examination of the pleadings in this action and consideration of the facts therein alleged, we are of opinion that the learned judge who heard the case below, was in error in denying the motion of the appealing defendants.

The general rule seems to have been established by the decisions of this Court that one defendant, jointly sued with others, may not be permitted to set up in the answer a cross action not germane to the plaintiff's action. A cause of action arising between defendants not founded upon or necessarily connected with the subject matter and purpose of the plaintiff's action should not be engrafted upon the action which the plaintiff has instituted. In order that a cross action between defendants may be properly considered as a part of the main action, it must be founded upon and connected with the subject matter in litigation between the plaintiff and the defendants. *Bowman v. Greensboro,* 190 N. C., 611, 130 S. E., 502; *Rose v. Warehouse Co.,* 182 N. C., 107, 108 S. E., 389; *Coulter v. Wilson,* 171 N. C., 537, 88 S. E., 857; *Bobbitt v. Stanton,* 120 N. C., 253, 26 S. E., 817; *Baugert v. Blades,* 117 N. C., 221, 23 S. E., 179; *Gibson v. Barbour,* 100 N. C., 192, 6 S. E., 766; *Hulbert v. Douglas,* 94 N. C., 128; *Joyce v. Growney,* 154 Mo., 253; 49 C. J., 312; McIntosh Prac. & Proc., 493.

Section 602 of the Consolidated Statutes provides that "judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants, and it may determine the ultimate rights of the parties on each side, as between themselves." This permits the determination of questions of primary and secondary liability between joint tort-feasors, but it may not be understood to authorize the consideration of cross actions between defendants as to matters not connected with the subject of the plaintiff's action.

In *Hulbert v. Douglas, supra,* it was said: "The practice sanctioned by The Code does not go so far as to permit the introduction of questions in dispute among the defendants unless they arise out of the subject of the action as set out in the complaint, and have such relation to the plaintiff's claim as that their adjustment is necessary to a full and final determination of the cause."

In *Coulter v. Wilson, supra,* this statement of the rule was quoted with approval: "A cross action by a defendant against a codefendant or third party must be in reference to the claim made by the plaintiff, and based upon an adjustment of that claim. Independent and irrelevant causes of action cannot be litigated by cross actions."

The same result was reached in the case of *Liebhauser v. Milwaukee Electric Railway & Light Co.,* 180 Wis., 468, 43 A. L. R., 870, where the facts were similar to those here alleged. There the plaintiff, injured as result of collision between a street car and an automobile, sued both

the railway company and the driver of the automobile. The driver of the automobile filed cross complaint against the railway company alleging damage to his automobile due to its negligence. Demurrer to the cross complaint was sustained. The Court said: "The mere fact that the two occurrences were nearly contemporaneous in time in no manner affects the question."

In the recent case of *Sandmann v. Sheehan,* 279 Ky., 614, 131 S. W. (2), 484, where the litigation involved a collision between two automobiles causing injury to a passenger, demurrer to a defendant's cross petition against the city of Louisville on account of defective lights was sustained.

To the same effect is the holding in *Livingstone v. Philley,* 155 Ky., 224; *Hunter v. Bank,* 72 Ind., 62; *Bradley v. Guess,* 140 S. C., 60; *Johnson v. Moore,* 113 Okla., 238; and *Patterson v. Bank,* 75 Okla., 147. In the case last cited it was held, also, that the defendant against whom the cross complaint was filed by a codefendant had the right to interpose objection, whether the plaintiff did so or not.

Here the plaintiff Montgomery sues Blades, the Southern Railway Company, and the city of Durham for a personal injury to herself alleged to have been caused by the concurring negligence of the three defendants. The defendant Blades in her answer and cross complaint against her codefendants sets up a cause of action for the wrongful death of William B. Blades against the Railway Company and the city.

The subject matter of plaintiff's complaint is the personal injury she sustained, and the purpose of her action is to recover her damages therefor from the three defendants. The subject matter of the cross complaint is the wrongful death of William B. Blades and the purpose is to recover of the two defendants damages therefor for the benefit of the defendant Grace M. Blades.

The subject matter of the cross action by defendant Blades against her codefendants has no relation to the injury to the person of the plaintiff or her right to sue therefor. The plaintiff is suing for the invasion of one primary right, and the defendant Blades is suing for the invasion of a distinct and different right of her intestate.

If the plaintiff Montgomery and the defendant Blades had joined as parties plaintiff in an action against the Railway Company and the city, their complaint would have been demurrable for misjoinder.

The defendant Blades relies on *Powell v. Smith,* 216 N. C., 242, but that case is distinguishable from the case at bar. In that case the plaintiff Powell sued Smith Transfer Company for a personal injury due to the negligence of the Tranfer Company in the operation of motor truck. On motion of the Transfer Company, S. E. Campbell and Christine Wallace were joined as parties defendant, and the Transfer Company

filed complaint or cross action against them alleging they were joint tort-feasors, and asking for contribution. Campbell and Wallace answered setting up cross actions against the Transfer Company for damages because of its negligence in injurying their property. The Transfer Company moved to strike and demurred to the cross action. The judgment denying the motion and overruling the demurrer was affirmed by this Court. The opinion states the reason for the ruling as follows: "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 given against the Transfer Company because of its negligence. Each of the defendants countered with an affirmative demand of compensation against the Transfer Company for negligent injury to property." Having brought the other defendants in and filed a complaint against them, the original defendant could not complain of their reply to his cross-complaint.

The decision in *Bargeon v. Transportation Co.*, 196 N. C., 776, 147 S. E., 299, does not militate against the view here taken.

We conclude that there was error in the ruling of the court below and that the judgment must be

Reversed.

COMFORT SPRING CORPORATION v. G. R. BURROUGHS.

(Filed 8 June, 1940.)

1. Contracts § 7a: Injunction § 8—

A contract by an employee not to engage in a similar business within a specified territory for a certain time is valid and enforceable only if the restraint imposed is reasonably necessary to protect the business or good will of the employer and imposes no greater restraint upon the employee than is reasonably necessary for this purpose, provided its enforcement would not be detrimental to the public interest in depriving it of the services and skill of the employee or in incurring the danger of the employee becoming a public charge.

2. Same—

A covenant by an employee not to engage in a similar business in the entire United States as an employee of a named competitor is unreasonable and oppressive upon the employee and unnecessary for the protection of the employer, and is void as being in restraint of trade, and the employer may not enforce such contract in the absence of allegation and evidence circumscribing and limiting the territory by showing the extent of the territory over which its business extends.

3. Injunctions § 12—

The party seeking injunctive relief has the burden of proof.

COMFORT SPRING CORP. *v.* BURROUGHS.

APPEAL by plaintiff from *Clement, J.,* at October Term, 1939, of GUILFORD.

B. L. Herman for plaintiff, appellant.
Miller & Myers for defendant, appellee.

SCHENCK, J. This is an action to restrain and enjoin the violation of restrictive covenant contained in a written contract of employment entered into between the plaintiff, as employer, and the defendant, as employee. The contract contained, *inter alia,* the following provision:

"If the contract is terminated as herein provided by the party of the second part (the defendant), or by the party of the first part (the plaintiff), for cause, then for the period of three years thereafter he contracts and agrees not to represent any company, person or firm, either directly or indirectly, in any of the Southern States for the sale of products similar to those sold by the party of the first part. If the party of the first part shall terminate said contract without just cause, then and in that event the party of the second part shall be at liberty to represent, in any Southern State or in any other territory, any company, person or firm selling products similar to those sold by the party of the first part, other than the Spring Products Corporation, of New York City, but as to such last named corporation, or its successor, it is understood and agreed that for the period of five years immediately following the termination of this contract by either party for or without cause, the party of the second part shall not, directly or indirectly, enter into the employ of such corporation, or its successor, or represent same within the entire United States; and the said party of the second part agrees that for said period of five years and in the United States he will not represent or enter the employ of the said Spring Products Corporation in any manner whatsoever."

The complaint makes the following allegations:

"5. That the defendant G. R. Burroughs is no longer in the employment of the plaintiff, and that the termination of said employment was in no manner caused or contributed to by the said plaintiff, and that the defendant has accepted employment with the Spring Products Corporation, of New York City, and has entered upon such and has called and is calling upon customers of the plaintiff.

"That the said Spring Products Corporation is a business similar in nature to that of the plaintiff, and that the defendant has become acquainted with confidential information of the plaintiff and of the trade.

"6. That the defendant G. R. Burroughs, while in the employment of the plaintiff from the 2nd day of June, 1938, and for some time prior thereto became acquainted with all the business affairs of the plaintiff and of all the confidential records and information of the plaintiff's past and present customers.

"That if the defendant G. R. Burroughs is permitted and allowed to directly or indirectly enter the employment of a competitor of the plaintiff and especially the employment of the Spring Products Corporation, of New York City, or to enter into a like business of his own, with the peculiar knowledge and information of the plaintiff's business and customers as above set out, which he may now use so as to benefit said rival and seriously injure the plaintiff, and which he is now doing and threatens to and will continue to do unless restrained by this court, he will continue to cause great and irreparable injury and damage to the plaintiff.

"7. That said acts of the defendant G. R. Burroughs in violation of said agreement constitute a continuing injury to and interference with plaintiff's business and greatly reduce plaintiff's profits, and plaintiff cannot be fully compensated in damages, but is suffering and will continue to suffer irreparable injury."

In the municipal court of the city of High Point, where the action was commenced, the defendant filed a demurrer *ore tenus* upon the ground that the complaint did not state facts sufficient to state a cause of action. This demurrer was overruled by the municipal court, and a judgment was entered restraining the defendant from engaging or continuing in the employment of the Spring Products Corporation, as salesman or otherwise, for a period of five years anywhere in the United States; and further restraining the defendant from engaging or continuing in the employment of any person or corporation, who shall be engaged in any business of a like or similar nature or character as the springs business now being conducted by the plaintiff, as salesman or otherwise, in any Southern State for a period of three years.

From the judgment of the municipal court the defendant appealed to the Superior Court, where the demurrer was again heard, and judgment entered sustaining the defendant's assignments of error, reversing the judgment of the municipal court, and sustaining the demurrer of the defendant.

From the judgment of the Superior Court the plaintiff appealed to the Supreme Court, assigning as error (1) the sustaining of defendant's exception to the signing of the judgment of the municipal court, (2) the sustaining of defendant's exception to the refusal of the municipal court to sustain the defendant's demurrer *ore tenus,* and (3) the holding by the court, as a matter of law, that the contract of employment is both unreasonable as to time and as to territory and is not necessary for the protection of the plaintiff, as an employer, and is oppressive to the defendant, in restraint of trade, against public policy, and therefore illegal and void.

These assignments of error present but a single question, namely: Is the restrictive covenant in the contract of employment unreasonable as to

time or territory, and unnecessary for the protection of the employer, and oppressive to the employee, and therefore in restraint of trade, and illegal and void? We are constrained to answer the question in the affirmative.

It should first be observed that the only breach of the restrictive covenant alleged is that the defendant has accepted employment from the Spring Products Corporation and is calling upon the customers of the plaintiff. There is no allegation nor evidence as to the territory in which the defendant is calling upon the plaintiff's customers, whether in the "Southern States" or elsewhere. In truth, there is no allegation nor evidence as to over what territory the plaintiff's business extends. Therefore we are called upon to decide simply the question as to whether the covenant that the defendant would not accept employment as a salesman or otherwise from the Spring Products Corporation anywhere in the United States is unreasonable and oppressive, and in restraint of trade.

While it is true a contract by an employee not to engage in a certain business within a reasonable area and for a reasonable length of time, which does not affect the interest of the public, and is necessary to protect the employer, may be upheld, *Scott v. Gillis,* 197 N. C., 223; *Moskin Bros. v. Swartzberg,* 199 N. C., 539, it is equally true that contracts restraining freedom of employment can be enforced only when they impose a reasonable restraint and are not wider in scope than is necessary for the protection to which the employer is entitled, and are not injurious to the public interest. *Sherman v. Pfefferkorn,* 241 Mass., 468, 135 N. E., 568. See annotations in 29 A. L. R., 1331.

A test to determine whether or not a restraint is reasonable is to inquire whether the restraint is necessary for the protection of the business or good will of the employer, and, if so, whether it imposes on the employee any greater restraint than is reasonably necessary to protect the business of the employer, or the good will thereof, regard also being had to the injury which may result to the public by restraining the breach of the covenant, the loss of the service and skill of the employee and the danger of his becoming a charge on the public. *Briggs v. Mason,* 217 Ky., 269, 289 S. W., 295; 52 A. L. R., 1344. See annotations 52 A. L. R., 1362.

The burden of proof in an application for a restraining order or injunction is upon the party seeking such relief, and in the absence of any allegation or proof as to the territory over which the plaintiff's business extends, we are impelled to hold that the restriction upon the defendant to engage as a salesman for the Spring Products Corporation "within the entire United States" is unnecessary for the protection of

the plaintiff, and unreasonable and oppressive upon the defendant, and is, therefore, in restraint of trade and illegal and void.

We conclude that the judgment of the Superior Court must be affirmed, and it is so ordered.

Affirmed.

B. H. SILLS v. J. H. MORGAN AND WIFE, FLORA MORGAN.

(Filed 8 June, 1940.)

1. Fraudulent Conveyances § 9: Pleadings § 28—Plaintiff is not entitled to judgment on pleadings when essential facts are denied.

In an action to set aside a deed as being fraudulent to plaintiff creditor, plaintiff is not entitled to judgment on the pleadings, even though it is admitted that the deed recited a consideration of $10.00 and that at the time of its execution the grantor was indebted to plaintiff and did not retain property sufficient and available to pay his then existing creditors, when defendants deny the want of valuable consideration for the deed and deny actual intent on the part of the grantor with knowledge of the grantee, to defraud his creditors, and allege facts relied upon as showing the existence of valuable consideration for the deed, and as indicating the absence of fraudulent intent.

2. Fraudulent Conveyances § 3—Evidence that deed was supported by valuable consideration held for jury.

This action was instituted to set aside a deed from a husband to his wife on the ground that it was fraudulent as to plaintiff creditor. It was admitted that the recited consideration for the deed was $10.00. Defendants' evidence tended to show that the deed conveyed the home place, that the wife used her own money in making improvements upon the property and that the husband executed notes to his wife therefor and promised to convey the property to her if he should be unable to pay the notes, that at the time of the conveyance the property was subject to a mortgage and that the mortgage indebtedness and the amount of the notes together represented the reasonable value of the property. *Held:* Whether the deed was executed for a valuable consideration is for the determination of the jury upon the evidence, and the refusal of plaintiff's request for a peremptory instruction on the issue was not error.

3. Fraudulent Conveyances § 5—Fraudulent intent may not ordinarily be inferred as a matter of law.

In this action to set aside a deed from a husband to his wife on the ground that it was fraudulent as to plaintiff creditor, defendants' evidence tended to show that the property was conveyed on the date plaintiff obtained judgment against the husband, but that the consideration for the deed was notes which had been executed by the husband to the wife for her own money which had been used in making improvements upon the property, and that they had agreed that if the husband should be unable to pay the notes he would convey the property to her in satisfaction thereof, and that they regarded the notes "just as good as a mortgage."

Held: The question of fraudulent intent was properly submitted to the jury, and the denial of plaintiff's request for a peremptory instruction on the issue was not error.

4. Fraudulent Conveyances § 4—

Where it is established that the deed in question was executed for a valuable consideration and that it was not executed with intent to delay, hinder and defraud creditors, the question of the knowledge and intent of the grantee is immaterial.

APPEAL by plaintiff from *Olive, Special Judge,* at September Term, 1939, of STANLY.

Civil action to set aside deed allegedly executed in fraud of creditors.

These issues were submitted to and answered by the jury as indicated:

"1. Did the defendant J. H. Morgan, on the 11th day of April, 1938, execute to Mrs. Flora Morgan a deed conveying the real property described in the complaint? Answer: 'Yes' (by consent).

"2. If so, in what amount, if any, was the defendant J. H. Morgan indebted to the plaintiff at the time of the execution of said deed? Answer: '$500' (by consent).

"3. Did the defendant J. H. Morgan, at the time of executing said deed, retain property in his own name fully sufficient and available to pay his then existing creditors? Answer: 'No' (by consent).

"4. Was the deed from J. H. Morgan to Mrs. Flora Morgan, dated April 11, 1938, executed for a valuable consideration? Answer: 'Yes.'

"5. Did the defendant J. H. Morgan execute said deed with intent to delay, hinder, or defraud his creditors, as alleged in the complaint? Answer: 'No.'

"6. If said conveyance was upon a valuable consideration and made with intent, upon the part of J. H. Morgan, to defraud his creditors, did the defendant Flora Morgan have notice of such fraudulent intent and participate therein? Answer: ....."

From judgment on verdict for defendants plaintiff appeals to Supreme Court and assigns error.

James L. DeLaney, I. R. Burleson, and L. L. Moffitt for plaintiff, appellant.

Brown & Mauney for defendants, appellees.

WINBORNE, J. The only assignments brought forward and discussed in appellant's brief are those challenging the rulings of the court below in refusing (1) to grant motion of plaintiff for judgment on the pleadings, and (2) to give peremptory instructions to the jury to answer the fourth issue "No," the fifth issue "Yes," and the sixth issue "Yes." After consideration of the pleadings and evidence offered we find no cause to disturb these rulings.

(1) As to the first point, while it is not controverted that when on 11 April, 1938, defendant J. H. Morgan executed the deed in question to his wife, defendant Flora Morgan, for the recited consideration of ten dollars, he was indebted to plaintiff in the sum of $500 and did not retain property sufficient and available to pay his then existing creditors, other material issues of fact are raised by the pleadings.

The complaint alleges that the deed was executed the same day on which plaintiff obtained judgment on said indebtedness; that the deed was voluntary and executed by J. H. Morgan "for the intent and purpose of hindering and defrauding the plaintiff and avoiding the payment of said judgment, which, Mrs. Flora Morgan well knew of her own knowledge."

The answer of defendants denies these allegations of the complaint, and further avers substantially these facts: That on 11 April, 1938, the date of and on which the deed in question was acknowledged, J. H. Morgan was justly and honestly indebted to his wife, Flora Morgan, for money borrowed in the principal amount of $2,342.00, $650.00 of which was borrowed in 1919, and $1,692.00 about November, 1927, represented by notes from J. H. Morgan payable to Flora Morgan, and used in part in completing the home, digging a well and otherwise improving the premises in question; that at the time the $1,692.00 was loaned it was definitely agreed that the money should be used as above stated and that unless J. H. Morgan could and did repay this and the $650.00 borrowed previously "within a short time" he would convey the home place, that is, the land in question, to Flora Morgan for the amount of the loans; that nothing was ever paid thereon "except a little interest"; that pursuant to this agreement and "for the valuable consideration in the sum of $2,342.00, together with such interest as was due upon said indebtedness, the defendant J. H. Morgan, executed and delivered to Flora Morgan deed conveying" said land; that the consideration constituted the reasonable value of the land, especially in view of the fact that at the time it was encumbered by a registered mortgage to Luther Bowers as security for a note in the sum of $650.00 and interest; that the deed was executed in payment of said preëxisting indebtedness and not with the intent to delay, hinder or defraud the plaintiff or any other person whomsoever, but "in absolute good faith for a valid and valuable consideration, and . . . for a price considerably in excess of the then market value of the land" conveyed thereby.

Plaintiff's right to recover on the pleadings is dependent upon sustaining his allegation that defendant J. H. Morgan conveyed the land to his wife voluntarily, or, if in payment of indebtedness to her, with an actual intent on his part, known to her, to defraud his creditors. *Parker v. Fenwick,* 147 N. C., 525, 61 S. E., 378.

Defendants having denied these allegations, the fourth, fifth and sixth issues arise for submission to the jury.

(2) Regarding the requests of plaintiff for peremptory instructions: (a) As to the fourth issue, the evidence is conflicting. Plaintiff on the one hand points to the admission that the deed recites a consideration of ten dollars, and offered evidence tending to show that the market value of the land at the time of the deed was $3,000. On the other hand, defendants offered evidence tending to show that defendant J. H. Morgan borrowed $2,342 from his wife, Flora Morgan, as alleged in their answer for which he gave to her his notes; that the money was her property, $650 of it being savings from the sale of cabbage, chickens, eggs and pigs, and $1,692 being the proceeds of the sale of timber from a tract of land inherited by her from her father, and allotted to her in the division of the estate; that the money was loaned to J. H. Morgan to be used and was used by him for the purposes alleged and with the agreement alleged; that at the time the deed was made the whole of the amount borrowed, with accumulated interest, was honestly due and unpaid, and the mortgage encumbrance thereon due Luther Bowers was outstanding; that the market value of the land was from $1,800 to $2,000; and that the deed was made and the notes surrendered pursuant to the agreement.

(b) As to the fifth issue, "Did the defendant J. H. Morgan execute said deed with intent to delay, hinder and defraud his creditors, as alleged in the complaint?" the defendant J. H. Morgan testified in part: ". . . I told my wife . . . if things got too hard and I could not pay it back I would just make her a deed to the place and it went on . . . I made that deed to my wife because I positively owed her her money." Then on cross-examination he stated that he had a lawyer to draw it up and that it was made the day before the case was tried in Montgomery County. Concluding, he said, "I think a note just as good as a mortgage in a case like ours, because I told her in case I could not pay it I would deed it to her, and I did. I don't know about the suing business; it was right after he left home and he told me he would pay his part if I would pay mine. I was referring to Mr. Sills in my last answer. We had a little friendly wreck . . . the same wreck they have this judgment about."

Mrs. Flora Morgan testified that J. H. Morgan gave her notes for the loans; that she kept them until he deeded the land to her; that he told her if he did not pay the notes he would deed the land to her. On cross-examination she stated: "I thought a note was just as good as a mortgage. . . . I knew he was sued over in Montgomery, and when the case was to be tried, and I thought mine came first. He kept putting it off and I asked him to make it over, but not especially because of this suit in Montgomery County. . . . I was not at the trial. . . .

I was sick at the time, but I knew my husband and daughters were there." The two daughters testified in corroboration of their parents, and stated they were present when the deed was made and saw the mother give the notes to their father.

We think this evidence requires the submission of the issue to the jury. "Since intent is an operation of mind it should be proven and found as a fact, and is rarely to be inferred as a matter of law." *Mfg. Co. v. Building Co.,* 177 N. C., 103, 97 S. E., 718; *Mfg. Co. v. Lefkowitz,* 204 N. C., 449, 168 S. E., 517.

(c) The jury having found in response to the fourth issue that the deed was for a valuable consideration, and that it was not executed by J. H. Morgan with intent to delay, hinder and defraud his creditors, as alleged in the complaint, the answer to the sixth issue is immaterial.

All other exceptions are deemed abandoned. Rule 28 of Rules of Practice in Supreme Court, 200 N. C., 811.

In the judgment below we find

No error.

LIBERTY MANUFACTURING COMPANY, A CORPORATION, v. JAMES D. MALLOY AND ARMOUR & COMPANY, A CORPORATION.

(Filed 8 June, 1940.)

1. Chattel Mortgages § 9a: Mortgages § 12—

Proper registration of a lien upon real or personal property is notice to all the world of the existence of the lien created by the instrument, but due cancellation of record may be relied upon with equal security.

2. Mortgages § 27: Chattel Mortgages §§ 2, 14—

A lien is incident to the debt secured and the discharge of the debt discharges the lien itself, and therefore when it appears upon the face of a chattel mortgage that it was given as additional security to a deed of trust, cancellation of record of the deed of trust discharges the chattel mortgage, even though the chattel mortgage is not canceled of record.

3. Same—After discharge of lien it may not be held as security for another debt as against purchaser from encumbrancer.

Upon the maturity of one of the notes secured by a deed of trust on lands, the trustor executed a note secured by a chattel mortgage and delivered same to the *cestui* as additional security to the deed of trust, which chattel mortgage provided on its face that it was additional security to the mortgage debt. Plaintiff *cestui* contended that it was executed as additional security, also, to a crop lien theretofore executed by trustor. Thereafter the crop lien and the deed of trust were canceled of record upon the conveyance of the realty to the *cestui.* The *cestui* also contended that two mules covered by the deed of trust were released to the trustor under agreement that the chattel mortgage should remain in effect.

Held: The cancellation of the deed of trust and the crop lien discharged the chattel mortgage, and as against the purchaser of the chattels from the trustor, *cestui* may not assert that the release of the mules continued the lien of the chattel mortgage, since after the discharge of the lien it may not be asserted against a purchaser for any separate or collateral debt or agreement.

APPEAL by defendant Armour & Company from *Harris, J.*, at October Term, 1939, of ROBESON. New trial.

Civil action to recover the value of property sold by individual defendant to corporate defendant and upon which plaintiff claims a lien.

On 31 October, 1938, the defendant Malloy was indebted to the plaintiff as evidenced by two notes in the aggregate sum of $1,657.27, which notes were secured by a real estate mortgage. The first note in the sum of $857.27 matured 1 October, 1938. On 31 October, 1938, defendant Malloy executed to the plaintiff a note in the sum of $800 and at the same time executed and delivered a chattel mortgage to secure the same conveying "52 hogs averaging about 3 months old each, and weighing approximately 60 pounds each, being all the hogs of this age and weight that I now own," subject to the agreement that from this number of hogs grantor excepted two as brood sows to be selected by him. This chattel mortgage contained the provision that: "This chattel is given as additional security to a certain deed of trust on the lands of grantor in favor of Liberty Manufacturing Company, which deed of trust matured in part on 1 October, 1938." At the same time Malloy was indebted to the plaintiff on a crop lien mortgage in the sum of $577.93.

Subsequent to the execution of the chattel mortgage Malloy conveyed to the plaintiff the lands described in the deed of trust in satisfaction of the indebtedness thereby secured and said deed of trust was duly canceled of record. The crop lien mortgage was marked paid 23 November, 1938, and was duly canceled of record.

In February and March, 1939, after the execution of the chattel mortgage, Malloy sold to the defendant Armour & Company 38 hogs for the sum of $393.10. Of this amount $11.24 was paid to plaintiff by Armour & Company on order of Malloy. Plaintiff sues for the balance, claiming same under the terms of the chattel mortgage.

Issues were submitted to and answered by the jury under the instructions of the court that if they believed all of the evidence they would answer the same in favor of the plaintiff as indicated by the answers as follows:

"1. Did the defendant James D. Malloy execute the note to the plaintiff bearing date October 31, 1938, for value, as alleged in the complaint? Answer: 'Yes.'

"2. What amount, if any, is the defendant James D. Malloy indebted

to the plaintiff on said note? Answer: '$800.00, with interest from October 31, 1938, subject to a credit of $11.24 as of May 5, 1939.'

"3. Did the defendant James D. Malloy execute the chattel mortgage, as alleged in the complaint? Answer: 'Yes.'

"4. Did the defendant Armour & Company purchase from James D. Malloy the hogs described in the chattel mortgage, as described in the complaint? Answer: 'Yes.'

"5. What amount, if any, is the defendant Armour & Company indebted to the plaintiff on account of the matters alleged in the complaint? Answer: '$393.10, together with interest from February 9, 1939, subject to a credit of $11.24 as of May 5, 1939.'

"6. Did the plaintiff Liberty Manufacturing Company hold a valid recorded lien against the hogs described in the chattel mortgage when purchased by Armour & Company? Answer: 'Yes.'"

From judgment thereon defendant Armour & Company appealed.

Downing & Downing and Myers & Snerly for defendant Armour & Company, appellant.

Johnson & Timberlake for plaintiff, appellee.

BARNHILL, J. There was no present consideration for the execution of the chattel mortgage and note secured thereby. It was executed and delivered as additional security to the notes secured by the trust deed as is indicated upon its face. Witness for plaintiff so testified: "When he gave the chattel mortgage he owed the money. He already had the consideration for the chattel mortgage. We asked for additional security on what he already had. He gave the additional security because we asked for it. There was no additional consideration. We did not give him anything additional for it. When Mr. Malloy executed the chattel mortgage referred to there was no additional credit given him."

When an instrument creating a lien upon real or personal property is recorded as required by law it is for the purpose, in part at least, of giving notice of the lien to all persons who may thereafter acquire an interest in the property thus conveyed. It is equally true that when such instrument thus recorded is duly canceled of record it gives notice that the lien thereby created no longer exists. All persons are charged with notice of the lien created by the registered instrument. They may rely with equal security upon the cancellation.

The debt secured is the life of the mortgage and gives it vigor and efficacy. The essential effect and consequence of the discharge of the mortgage debt is the discharge of the mortgage itself. The mortgage was incident to the debt, rested upon it, and when the purpose for which it was created was accomplished, it ceased to have effect. *Walker v. Mebane,* 90 N. C., 259; *Elliott v. Wyatt,* 74 N. C., 55. While the

chattel mortgage is not canceled of record the debt secured by the deed of trust and for which the chattel mortgage was given as additional security has been paid and the trust deed has been duly canceled. When the principal debt is discharged the security is discharged. Cancellation of the trust deed was notice to the public that the lien created by the chattel mortgage no longer existed for the reason that the debt for which it was given as security had been fully discharged.

But the plaintiff contends and offered evidence tending to show that at the time the chattel mortgage was executed it was understood and agreed that it should also be held as additional security for the crop lien, which, incidentally, has been duly marked paid and canceled of record. As to this, what has been said is apropos, even if it be conceded that the verbal agreement had any legal effect.

But the plaintiff contends further that at the time the real estate notes were satisfied by the conveyance of the land described in the trust deed, at the request of Malloy, plaintiff agreed to release two mules which were included in the deed of trust upon condition that Malloy would permit plaintiff to retain the chattel mortgage. The purpose for which the chattel mortgage was to be retained is not clear. The land debt was paid by the conveyance of the land and if the chattel mortgage was to be retained as security for the value of the two mules released, the amount to be so secured does not appear. Even so, this is not material.

"There is no principle which permits a mortgagor who has paid his mortgage and taken a satisfaction, there being at the time no equitable reason for keeping it afoot, subsequently to resuscitate and reissue it as security for a new loan or transaction, especially where the rights of third parties are in question, and it would make no difference whether the reissue of the mortgage was before or after the new rights and interests had intervened . . . the contention that a person having at the time notice that a mortgage had been paid by the mortgagor in usual course, can, by a verbal arrangement between himself and the mortgagor, give the extinct mortgage vitality again as security for a new loan, so as to give it priority over a subsequent conveyance or mortgage is not justified by the authorities." *Saleeby v. Brown,* 190 N. C., 138, 129 S. E., 424; *Bogert v. Striker,* 42 N. E. (N. Y.), 528; *Flye v. Berry,* 63 N. E. (Mass.), 1071; *Hibernia Nat'n. Bank v. Succession of Gragard,* 30 So. (La.), 728; 19 R. C. L., 445, sec. 229.

In *Blake v. Broughton,* 107 N. C., 220, there was evidence that the mortgagor, after the execution of the mortgage and notes secured thereby, procured the assignment of the notes to a third party to secure money then advanced. There was likewise evidence that the original debt, evidenced by the notes and mortgage, had been satisfied. The Court held that if the mortgage debt had been discharged the mortgage was no

longer operative, although the notes were not marked satisfied. It was there said: "After their (notes) satisfaction, though not so marked on the record, they certainly could not be held as a security for money loaned or advanced to the prejudice of a purchaser for value from the mortgagor or his assigns. Having been paid off and discharged, the want of cancellation could not have the effect to revive them and give them new life and vitality to defeat such a purchaser." *Walker v. Mebane, supra; Ballard v. Williams,* 95 N. C., 126.

It follows that on this record the corporate defendant acquired a good title to the personal property purchased from Malloy and that the charge of the court was erroneous. As there was no motion for judgment as of nonsuit the only course left for us to pursue is to direct a new trial.

The defendant Malloy gave notice of appeal and joined in the settlement of the case on appeal. However, as he filed no brief, his appeal is deemed to be abandoned.

New trial.

R. S. BEAM v. H. M. RUTLEDGE.

(Filed 8 June, 1940.)

1. Appeal and Error § 37c—

Upon appeal from judgment continuing a temporary order to the final hearing, it will be presumed that the court found facts sufficient to support the judgment in the absence of a request for findings or challenge to any facts found.

2. Injunctions § 8: Contracts § 7a—

A stipulation of a partnership agreement between professional men that upon dissolution of the partnership the junior member would not practice the profession within the same town or within one hundred miles thereof for a period of five years *is held* reasonable and enforceable.

3. Same—

The test to determine the validity of a covenant prohibiting a person from engaging in a similar business or practicing his profession in a specified area is the existence of legitimate interests of the covenantee which are sought to be protected by the covenant, and whether the restrictions in regard to time and territory are reasonably necessary to afford fair protection for that interest and are not injurious to the interest of the public.

4. Contracts § 1—

The freedom to contract will not be lightly abridged, and public policy favors the enforcement of contracts intended to protect legitimate interest.

5. Injunctions § 8: Contracts § 7a—

A covenant in a partnership agreement between professional men that upon dissolution of the partnership the junior partner should not practice the profession within a restricted area for a specified time stands upon a different footing from like agreements between employer and employee, since a professional man is deemed capable of guarding his own interest and is not under like compulsion in making the agreement, but the line of demarcation between freedom to contract on one hand and public policy on the other must be determined upon the circumstances of each particular case.

SEAWELL, J., dissents.

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

APPEAL by defendant from *Stevens, J.*, in Chambers at Fayetteville, 13 March, 1940. From ROBESON.

Civil action to enjoin the defendant from engaging in the practice of medicine in restricted territory for limited time in violation of agreement with the plaintiff.

The plaintiff is a physician—ear, eye, nose and throat specialist—and has practiced his profession for more than twenty-five years in Robeson County, this State. He has a large and lucrative practice, well established and covers a wide territory. On or about the first of May, 1938, the defendant came to Lumberton and was employed as an assistant in the office of the plaintiff at a salary of $75.00 a week, with the understanding that if the employment proved unsatisfactory, the defendant "was not to practice medicine in Lumberton, or within 100 miles thereof, for a period of five years after the employment ceased." About a year later, plaintiff and defendant, at the solicitation of the latter, formed a partnership for the practice of their profession under an agreement containing provision for division of profits, etc., with stipulation that either might dissolve the partnership on ninety days' written notice. The firm name and style was to be "Beam and Rutledge."

The following clause in the partnership agreement is the one here in controversy: "In the event of a dissolution of the copartnership herein created, it is agreed by Dr. H. M. Rutledge, one of the partners, that he will not engage in the practice of the profession of medicine in the town of Lumberton, Robeson County, North Carolina, or within 100 miles of said town of Lumberton, Robeson County, North Carolina, for a period of five years from the date of said dissolution."

It is admitted that upon written notice the partnership was dissolved on 23 January, 1940, and that, thereafter, in disregard of the above covenant, the defendant opened an office in the town of Lumberton for the practice of medicine, limited to the diseases of the ear, eye, nose and throat. Both plaintiff and defendant had limited their practice to this field of medicine.

This action was brought to enforce compliance with the terms of the partnership agreement.

Order to show cause was duly issued, and upon return thereof, the defendant was restrained from engaging in the practice of medicine in the town of Lumberton, or within 100 miles thereof, until the final hearing of the cause on its merits.

From the signing of this order, the defendant appeals.

McLean & Stacy, L. J. Huntley, and Varser, McIntyre & Henry for plaintiff, appellee.

McKinnon, Nance & Seawell for defendant, appellant.

STACY, C. J. The case, as presently presented, turns on the validity of the defendant's agreement not to engage in the practice of medicine in the town of Lumberton, or within 100 miles thereof, for a period of five years following the dissolution of the partnership between himself and the plaintiff.

There being no request to find the facts, and no challenge to any fact found, it will be presumed that the court found sufficient facts to support the judgment. *Wood v. Woodbury & Pace, ante,* 356; *McCune v. Mfg. Co., ante,* 351. The case then comes to the single question whether the restrictive covenant in the partnership agreement is valid and enforceable under the law of this State. It would seem that an affirmative answer was adumbrated in the cases of *Scott v. Gillis,* 197 N. C., 223, 148 S. E., 315, and *Hauser v. Harding,* 126 N. C., 295, 35 S. E., 586.

In *Teague v. Schaub,* 133 N. C., 458, 45 S. E., 762, a restrictive covenant in a contract between physicians was not upheld because of its indefiniteness. Even so, two members of the Court thought otherwise and expressed their views in a strong dissent. Here, there is no doubt as to the meaning of the stipulation. It is clear and unambiguous.

Speaking to a similar situation in *Butler v. Burleson,* 16 Vt., 176, it was said: "This contract is not forbidden by any principle of policy or law. Dr. Burleson can be as useful to the public at any other town as at Berkshire, and the lives and health of persons in other villages are as important as they are there. Community are, therefore, not injured by any stipulation of this kind between two practicing and eminent physicians."

The application of two principles are here involved: freedom to contract and public policy. The plaintiff invokes the one; the defendant the other.

The parties evidently thought the plaintiff had a legitimate interest to protect when the agreement was signed. They so stipulated. And he did. The existence of such an interest is the first thing to look for in

passing upon the validity of a restrictive covenant. Its presence is essential to make it enforceable in equity. *Williams v. Thomson,* 143 Minn., 454, 174 N. W., 307. This right of the parties to say upon what terms and conditions they are willing to form a partnership, or to enter into a contract of the character here disclosed, is not to be lightly abridged. Indeed, it is no small part of the liberty of the citizen. *Adkins v. Children's Hospital,* 261 U. S., 525. "Freedom to contract must not be unreasonably abridged. Neither must the right to protect by reasonable restrictions that which a man by industry, skill and good judgment has built up, be denied." *Eureka Laundry Co. v. Long,* 146 Wis., 205, 131 N. W., 412, 35 L. R. A. (N. S.), 119.

Public policy is concerned with both sides of the question. It favors the enforcement of contracts intended to protect legitimate interests and frowns upon unreasonable restrictions. *Granger v. Craven,* 159 Minn., 296, 199 N. W., 10, 52 A. L. R., 1356. It is as much a matter of public concern to see that valid contracts are observed as it is to frustrate oppressive ones. Both functions belong to the courts.

The test to be applied in determining the reasonableness of a restrictive covenant is to consider whether the restraint affords only a fair protection to the interest of the party in whose favor it is given, and is not so broad as to interfere with the rights of the public. *Horner v. Graves,* 7 Bing., 735, 131 Eng. Rep., 284; *Mandeville v. Harman,* 42 N. J. Eq., 185; *Rakestraw v. Lanier,* 104 Ga., 188, 69 Am. St. Rep., 154; *Faust v. Rohr,* 166 N. C., 187, 81 S. E., 1096. The question is one of reasonableness—reasonableness in reference to the interests of the parties concerned and reasonableness in reference to the interests of the public. *Milwaukee Linen Supply Co. v. Ring,* 210 Wis., 467, 246 N. W., 567. Such a covenant is not unlawful if the restriction is no more than necessary to afford fair protection to the covenantee and is not injurious to the interests of the public. *Granger v. Craven, supra.*

The parties themselves, when the instant contract was made, regarded the restriction as reasonable. They were dealing with a situation of which both were familiar. The defendant insisted on having the contract signed and did not object to the restrictive covenant. It is limited both as to time and place. We cannot say that the restraint put upon the defendant by his contract is unreasonable as presently applied. *Hauser v. Harding, supra;* Note, 59 Am. Dec., 686, at p. 691.

It is not to be overlooked that cases arising out of the conventional relation of master and servant, or employer and employee, are not wholly applicable to a situation like the present. *Comfort Spring Corp. v. Burroughs, ante,* 658. The attendant circumstances are different. A workman "who has nothing but his labor to sell and is in urgent need of selling that" may readily accede to an unreasonable restriction at the time of his

employment without taking proper thought of the morrow, but a professional man who is the product of modern university or college education is supposed to have in his training an asset which should enable him adequately to guard his own interest, especially when dealing with an associate on equal terms.

The line of demarcation, therefore, between freedom to contract on the one hand and public policy on the other must be left to the circumstances of the individual case. Just where this line shall be in any given situation is to be determined by the rule of reason. Of necessity, no arbitrary standard can be established in advance for the settlement of all cases.

Looking at the matter in retrospect, the defendant may now regard the stipulation as unwise. Undoubtedly he does. Nevertheless, unless it contravene public right or the public welfare, he is bound by it. *B. & O. Ry. v. Voight,* 176 U. S., 498. Freedom to contract involves risks as well as rights.

There was no error in continuing the restraining order to the hearing. Affirmed.

SEAWELL, J., dissents.

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

GERTRUDE SAYLES, ADMINISTRATRIX OF THE ESTATE OF TALMADGE SAYLES, DECEASED, v. V. P. LOFTIS.

(Filed 8 June, 1940.)

1. Negligence § 1—

Allegations that defendant felled a tree in close proximity to plaintiff's intestate without warning intestate so as to enable him to escape to a place of safety and that the tree struck and killed intestate, *is held* to state a cause of action.

2. Pleadings § 29—Denial of motion to strike held not error under rule that pleading will be liberally construed.

In reply to plaintiff's allegation that intestate was struck and killed by a tree felled by defendant, defendant admitted that as the tree accidentally fell in an unforeseeable manner it accidentally struck and killed intestate, without fault on the part of defendant. *Held:* The refusal of the court to grant plaintiff's motion to strike the paragraph of the reply, or the parts thereof inartificially setting up a defense, is not held for reversible error, plaintiff's more appropriate remedy being a motion to make defendant's pleading more definite and certain. C. S., 537, 535, 522, 519.

3. Same: Master and Servant § 44—In action for wrongful death, motion to strike allegations upon which were predicated defense that Industrial Commission had exclusive jurisdiction should have been granted.

This action was instituted by an administratrix to recover for wrongful death of intestate. It appeared from the allegations and admissions that intestate was an employee of a subcontractor of defendant contractor, and was killed by a tree felled on the job. Defendant's answer alleged facts upon which it contended that the cause alleged was within the exclusive jurisdiction of the Industrial Commission, and that an award had been made under the Compensation Act and any right of action against defendant assigned, and that plaintiff does not have the right, or sole right, to maintain the action. Plaintiff moved to strike such allegations from the complaint. *Held:* Upon the record as constituted plaintiff's motion to strike should have been granted. Michie's Code, 8081 (r), 8081 (aa).

4. Pleadings § 29—

The test upon a motion to strike is whether the alleged matter is competent to be shown upon the trial.

APPEAL by plaintiff from *Alley, J.*, at 15 April, 1940, Civil Term, of GUILFORD. Modified and affirmed.

This is an action for actionable negligence, brought by plaintiff against the defendant alleging damage. The action is for alleged wrongful death. N. C. Code, 1939 (Michie), sec. 160. The complaint, verified by plaintiff, was filed on 17 February, 1940, and therein it is alleged that plaintiff's intestate was killed on 21 August, 1939, by the negligent felling of a tree by defendant in close proximity to plaintiff's intestate, without warning him so as to enable him to escape to a place of safety.

From the face of the complaint and admissions contained in the answer, it appears that, on the day complained of, defendant was engaged as a general contractor on a project upon which the employer of plaintiff's intestate was engaged as a subcontractor. In the complaint there is no mention of or reference to workmen's compensation, the Workmen's Compensation Act, or any compensation or other benefits under said act or any matters pertaining thereto. The answer contains three paragraphs to which plaintiff objects, namely, Article 16, and Articles 1 and 2 of the further answer. In Article 16 defendant in admitting certain allegations of the complaint has inseparably interwoven in the form of admissions certain matters he alleged. Plaintiff by motion seeks to strike said article or the portion thereof constituting its defects. In Articles 1 and 2 of the further answer defendant pleads the Workmen's Compensation Act, a settlement (it is not indicated by whom) of all liabilities and perforce an assignment of any right of action against him in bar of plaintiff's further proceeding. Plaintiff, by motion, seeks to strike said articles. Upon the hearing of plaintiff's motion in the Superior Court, it was denied, and plaintiff excepted, assigned error and

appealed to the Supreme Court. The exceptions and assignments of error and other necessary facts will be set forth in the opinion.

Hobgood & Ward, Chas. M. Ivey, Jr., and Z. H. Howerton for plaintiff.

Sapp & Sapp for defendant.

CLARKSON, J. The allegations of the complaint set forth a cause of action. In the case of *Riggs v. Mfg. Co.*, 190 N. C., 256, where a workman was injured by the falling of a tree without notice, this Court said: "The warning must not only be given, but it must be a timely warning—proper warning. Such reasonable time so that workmen can avoid injury."

Article 16 of the complaint is as follows: "That as said tree fell it struck plaintiff's intestate with great force and killed him. Article 16 of the answer is as follows: "The defendant admits that as the tree accidentally fell in a totally unforeseeable manner it accidentally struck plaintiff's intestate, causing injuries from which he died, without fault on the part of this defendant."

Appellant (plaintiff) moved to strike the above quoted paragraph of the answer, or, in lieu of striking the same in its entirety, to strike the word "accidentally" from each of the places where it appears, the words "in a totally unforeseeable manner" and the words, "without fault on the part of this defendant." The plaintiff contends that the paragraph of the answer about which appellant complains is evasive and irresponsive; and being so it does not conform to the applicable statutory requirements.

N. C. Code, 1939 (Michie), sec. 519, is as follows: "The answer of the defendant must contain: 1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief. 2. A statement of any new matter constituting a defense or counterclaim in ordinary and concise language, without repetition."

The answer denies liability and at the same time inartificially sets up a defense—N. C. Code, *supra*, sec. 522. Under the facts and circumstances of this case, we cannot uphold plaintiff's motion to strike, under our liberal practice.

N. C. Code, *supra*, sec. 535, is as follows: "In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed with a view to substantial justice between the parties."

We think a motion by plaintiff to make the pleading by defendant "definite and certain by amendment" would be a more correct procedure than to "strike." N. C. Code, *supra*, sec. 537.

The second motion of plaintiff to strike is more serious. Plaintiff moves "To strike from the answer of the defendant Article 1 of the further answer, for that: The averments of said article are immaterial and would not, if true, constitute a defense or a portion of a defense. . . . The averments appearing in said article after the second semicolon merely state a conclusion or conclusions of law, and at that an incorrect conclusion or conclusions. . . . Motion to strike Article II of the further answer, the terms and provisions of the North Carolina Workmen's Compensation Act and the alleged assignment of the right of action by the defendant do not constitute a plea in bar or a defense or a portion of a defense and are immaterial."

The said article for which plaintiff moves to strike being as follows: "That prior to and on the 21st day of August, 1939, this defendant employed more than five regularly; that he operated under the terms and conditions of the North Carolina Workmen's Compensation Act, as did his employees; that by the terms and provisions of the North Carolina Workmen's Compensation Act, the exclusive jurisdiction for the determination of the matters and things arising herein is in the North Carolina Workmen's Compensation Commission created by the terms and provisions of the North Carolina Workmen's Compensation Act, and defendant pleads the want of jurisdiction of this Court as a bar to plaintiff's further proceedings herein. . . . The defendant avers that all liabilities created and existing under and by virtue of the terms and provisions of the North Carolina Workmen's Compensation Act have been settled and determined; that by this procedure an assignment of the right of action, if any existed, all of which this defendant denies, against him, was consummated; that plaintiff is not the real party in interest and does not have the right, or the sole right, to maintain this action and defendant pleads the terms and provisions of the North Carolina Workmen's Compensation Act and the assignment of the right of action against him, if any existed, which he denies, as a bar to plaintiff's further proceedings herein."

The defendant contends that his answer is predicated upon section 11 of the North Carolina Workmen's Compensation Act (Michie's Code, 8081-r) and section 19 of the act (Michie's Code, 8081-aa), *et seq.*

The approved test upon such a motion to strike is whether the alleged matter is competent to be shown at the trial. *Pemberton v. Greensboro,* 203 N. C., 514. We think the question here presented has been considered and determined, adversely to defendant's contention, by this Court. *Brown v. R. R.,* 202 N. C., 256; *Mack v. Marshall Field & Co., ante,* 55.

We predicate this opinion on the record as now presented to this Court.

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

Modified and affirmed.

MRS. JENNIE W. REDMOND v. W. P. FARTHING, ADMINISTRATOR OF W. P. REDMOND, SUBSTITUTED DEFENDANT FOR THE FIDELITY BANK OF DURHAM.

(Filed 8 June, 1940.)

1. Banks and Banking § 7a: Estates § 16: Pleadings § 28—Where all facts necessary to constitute cause are not admitted, plaintiff is not entitled to judgment on pleadings.

This action was instituted by a widow against her husband's administrator to recover funds which had been deposited in a bank in his name "or" her name. Defendant, while admitting that the funds represented proceeds of sale of lands held by her and her husband by entirety, denied that she had made the deposit and denied that she and her husband had agreed that the survivor was to take the balance. *Held:* Plaintiff's motion for judgment on the pleading was properly denied, since the account cannot constitute a gift *inter vivos* for the reason that the husband did not lose dominion over the property, and since, in the absence of rebutting evidence, the person making a deposit is deemed the owner thereof, and therefore upon the facts admitted the wife had authority to withdraw the funds only as an agent, which agency and authority terminated upon his death.

2. Declaratory Judgment Act § 1—

In an action instituted under the Declaratory Judgment Act the court has no authority to instruct a litigant whether to take advantage of the provisions of C. S., 1795 upon the hearing of the cause upon its merits, since such instructions upon a question of procedure do not fall within the purview of the act.

APPEAL by the plaintiff from *Williams, J.*, at April Term, 1940, of DURHAM.

Basil M. Watkins for plaintiff, appellant.
A. W. Kennon, Jr., for defendant, appellee.

SCHENCK, J. This is an action brought by a widow to recover the amount of a deposit in The Fidelity Bank of Durham which was in the name of her deceased husband or herself at the time of her husband's death. Under order of court the bank paid the amount of the deposit into the office of the clerk of the Superior Court and W. P. Farthing, the administrator of the husband, was substituted as defendant.

The plaintiff moved for judgment on the pleadings consisting of her complaint and amended complaint and the answer of the administrator.

The allegations of the complaint admitted by the answer are to the effect that W. P. Redmond died intestate on 7 July, 1939, leaving surviving him a widow, the plaintiff, a brother, a sister and several nieces

and nephews, children of a deceased brother and sister, one of whom is a minor; that at the time of his death there was deposited in The Fidelity Bank of Durham a savings account in the amount of $6,552.22 in the following form: "In account with W. P. Redmond or Mrs. Jennie Redmond;" that deposits and withdrawals to and from this account had been made from time to time by W. P. Redmond since 1919, and that a large portion of the deposits was derived from the sale of personal property of the plaintiff and from lands held by her individually and by her and her husband as tenants by the entirety. It is alleged in the complaint that the last deposit to the account, $6,500.00 on 31 May, 1938, was made by the plaintiff, at which time there was in the account only $1,316.66. The answer does not admit all of this allegation, but only admits that the deposit was made, and denies that the plaintiff made the deposit.

The answer, while admitting some of the allegations of the complaint, denies others, and denies the allegation of an agreement existing between the plaintiff and her husband that the survivor was to take the balance of the deposit upon the death of one of them and asks that the court direct the defendant under the Declaratory Judgment Act as to whether he should take advantage of the provisions of C. S., 1795, in the trial of the action.

The court entered judgment denying the plaintiff's motion for judgment on the pleadings, and instructing the defendant in trial of the action not to waive any objections to any testimony of plaintiff in support of allegations with respect to transactions, agreements and communications between plaintiff and her deceased husband. To this judgment the plaintiff excepted and appealed to the Supreme Court, assigning errors.

That portion of the judgment denying the motion of the plaintiff for judgment on the pleadings must be affirmed, upon authority of what is said in *Nannie v. Pollard,* 205 N. C., 362: "In the absence of rebutting evidence the person making a deposit in a bank is deemed to be the owner of the fund. The appeal, therefore, brings up this case: A husband deposited money in a bank which was entered upon the records of the bank in the name of the husband or his wife; the husband died; the wife survived. Is the widow entitled to the deposit?

"The deposit did not constitute a gift to the wife *inter vivos.* To make a gift of a bank deposit there must be not only an intention to give but a delivery and loss of dominion over the property given. 30 C. J., 701, sec. 297. The title to the deposit remained in the husband; hence the only right the wife had to draw out the money was by virtue of the authority conferred upon her by her husband, she acting as his agent; and her power as agent was revoked by the death of her husband. 3 R. C. L., 579; *Jones v. Fullbright,* 197 N. C., 274."

The appellant in his brief virtually concedes that C. S., 230, in the light of *Jones v. Fullbright, supra,* and *Nannie v. Pollard, supra,* has no application to the case at bar in view of the fact that it appears from the admissions in the pleadings that the deceased husband made the deposits, and "in the absence of rebutting evidence, the person making the deposit in a bank is deemed to be the owner of the fund," and, nothing else appearing, the wife became only an agent of the depositor with authority to withdraw the funds, which agency and authority was terminated upon the death of her husband, and that "the agency cannot be converted into a tenancy in common by transforming the word 'or' into 'and.'"

The position taken in the plaintiff's brief that she is at least entitled to a judgment on the pleadings for the amount of the last deposit, $6,500.00, since such deposit was made by the plaintiff, cannot be sustained. A close reading of the pleadings reveals that while it is alleged that this deposit was made by the plaintiff, the only unqualified admission is that the deposit was made, and inferentially that the funds were derived from the sale of real estate which was held by the plaintiff and her husband by the entirety, but it is denied that the plaintiff made the deposit. Under such circumstances the motion for judgment on the pleadings was properly denied.

In so far as the judgment of the Superior Court assumes to instruct the defendant in the trial of the action not to waive any objections to any testimony of the plaintiff in respect to transactions, agreements and communications between her and her deceased husband, which he would have a right to make under C. S., 1795, we think it is in error.

The Declaratory Judgment Act, ch. 102, Acts 1931, N. C. Code of 1935 (Michie), sec. 628 (a), *et seq.,* does not confer upon one judge of the Superior Court the authority to advise a litigant upon a matter of procedure in another trial before another judge. The Declaratory Judgment Act provides that "courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed." The instructions upon a question of procedure assumed to be given in the judgment below do not fall within the purview of the act. Whether it would be wise or expedient for the administrator to lodge objection to any testimony of the plaintiff relative to certain transactions, agreements and communications between her and her deceased husband, should be left open for determination in the light of the evidence adduced at the trial—the administrator bearing in mind at all times that he represents the interest of the next of kin of the deceased. Upon a trial of the action it may be expedient for the administrator to be examined in his own behalf or that the testimony of the deceased person be given in evidence

concerning such transactions, agreements and communications, and thereby to waive any inhibition made by C. S., 1795, against the testimony of the plaintiff concerning such subjects. The administrator should be at liberty to proceed in the trial untrammeled by any instructions upon such procedure. That portion of the judgment that assumes to instruct the administrator upon the question of waiving any rights that he might have under C. S., 1795, is stricken out.

The judgment below as modified is affirmed.

Modified and affirmed.

E. B. KNIGHT, LEE JORDAN, WILLIAM HANEY, HENRY COLLINS, SR., BAXTER NASH, CECIL BRASWELL, TRUSTEES OF FAULKS BAPTIST CHURCH, v. J. B. LITTLE, T. B. EDWARDS, T. K. COLLINS, L. V. PIERCE, T. BRICE GRIFFIN, GENERAL WEBB, E. N. BIVENS, CARROLL HANEY, J. W. DEAN, ROMMIE PIERCE, VERNON HANEY, OLIN HANEY, J. D. WEBB AND J. S. JAMES.

(Filed 8 June, 1940.)

1. Appeal and Error § 2—

Even though an appeal from an order granting plaintiffs' motion for an examination of the adverse party is premature, the Supreme Court may nevertheless in its discretion consider the matter upon its merits.

2. Bill of Discovery § 1—Held: Petition disclosed that plaintiffs had knowledge of all facts necessary to constitute cause of action and petition for examination of adverse party should have been denied.

In their petition for an order for the examination of the adverse party, plaintiffs alleged that they were seeking to recover, as trustees for a church, building material which had been placed on the church's land and which, pursuant to a conspiracy among the defendants, had been carried away or destroyed. *Held:* What part each of defendants took in the matter is immaterial since a conspiracy is alleged, and the petition alleges all ultimate facts necessary to constitute a cause of action except the value of the property and damages which must of necessity be within the knowledge of plaintiffs, and therefore the petition should have been denied.

3. Same—

An order for the examination of an adverse party is an extraordinary remedy, and a petition therefor should disclose the nature of the cause of action and make it appear that the information sought is material and necessary, and that it is not accessible to applicant, it being necessary that the petition be made in good faith and not merely to harass or oppress the adverse party or to gather facts upon which he may be sued. C. S., 901.

APPEAL by defendants from *Clement, J.*, at February Term, 1940, of UNION. Reversed.

A controversy between plaintiffs and the defendants and other members of an opposing group in the membership of the Faulks Baptist Church concerning the right of control of the church and its property has existed over a period of time. This controversy has resulted in litigation, both criminal and civil, of which this is the fourth action.

The plaintiffs having first procured the issuance of the summons herein against the defendants, filed a verified petition for an order permiting the examination of the defendants to secure information on which to file a complaint. Notice of a motion for an adverse examination was served on defendants.

When the petition and motion came on to be heard before the clerk it was denied and plaintiffs appealed.

The petition and motion were heard on appeal by Clement, J., who reversed the judgment of the clerk and entered an order requiring the defendants to appear before a commissioner named in the order "to be sworn and to answer such questions concerning the matters in controversy between the plaintiffs and themselves as may be propounded to them by the plaintiffs or their attorneys." The defendants excepted and appealed.

Vann & Milliken for plaintiffs, appellees.
Helms & Mulliss for defendants, appellants.

BARNHILL, J. While the plaintiffs make no formal motion to dismiss the appeal for that it is fragmentary and premature, they so contend in their brief filed and cite authorities in support thereof. It has been so held by this Court, *Holt v. Warehouse Co.*, 116 N. C., 487; *Smith v. Wooding*, 177 N. C., 546, 94 S. E., 404; *Monroe v. Holder*, 182 N. C., 79, 108 S. E., 359; *Johnson v. Mills Co.*, 196 N. C., 93, 144 S. E., 534, and cases cited.

Even though an appeal be premature this Court may, in its discretion, consider the questions presented and express an opinion upon the merits thereof. *Dowdy v. Dowdy*, 154 N. C., 556, 70 S. E., 917; *Milling Co. v. Finlay*, 110 N. C., 411; *Bargain House v. Jefferson*, 180 N. C., 32, 103 S. E., 922; *Taylor v. Johnson*, 171 N. C., 84, 87 S. E., 981; *Ward v. Martin*, 175 N. C., 287, 95 S. E., 621; *Cement Co. v. Phillips*, 182 N. C., 437, 109 S. E., 257.

The plaintiffs, in their petition, allege that they are trustees of Faulks Baptist Church; that recently a fire of unknown origin destroyed the church building; that the plaintiffs, as trustees, have made plans to rebuild said church as a place of worship for the congregation; that they recently placed upon the grounds of said church a large number of brick and a large quantity of sand to be used in the reconstruction of said church; and,

"4. That on or prior to the 27th of August, 1939, the defendants, as these plaintiffs are informed, believe and allege, conspired and confederated together to destroy said property and for the purpose of injuring and damaging the plaintiffs and hindering, delaying and preventing the construction of said church, and that on the said 27th day of August, 1939, in carrying out the purpose and intent of said conspiracy the defendants, as the plaintiffs are informed and believe, did wilfully and maliciously destroy and remove said property to the great injury and damage of the plaintiffs."

As the plaintiffs in their complaint are required to allege only ultimate facts upon which the cause of action is based, it affirmatively appears from the petition filed that they are now in possession of and have alleged the facts essential to constitute a cause of action against the defendants for conversion and for damages for the destruction of personal property belonging to the plaintiffs, as trustees. The only fact not alleged is the value of the property thus destroyed or the amount of damages sustained by the conversion. As the plaintiffs purchased and placed on the church grounds the property which they allege the defendants destroyed or converted, it cannot be said that they are not in possession of information as to the value thereof. And as the plaintiffs rely upon allegations of conspiracy it is immaterial as to what part each defendant took in executing the conspiracy alleged.

From a reading of the original petition and the subsequent affidavit filed by the plaintiffs, it is apparent that the plaintiffs do not desire to obtain information to file a complaint against these defendants but they, in fact, are seeking to discover, through an examination of these defendants, the names of those who may, in fact, be liable to them on the cause of action alleged. This is not a proper objective under the terms of the statute.

In a proceeding of this kind it is of first importance that the petition for an order of examination should state facts which will show the nature of the cause of action and make it appear that the information sought is material and necessary; that the information desired is not already accessible to the applicant; and that the motion is made honestly and in good faith and not maliciously—in other words, that it is meritorious. The law will not permit a party to spread a dragnet for an adversary in the suit in order to gather facts upon which he may be sued, nor will it countenance an attempt under the guise of a fair examination, to harass or oppress his opponent. It is seldom that the exercise of this function of the Court is required. *Chesson v. Bank,* 190 N. C., 187, 129 S. E., 403; *Bailey v. Matthews,* 156 N. C., 78, 72 S. E., 92; *Fields v. Coleman,* 160 N. C., 11, 75 S. E., 1005; *Jones v. Guano Co.,* 180 N. C., 319, 104 S. E., 653; *Monroe v. Holder, supra.*

If the plaintiffs, as they assert, are proceeding in good faith against these defendants to recover damages for the wrongful destruction of property belonging to the plaintiffs, as trustees, then it appears that plaintiffs are in possession of information sufficient to enable them to prepare and file their complaint. If, as asserted by the defendants, the plaintiffs are seeking to prolong the controversy existing among members of the church and to further harass these defendants and their associates with litigation, then they may not do so under the guise of an application to examine defendants under the provisions of C. S., 901. In this connection we may note that the order entered does not restrict the examination to matters concerning the controversy relative to the particular building material described in the petition.

While it may be conceded that the appeal of the defendants is premature, we are of the opinion that the order of examination was improvidently granted, and that the order should be reversed as was done in *Jones v. Guano Co., supra,* in which the opinion was written by *Clark, C. J.,* and in *Chesson v. Bank, supra,* in which the opinion was written by *Stacy, C. J.*

Reversed.

WILLIAM M. GEORGE, ADMINISTRATOR OF W. EDWARD GEORGE, v. WINSTON-SALEM SOUTHBOUND RAILWAY COMPANY.

(Filed 8 June, 1940.)

1. Appeal and Error § 49a—

Where the evidence upon the subsequent trial is materially different from that on the former trial, the decision of the Supreme Court on the former appeal is not conclusive.

2. Evidence § 45a: Railroads § 10—

Testimony of an expert witness as to the position of deceased's body when struck by defendant's train is properly stricken out when the witness testifies that his opinion is not based upon the wounds on the body but upon the fact that intestate was wearing white shoes and white marks were found on the inside of one of the rails and the "opinion of the entire crowd."

3. Railroads § 10—

In an action to recover for the death of intestate killed on defendant's railroad tracks by a train, the doctrine of last clear chance applies only if intestate was down on the tracks in an apparently helpless condition; and when the evidence does not tend to positively establish this essential fact, but leaves the matter in speculation and conjecture, it is insufficient to support the submission of the issue.

GEORGE *v.* R. R.

APPEAL by defendant from *Rousseau, J.*, at February Term, 1940, of DAVIDSON. Reversed.

Willis & Seawell and C. David Swift for plaintiff, appellee.
Craige & Craige and Phillips & Bower for defendant, appellant.

SCHENCK, J. This is an action for the wrongful death of the plaintiff's intestate alleged to have been caused by the negligent failure of the defendant to avail itself of the last clear chance to avoid running its train over and fatally injuring said intestate while on the track of the defendant.

From an adverse judgment predicated upon the verdict, the defendant appealed, assigning as error the failure of the court to sustain its motion for a judgment as in case of nonsuit made when the plaintiff had introduced his evidence and rested his case and renewed after all the evidence on both sides was in. C. S., 567.

This case was before us at the Spring Term, 1939, upon the plaintiff's appeal from a judgment as in case of nonsuit, which judgment was reversed (215 N. C., 773). The former judgment was predicated upon the holding that there was no competent evidence that the intestate was down on the track in an apparently helpless condition at the time he was run over and killed by the defendant's train. This Court, however, was of the opinion that the expert testimony of the witness Doctor Terry to the effect that in his opinion, judging from the nature, the condition and position of the wounds on his body, the deceased was lying down upon the track at the time same were inflicted, was competent, *McManus v. R. R.*, 174 N. C., 735, and sufficient evidence to be submitted to the jury upon the issue of last clear chance, and reversed the holding of the trial court.

In the second trial of the case, which is now before us for review, the testimony of Doctor Terry was substantially different from what it was in the former trial. While he repeated his opinion to be that the intestate was lying down upon the track at the time he was struck and killed by the train, he stated that this opinion was based upon the fact that the intestate had on white shoes and white marks were found on the inside of one of the rails of the track, "and it was the opinion of the entire crowd that he was lying on the flat side of this sawed crosstie, but not from the wounds on the body—not of the opinion from the wounds on the body, but from the signs on the rail."

Notwithstanding the court in its discretion allowed the plaintiff who had offered Doctor Terry as a witness to cross-examine him, he steadfastly reiterated that his opinion that the intestate was prone upon the track was based upon the white marks on the rail and "the opinion of

the entire crowd," and not upon the nature, condition and position of the wounds upon the body. The court struck out the witness' testimony as to his opinion that the intestate was lying upon the track when struck and killed. This we think was proper, and no exception thereto appears in the record.

The evidence in the first trial and in the second trial was practically the same, except the material difference in the essential testimony of Doctor Terry. Where upon the new trial granted on appeal by the Supreme Court the evidence is materially different from that on the former trial, the former adjudication is not conclusive and another appeal will lie. *McCall v. Institute,* 189 N. C., 775.

With Doctor Terry's expert opinion as to the intestate's being prone upon the track eliminated, there is no evidence of the first fact essential to be proven in cases of this nature, as stated in *Henderson v. R. R.,* 159 N. C., 581, namely, "that the deceased was down on the track in an apparently helpless condition."

With Doctor Terry's expert opinion out of the record, what is said by *Winborne, J.,* in *Cummings v. R. R., ante,* 127, becomes pertinent: ". . . it may be inferred from the evidence as to the physical condition of the body and accompanying signs at the scene that the intestate was struck and killed by a train. Yet these physical facts present no reasonable theory to the exclusion of many others as to the circumstances under which the accident occurred. In what position was intestate when struck? The evidence is consonant with any of many theories which may be advanced with equal force, but all of which are speculative and rest in mere conjecture. The probabilities arising from a fair consideration of such evidence affords no reasonable certainty on which to ground a verdict upon an issue of last clear chance."

The judgment of the Superior Court is

Reversed.

O. F. CLINARD AND WIFE, MILDRED CLINARD, v. TOWN OF KERNERSVILLE.

(Filed 8 June, 1940.)

1. Municipal Corporations § 16—Judgment held to embrace permanent damages resulting from operation of municipal sewage disposal plant.

In this action to recover damages resulting to lands from defendant municipality's sewage disposal plant, the judgment, considered in the light of the pleadings, evidence and charge of the court, notwithstanding the absence of the word "permanent" in the issue submitted, *is held* to embrace permanent damages from every source of injury in the operation of

the plant, including dye water from a manufacturing plant discharged through the municipality's system, and to give the municipality an easement for the continued operation of the plant in the same manner.

2. Trial § 37—

An issue will be construed with reference to the pleadings, evidence and charge of the court pertinent thereto.

APPEAL by defendant from *Alley, J.*, at November Term, 1939, of FORSYTH. No error.

Lovelace & Kirkman and Benbow & Hall for plaintiffs, appellees.
Manly, Hendren & Womble and I. E. Carlyle for defendant, appellant.

SEAWELL, J. This is an action for the recovery of damages from the town of Kernersville for wrongfully operating a sewage disposal plant on the banks of Abbotts Creek near the property of the plaintiffs, which it is alleged, by reason of the odor and the noxious properties of the discharged sewage, has greatly damaged plaintiffs' premises. The court was requested to allow permanent damages for the injury done to plaintiffs' property, and the defendant is interested in the character and extent of the easement and the rights thus acquired by it.

When this case was here before—*Clinard v. Kernersville,* 215 N. C., 745, 3 S. E. (2d), 267—the town of Kernersville and Vance Knitting Company were defendants. It was then complained that much of the injury done to plaintiffs' premises was caused by waste products from the Vance Knitting Company, conveyed through the Kernersville sewerage system. Under the facts of that case, which are the same as now, the Court held the evidence insufficient to sustain a cause of action against the Vance Knitting Company.

It is now complained that the issues, pertinent evidence, and instructions of the court were not sufficient to settle the liability of the town of Kernersville with respect to the dye water and waste products originating with the Vance Knitting Company and still discharged through its sewerage system, but that the mode of trial left the municipality open to further assault by the plaintiffs for additional damages on that score.

A thorough examination of all the record convinces us that the apprehension is not well founded. Consideration by the jury of damages due to the dye water—an item supposed by defendant not to be caught within the net of procedure—was, we think, inevitable, and the judgment is sufficient to protect the defendant and to secure it in any rights which it may have obtained thereby with respect to the discharge of this and other sewage from its plant. *Gibbs v. Higgins,* 215 N. C., 201, 1 S. E. (2d), 554; *Stelges v. Simmons,* 170 N. C., 42, 44, 86 S. E., 801; *Coltrane v. Laughlin,* 157 N. C., 282, 72 S. E., 961.

We do not regard the failure to insert the word "permanent" in the issue as to damages material. It might have been better to include it, but the issue must be construed with respect to both the pleadings and the evidence and such part of the instructions of the court as may be pertinent to it; *Coltrane v. Laughlin, supra; Holloway v. Durham,* 176 N. C., 550, 97 S. E., 486; *Propst v. Caldwell,* 172 N. C., 594, 90 S. E., 757; *Southerland v. R. R.,* 148 N. C., 442, 62 S. E., 517; *Union Bank v. Oxford,* 116 N. C., 339 (340), 21 S. E., 410; *McKimmon v. Caulk,* 170 N. C., 54, 56, 86 S. E., 809; *Weston v. Lumber Co.,* 162 N. C., 165, 77 S. E., 430; *Gillam v. Edmonson,* 154 N. C., 127, 69 S. E., 924; *Fayerweather v. Ritch,* 195 U. S., 277; *Weidner v. Lund,* 105 Ill. A., 454, 456; *Oglesby v. Attrill,* 20 Fed., 570; *Gulling v. Washoe County Bank,* 29 Nev., 257, 260, 89 P., 25; and the judgment, considered as *res judicata,* must be construed with reference to them all, as well as to issuable matters which might have been litigated under the pleadings. *Buchanan v. Harrington,* 152 N. C., 333, 335, 67 S. E., 747. We think the record is conclusive as to the character of damages awarded the plaintiffs. *Lightner v. Raleigh,* 206 N. C., 496, 174 S. E., 272; *Teseneer v. Mills Co.,* 209 N. C., 615, 184 S. E., 535.

Other exceptions in the record are not meritorious.

We find

No error.

THE NATIONAL BANK OF BURLINGTON v. O. M. MARSHBURN.

(Filed 8 June, 1940.)

1. Bills and Notes §§ 9f, 29—If person, in wrongfully procuring note, acts as agent for holder, the holder is not a holder in due course.

Defendant's evidence tended to show that he executed the note in suit to be used to pay for shares of stock of the corporate payee, that the stock was never delivered to him and consequently the note was never delivered by him, but that the note was procured from his office without his knowledge or consent by the president of the payee who was also a collecting agent for a bank, and who turned the note over to the bank as collateral security for his company's note. *Held:* If in procuring the note the president of the company was acting as an agent of the company, knowledge of the infirmity, nothing else appearing, would not be imputed to the bank and it would be a holder in due course, while if, in procuring the note, he was acting as agent of the bank it would have imputed knowledge of the infirmity and would not be a holder in due course, and therefore, it being admitted that he was an agent of the bank, an instruction that the maker could not be held liable if the note had been taken by an agent of the bank, without further elaboration, is error.

2. Appeal and Error § 41—

Where a new trial is awarded on one assignment of error, other assignments relating to matters which may not arise on the subsequent hearing need not be considered.

APPEAL by plaintiff from *Carr, J.*, at November Term, 1939, of ALAMANCE.

Allen & Madry for plaintiff, appellant.
J. W. Grissom for defendant, appellee.

SCHENCK, J. This is an action instituted on a note signed under seal by the defendant, payable to the Home Fertilizer & Chemical Company for $472.10, dated 1 November, 1937, due 1 July, 1938, and negotiated by the payee to the plaintiff.

The defendant admits signing the note in suit, but denies making any delivery thereof, or receiving any consideration therefor, and alleges that the plaintiff took the note with notice of the infirmities therein and was not therefore a holder in due course.

The plaintiff's evidence tended to show that the Home Fertilizer & Chemical Company was indebted to the plaintiff in a substantial amount and executed its note for such indebtedness and gave the note in suit, together with others, as collateral therefor, and that its note was not paid and the plaintiff thereby became the holder in due course of the note in suit.

The defendant's evidence tended to show that one Crenshaw sought the note of the defendant to use as collateral for the note of the Home Fertilizer & Chemical Company to the plaintiff, and that he agreed to execute and deliver the note in exchange for 500 shares of stock in the fertilizer and chemical company of which Crenshaw was president, and did sign the note and intended to deliver it when the shares of stock were delivered to him, and placed the note in his check book in his office to await the procurement and delivery to him of such shares of stock, but that said shares of stock were never delivered to him and the note was consequently never delivered by him; that said note was taken from his office by Crenshaw and delivered to the plaintiff bank without his (defendant's) knowledge or consent. And further, that in procuring the note in suit in the manner in which it was procured Crenshaw was acting as an employee and agent of the plaintiff bank.

The plaintiff's evidence, more particularly on rebuttal, tended to show that while Crenshaw was an employee of the plaintiff and its agent for the purpose of collecting certain notes due it and placed in his hands for the purpose of collection, he had no further authority than to collect

the notes placed in his hands; that Crenshaw had no authorization from the plaintiff bank to procure for it collateral for the note of the Home Fertilizer & Chemical Company held by it, and that in procuring the note in suit, however he procured it, he was acting as agent of the fertilizer and chemical company that he might place the note as collateral for the fertilizer and chemical company's note to plaintiff and thereby strengthen the credit with the bank of the company of which he was president; that the plaintiff bank had no knowledge of the manner in which the note in suit was procured.

There was a definite issue drawn as to whether Crenshaw at the time he procured the note in suit was acting as agent and in the interest of the plaintiff bank, or as agent and in the interest of the Home Fertilizer & Chemical Company. This issue was vital to the determination of the defendant's liability, because, ordinarily, if Crenshaw was acting as agent and in the interest of the plaintiff, and within the scope of his authority as such agent, in the procurement of the note in suit, then the plaintiff would be fixed with notice of the infirmity in said note and would not be a holder thereof in due course; whereas, ordinarily, if Crenshaw was acting as agent and in the interest of the payee in the note, the Home Fertilizer & Chemical Company, of which he was president, in the procurement of the note in suit, then the plaintiff would not be fixed with notice of the infirmity in the note and would be a holder thereof in due course.

His Honor charged the jury: "Mr. Marshburn would not be liable upon a note stolen out of his possession by an agent of the plaintiff." This is assigned as error by the plaintiff, and we are constrained to sustain the assignment.

There was no controversy as to Crenshaw being an agent of the plaintiff, or as to Crenshaw being an agent of the Home Fertilizer & Chemical Company. The question presented was in which capacity and in whose interest was he acting when he stole the note in suit, if he did steal it. If he was acting in the scope of his employment by and in the interest of the plaintiff, then Mr. Marshburn would not be liable, but if he was acting as president or agent of the fertilizer and chemical company and in its interest, then Mr. Marshburn would be liable, nothing else appearing. *Trust Co. v. Anagnos,* 196 N. C., 327; *Bank v. Wells,* 187 N. C., 515.

Since there must be a new trial for the error indicated, it becomes unnecessary to discuss the other interesting assignments of error set out in appellant's brief, since the questions presented thereby are not likely to be raised on another trial of the case.

New trial.

OSCAR O. EFIRD v. BOARD OF COMMISSIONERS FOR THE COUNTY OF FORSYTH, JAMES G. HANES, T. E. JOHNSON AND D. C. SPEAS, MEMBERS OF THE BOARD OF COMMISSIONERS FOR THE COUNTY OF FORSYTH, AND THE COUNTY OF FORSYTH.

(Filed 8 June, 1940.)

1. Appeal and Error § 4—When act sought to be enjoined has been committed pending appeal, there is nothing for Court to enjoin and appeal will be dismissed.

This action was instituted to enjoin county commissioners from adopting a resolution suspending or abolishing the county court. It was made to appear that pending the appeal from an order dissolving the temporary restraining order, the county commissioners had adopted a resolution suspending the county court. *Held:* The board having taken the action sought to be restrained, there is nothing to be enjoined, and the question sought to be presented having become academic, the appeal is dismissed without determination of the authority of the county commissioners to adopt the resolution, the legal effect of its action not being presently presented for decision.

2. Public Officers § 3—

An incumbent has no title in the office held by him.

APPEAL by plaintiff from *Nettles, J.*, at April Term, 1940, of FORSYTH. Appeal dismissed.

The plaintiff as judge of the Forsyth County Court instituted this action against the Board of County Commissioners to recover his salary as judge of the county court, which he alleged the defendant board had unlawfully refused to pay. He asked for a restraining order restraining the defendant from attempting to abolish or suspend the Forsyth County Court.

Upon plaintiff's application a temporary restraining order issued restraining the defendant from adopting any resolution or taking any action to abolish or suspend the Forsyth County Court. Upon the hearing before Nettles, J., the temporary restraining order was dissolved, and the plaintiff appealed.

J. M. Wells, Jr., Roy L. Deal, Odell Sapp, and Felix L. Webster for plaintiff, appellant.

Fred S. Hutchins and H. Bryce Parker for defendants, appellees.

Burton Craige, G. H. Hastings, S. E. Hall, I. E. Carlyle, and John J. Ingle, amici curiæ.

DEVIN, J. The only question presented for review upon this appeal is the ruling of the court below in dissolving the temporary restraining

order restraining the defendant from adopting a resolution to abolish or suspend the Forsyth County Court. The question as to the plaintiff's right to recover of defendant board his salary is not now before us.

It is admitted that pursuant to the provision of chapter 520, Public-Local Laws of 1915, the plaintiff was duly appointed judge of the Forsyth County Court and has qualified and acted as such up to the time of the institution of this action.

The plaintiff now alleges that under the authority of chapter 519, Public-Local Laws of 1939, purporting to give to the Board of Commissioners of Forsyth County "the right to abolish or temporarily suspend the said Forsyth County Court" (which act he alleges was beyond the power of the General Assembly), the defendant board intends to adopt a resolution to abolish or suspend the court, and to interfere with the administration of justice therein to the detriment of litigants. Affidavits were presented to the trial judge relating to the question whether the Forsyth County Court serves any useful purpose, justifying its expense, and as to the wisdom of abolishing it.

It was admitted in the argument here that since the institution of this action and the dissolution of the temporary restraining order, the Board of Commissioners of Forsyth County had adopted a resolution suspending the operation of the county court.

The question presented by this appeal from the order dissolving the temporary restraining order has thus become academic. The Board of Commissioners has taken the action sought to be restrained. There is nothing the court could now enjoin. *Howerton v. Scherer,* 170 N. C., 669, 86 S. E., 596; *Rousseau v. Bullis,* 201 N. C., 12, 158 S. E., 553; *Hardy v. Comrs.,* 208 N. C., 699, 182 S. E., 328.

The legal effect of the action of the defendant board is not now before us. If the act of 1939 gave the defendant no power, the Forsyth County Court has not been abolished or suspended. If the act is valid, the plaintiff has no cause for complaint. While the plaintiff has brought this action as judge of the Forsyth County Court, it may be noted that he has no property right in the continuance of the office. *Mial v. Ellington,* 134 N. C., 131, 46 S. E., 961; *Queen v. Comrs.,* 193 N. C., 821, 138 S. E., 310; *Penny v. Board of Elections, ante,* 276.

The appeal from the judgment of the court below dissolving the temporary restraining order must be dismissed. This disposition of the appeal renders unnecessary a discussion of the question debated in the briefs and on the oral argument whether the act of 1939 was within the constitutional power of the General Assembly or whether it constituted an unwarranted delegation of power to the Board of Commissioners of Forsyth County. As to that we express no opinion.

Appeal dismissed.

JERRY A. JONES AND FIDELITY & CASUALTY COMPANY v. RANEY CHEVROLET COMPANY.

(Filed 8 June, 1940.)

1. **Automobiles § 6—Dealer may be held liable for negligence in putting dangerous instrumentality on highways where it is likely to cause injury.**

   Evidence tending to show that defendant, an automobile dealer, sold the car in question second-hand with representation that the brakes thereon were good and reliable, while in fact the brakes were defective and in such condition that the operator would lose control over the car upon the application of the brakes in an emergency, and that plaintiff was injured while riding as a passenger in the car as a direct result of the defective brakes, *is held* to state a cause of action against the dealer in tort.

2. **Same: Evidence § 39—Where action is in tort and not upon contract, parol evidence at variance with contract is not incompetent.**

   In an action by a passenger in a car to recover for alleged negligence of the dealer in selling the car second-hand with representations that the brakes were dependable, while in fact the brakes were defective, and resulted in injury to plaintiff passenger when they were applied by the driver, parol evidence that the dealer had represented the brakes as being good and dependable is erroneously excluded on the ground that such evidence was at variance with the written contract between the purchaser of the car and the finance company, since plaintiff is not a party to the contract, and the action is in tort and not upon the contract.

3. **Automobiles § 6: Evidence § 42d—Post rem statement of agent is competent to show principal's knowledge of the transaction.**

   In an action by a passenger in an automobile to recover for the negligence of the dealer in selling the car second-hand with representations that the brakes were good and dependable, while in fact the brakes were defective and would likely result in injury to the public, testimony of defendant's employee that brakes of the type used on the car had given trouble, that they had had to change a lot of them, but that the brakes on this car had not been changed, *is held* competent as a *post rem* statement of the agent tending to show knowledge of the principal.

APPEAL by plaintiffs from *Hamilton, Special Judge,* at October Term, 1939, of NEW HANOVER. Reversed.

Poisson & Campbell and J. A. Jones for plaintiffs, appellants.
E. K. Bryan and R. S. McClelland for defendant, appellee.

SCHENCK, J. This is an action brought by an insurance carrier in the name of an employee by reason of having been subrogated to the rights of an employer by payment of compensation for which the employer was liable under the North Carolina Workmen's Compensation

Act against a person other than the employer, to recover damages for personal injuries alleged to have been caused by the negligence of the defendant. Sec. 11, ch. 120, Public Laws 1929; sec. 1, ch. 449, Public Laws 1933. (N. C. Code of 1935 [Michie], sec. 8081 [r]).

This case was before us at the Spring Term, 1938, and a judgment of the Superior Court sustaining a demurrer upon the ground that the complaint did not state facts sufficient to constitute a cause of action was reversed. (213 N. C., 775.)

Notwithstanding in the trial below there was evidence to support the principal allegations of the complaint, the court sustained the motion of the defendant for a judgment as in case of nonsuit lodged when the plaintiffs had introduced their evidence and rested their case, and entered judgment accordingly, from which judgment the plaintiffs appealed, assigning errors.

There was evidence tending to show that the plaintiff Jerry A. Jones was an invited guest in an automobile, that because of defective brakes the automobile was wrecked resulting in injury to the plaintiff, that the defendant Raney Chevrolet Company was an automobile dealer and sold the automobile, second-hand, to the owner thereof with whom the plaintiff was riding, and that the dealer represented to the owner that the automobile was equipped with good, reliable brakes when it knew, or by the exercise of due care could have known, that the automobile had defective brakes, and that the defects would naturally result in the brakes becoming applied in an emergency manner in the ordinary operation of the automobile, causing the operator to lose control over the automobile.

"A retail dealer who takes a used truck in trade and undertakes to repair and recondition it for resale for use upon the public highways owes a duty to the public to use reasonable care in the making of tests for the purpose of detecting defects which would make the truck a menace to those who might use it or come in contact with it and in making the repairs necessary to render the truck reasonably safe for use upon the public highways, and is charged with knowledge of defects which are patent or discoverable in the exercise of ordinary care." *Egan Chevrolet Co. v. Bruner,* 102 F. (2d), 373, 122 A. L. R., 987. We think that the foregoing is a clear and concise statement of the law applicable to the case at bar, and that the Superior Court erred in entering judgment as in case of nonsuit.

The plaintiffs offered to prove by the witness Riggs, to whom the defendant sold the automobile involved in the wreck in which plaintiff was injured, that at the time of the sale the salesman of the defendant represented to him, witness, that the brakes on the automobile had been reconditioned and were in good shape and would work properly, and

that the motor was as good as brand new. The court sustained the defendant's objection to this evidence upon the theory that it contradicted and varied the written contract between the witness and the General Motors Acceptance Corporation. In this we think the court erred. The plaintiff was a stranger to any contract which the witness made and is in no way claiming by, through or under any such contract. His action is for a tort—based upon the alleged negligence of the defendant in putting a dangerous instrumentality on the highways where it was likely to cause injury to the public, and especially to the plaintiff or any other passenger therein, and the evidence tended to show that the defendant represented the automobile to be in a safe condition when in truth it was in a dangerous condition.

Plaintiffs also offered evidence tending to prove that some time after the wreck and injury to the plaintiff the shop foreman of the defendant stated to the plaintiff that they had had a lot of trouble with the type of brake that was on the automobile in which the plaintiff was injured and they had to change a lot of them, but the brakes on this automobile had not been changed. The court sustained the defendant's objection to this evidence. We think this ruling was in error, since the evidence was competent for the purpose of fixing the defendant with knowledge of the defective condition of the type of brake of the automobile it was selling. "*Post rem* statements of an agent, however, may be introduced in evidence against the principal for the purpose of showing his knowledge of the transaction." 20 Am. Jur., Evidence, par. 599, p. 511; 131 American States Reports, p. 315.

Reversed.

M. H. TURNER v. MARSH FURNITURE COMPANY.

(Filed 8 June, 1940.)

1. Quasi Contracts § 2—

Evidence that plaintiff originated a device for use in defendant's business, that defendant promised to pay him well if the device worked, that plaintiff made drawings and a model, and that defendant constructed the device in conformity therewith and used same in his business, *is held* sufficient to be submitted to the jury and to entitle plaintiff to recover the reasonable value of his services.

2. Same—

In the absence of an agreement as to the amount of compensation to be paid for services rendered at the request of defendant, the measure of the recovery is the reasonable worth of the services rendered, based on the time and labor expended, the skill, knowledge and experience involved, and attendant circumstances, and an instruction that plaintiff is entitled to recover the value of the services to defendant is error.

3. Same—

In an action to recover the reasonable value of plaintiff's services in making drawings and a model for a device originated by plaintiff for use in defendant's business, the use of the word "invention" in the judge's charge on the issue of damages will not be held for error when it is apparent that the word was used in its ordinary significance as meaning a contrivance, plan or device, and did not refer to a patent device under the patent laws.

APPEAL by defendant from *Clement, J.*, at October Term, 1939, of GUILFORD. New trial.

Plaintiff sued to recover for services rendered defendant pursuant to its agreement to pay therefor.

Plaintiff offered evidence tending to show that while he was doing some carpenter work in defendant's furniture factory, he learned that the method then in use in the factory of sliding furniture down a chute from the second to the first floor was unsatisfactory; that plaintiff originated the idea and devised plans for doing this by means of an automatic conveyer and mechanical tilting device, eliminating the labor of two men; that he communicated his plan to defendant's president who told him to go home and make drawings and bring them back and defendant would have the necessary construction put in, and "if it works satisfactorily, I will pay you for it, and pay you well"; that plaintiff made the drawings at home at night and gave them to defendant and explained them to him, and also made a model; that the necessary construction was put in and the means for operating the device installed, and these have been in successful use by the defendant since.

Defendant offered evidence tending to show that the conveyer and tilting device installed by the defendant were built by an independent machine company, and none of the ideas of the plaintiff were incorporated or used.

Upon issue submitted, the jury returned verdict for plaintiff, and from judgment in accord with the verdict, the defendant appealed.

Walser & Wright for plaintiff, appellee.

Roy L. Deal and Robeson, Haworth & Reese for defendant, appellant.

DEVIN, J. The defendant's motion for judgment of nonsuit was properly overruled. The plaintiff's evidence was sufficient to carry the case to the jury.

Defendant's principal assignment of error relates to the judge's charge on the measure of damages. Exception was duly noted to the instruction given by the court that if the jury found the defendant made the agreement to pay the plaintiff for the device as alleged, and that it

worked satisfactorily, "then the plaintiff would be entitled to recover such sum of money as would represent the value of that invention to the defendant."

We are constrained to hold this instruction for error. The measure of damages was not the benefit of the device to the defendant, but the reasonable value of plaintiff's services. This is not an action to recover for the sale of a patent right or an invention but for services rendered pursuant to request and agreement to pay therefor. *Sawyer v. Cox,* 215 N. C., 241, 1 S. E. (2d), 562; *Ray v. Robinson,* 216 N. C., 430.

The general rule is that when there is no agreement as to the amount of compensation to be paid for services, the person performing them is entitled to recover what they are reasonably worth, based on the time and labor expended, skill, knowledge and experience involved, and other attendant circumstances, rather than on the use to be made of the result or the benefit to the person for whom the services are rendered. 71 C. J., 161; 15 Am. Jur., 469; *Rothstein v. Siegel, Cooper & Co.,* 102 Ill. App., 600; *Stowe v. Buttrick,* 125 Mass., 449; *Rooney v. Porter-Milton Ice Co.,* 275 Mass., 254.

In *Campbell County v. Howard,* 133 Va., 19, 112 S. E., 876, where the action involved claim for compensation for services as attorneys at law, it was held that compensation should be based on the reasonable value of the services rendered, and not upon the benefit to the client. The Court used this language: "The circumstances to be considered in determining the compensation to be recovered are the amount and character of services rendered, the responsibility imposed, the labor, time and trouble involved, the character and importance of the matter in which the services are rendered, the amount of the money or the value of the property to be affected, the professional experience and skill called for. . . . The result secured by the services of the attorney may likewise be considered, but merely as bearing upon the consideration of the efficiency with which they were rendered, and, in that way, upon their value on a *quantum meruit,* not from the standpoint of their value to the defendant." This language was quoted with approval in *Old Dominion Transportation Co. v. Hamilton,* 146 Va., 594, 46 A. L. R., 186, where it was also said, "The value of services to the defendant measured by its necessities is not necessarily the measure of the value of the services in themselves."

The rule is fairly stated in appellant's brief, as follows: "The correct measure of damage in this case was the reasonable value of the services rendered, taking into consideration the amount of time, work and skill required, and also the benefits, if any, resulting to the defendant, and other facts and circumstances."

The defendant excepted to the use of the word "invention" by the

trial judge in referring to the contrivance and plan which plaintiff claimed to have originated. However, from the connection in which this word was used, it is apparent that it was not intended or understood to indicate technical reference to a patented device under the patent laws of the United States, but that the word was to be taken in its ordinary acceptance as meaning "a contrivance, plan or device; an original contrivance or apparatus." Webster's Int. Dictionary.

For the error in the judge's instructions to the jury as herein pointed out, there must be a

New trial.

STATE v. F. J. THOMPSON.

(Filed 8 June, 1940.)

Criminal Law § 51—

In the prosecution of a cafe proprietor for killing a customer in the cafe, the failure of the court to adequately protect defendant from extraneous and irrelevant argument of counsel, made over defendant's objection, to the effect that the establishment maintained by defendant amounted to a nuisance against public morals and was corrupting the morals of young people *is held* to entitle defendant to a new trial.

APPEAL by defendant from *Nettles, J.*, at January Term, 1940, of FORSYTH.

Criminal prosecution tried upon indictment charging the defendant with the murder of one Earl Latham.

Verdict: Guilty of murder in the second degree.

Judgment: Imprisonment in the State's Prison for a term of not less than five nor more than seven years.

The defendant appeals, assigning errors.

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

Roy L. Deal and Ingle, Rucker & Ingle for defendant.

STACY, C. J. The defendant operates a cafe and filling station on the High Point Road about two miles from Winston-Salem known as the Avalon Plaza. On the night of 22 December, 1939, or at an early hour on the morning of the 23rd, Earl Latham and several of his companions were customers in the defendant's cafe. They became boisterous; whereupon remonstrances were interposed, and as a consequence, the defendant shot Earl Latham with a pistol and killed him. The defendant

admitted the killing with a deadly weapon and set up a plea of self-defense. The State insisted on a verdict of murder in the second degree.

During the argument before the jury, counsel for the private prosecution contended that the defendant's place of business "not only stayed open all hours of the night but sold cups to permit the customers to drink whiskey there and that kind of place should not be allowed in Forsyth County." Upon objection, the court instructed the jury that "there is no evidence, which the court recalls, of this place selling any whiskey or any cups for the purpose of drinking liquor. . . . However, you are the sole judges of the facts, gentlemen of the jury, and the evidence, and you will depend entirely upon your recollection of the evidence and not the recollection of the court." Whereupon counsel for the private prosecution repeated his contention over objection of the defendant and without further correction from the court. Counsel for the private prosecution also argued to the jury "that if there be a hell, and he believed there was a hell, the place operated by the defendant and similar places were sending more young people to hell than anything else." Objection; overruled; exception.

These exceptions must be held for error on authority of what was said in *S. v. Green,* 197 N. C., 624, 150 S. E., 18; *S. v. Phifer, ibid.,* 729, 150 S. E., 353; *S. v. Evans,* 183 N. C., 758, 111 S. E., 345; and *S. v. Tuten,* 131 N. C., 701, 42 S. E., 443.

The defendant was not being tried for maintaining a nuisance or for corrupting the morals of young people. These extraneous and irrelevant matters were not germane to the case and were prejudicial. *S. v. Tucker,* 190 N. C., 708, 130 S. E., 720, and cases there cited. The error lies in the court's inaction, or failure to take adequate action, in the face of objections and protests by the defendant. *S. v. Tyson,* 133 N. C., 692, 45 S. E., 838.

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

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

New trial.

R. T. WILLIAMS v. D. U. BRUTON.

(Filed 8 June, 1940.)

Agriculture § 7e—

Evidence *held* sufficient to be submitted to jury in this action by a tenant to recover damages for breach of contract by his landlord in failing to give the tenant the tobacco allotment stipulated in the agreement.

DEVIN and BARNHILL, JJ., dissent.

APPEAL by plaintiff from *Stevens, J.*, at the February Term, 1940, of ROBESON.

McKinnon, Nance & Seawell for plaintiff, appellant.
F. D. Hackett for defendant, appellee.

SCHENCK, J. This is an action to recover damages alleged to have been caused by a breach of contract, and was formerly before us at the Fall Term, 1939 (216 N. C., 582). In the former opinion, which reversed a judgment sustaining a demurrer upon the ground that the complaint did not state facts sufficient to constitute a cause of action, it is said: "The contract, its breach and consequent damage are alleged, whether such can be proved is for determination upon the evidence adduced."

The contract alleged was that the defendant, as landlord, agreed to rent one-half of the 10½-acre tobacco allotment made to him by the Government to the plaintiff, as tenant, for the farming year 1938, and to give the plaintiff one-half of the poundage allotted for the 5¼ acres rented to him; and the plaintiff agreed to make a tobacco crop. There was evidence tending to show that the plaintiff made a crop on the 5¼ acres and raised and sold 4,336 pounds of tobacco; that the poundage allotment made to the defendant for the 10½ acres was 16,190 pounds, that one-half of this allotment was 8,095 pounds; that after selling 4,336 pounds of tobacco there was left on his and his landlord's portion of the poundage allotment 3,759 pounds; that one-half of this last mentioned number, 1,879 pounds, belonged to plaintiff; that this unused poundage was valued at 5c per pound, which amounted to $93.95; that the defendant has tendered the plaintiff $16.28 "in full for left-over poundage" which plaintiff refused, and demanded the full sum of $93.95.

We are of the opinion, and so hold, that the evidence adduced was sufficient to be submitted to the jury for determination of the issue involved, and that the judge of the Superior Court erred in sustaining the motion of the defendant for a judgment as in case of nonsuit when the plaintiff had introduced his evidence and rested his case.

Reversed.

DEVIN and BARNHILL, JJ., dissent.

W. J. RUSSELL v. PAUL FULTON ET AL.

(Filed 8 June, 1940.)

Taxation § 42—

Plaintiff, the purchaser of property at the foreclosure of the tax sale certificate in regular proceedings *is held* entitled to the cancellation, as a cloud on title, of a deed executed by the taxpayer on the day subsequent to the execution and registration of the commissioner's deed to plaintiff, defendants being charged with notice, and it not being necessary that they should have been made parties, since they acquired no interest in the land until after the tax lien had been foreclosed.

APPEAL by defendants from *Rousseau, J.*, at March Term, 1940, of GUILFORD.

Civil action to remove cloud on title.

The case was heard upon an agreed statement of facts.

In 1935 Sarah Boone owned a vacant lot in the city of High Point. It was duly listed for taxes which were regularly assessed against it. The taxes for the year in question were not paid and the property was duly offered for sale and bid in by the city of High Point. Seasonably thereafter on 23 May, 1938, suit was brought by the city against Sarah Boone to foreclose the tax sale certificate, which was duly prosecuted to judgment, sale had on 13 November, 1939, and the plaintiff became the highest bidder for the sum of $582.05. On 8 February, 1940, plaintiff received deed from the commissioner and same has been duly registered.

On 9 February, 1940, Sarah Boone executed deed purporting to convey the lot in question to the defendants. It is agreed that the defendants had no personal knowledge of the proceeding under which plaintiff acquired deed, albeit the proceeding was a matter of public record.

It is stipulated that if the plaintiff's deed is sufficient to pass title, he is the owner in fee of the premises; otherwise, it is agreed the defendants are the owners.

The court rendered judgment for the plaintiff and ordered that defendants' deed be removed as cloud on plaintiff's title, from which the defendants appeal, assigning error.

G. H. Jones for plaintiff, appellee.

C. R. McIver, Jr., for defendants, appellants.

STACY, C. J. The regularity of the assessment, sale for taxes, foreclosure of tax sale certificate, and purchase by plaintiff are all admitted. *Orange County v. Jenkins,* 200 N. C., 202, 156 S. E., 774. It is the

contention of the defendants "that they have certain rights under the law as it existed in 1935, which they may exercise at their option." Whatever rights the defendants may have, if any, are not asserted in this action. They suggest on brief that, if so advised, they may yet redeem under C. S., 8038. As to this, the case of *Hines v. Williams,* 198 N. C., 420, 152 S. E., 39, would seem to be an authority against them. See, also, *Drainage Comrs. v. Lumber Co.,* 193 N. C., 21, 136 S. E., 248. The judgment in the foreclosure proceeding, admittedly regular in all respects, is apparently binding on them as their predecessor in title, the sole owner of the land at the time, was a party to the proceeding. *Hill v. Street,* 215 N. C., 312, 1 S. E. (2d), 850.

The suggestion that defendants are not bound by the foreclosure proceeding, because they had no personal knowledge thereof, although a matter of public record, is untenable. There was no occasion to make them parties as they had no interest in the land at the time. *Orange County v. Wilson,* 202 N. C., 424, 163 S. E., 113.

On the record as presented, no error has been shown. *Price v. Slagle,* 189 N. C., 757, 128 S. E., 161. The judgment is supported by the stipulation of the parties.

Affirmed.

W. A. JOHNSON v. ROBERT C. SINK.

(Filed 8 June, 1940.)

1. Judicial Sales § 6—

The presumption is in favor of the regularity of a judicial sale.

2. Homestead § 8: Execution § 20—

In an action in ejectment instituted by the purchaser of the land at execution sale, the burden is upon the judgment debtor attacking the title on the ground that his homestead had not been allotted in the land, to show that his homestead had not been allotted and that he was entitled to homestead therein, and the mere statement of the purchaser on cross-examination to the effect that homestead had not been allotted in the land is insufficient to justify judgment as of nonsuit, plaintiff purchaser having established *prima facie* title under the execution sale.

APPEAL by plaintiff from *Olive, Special Judge,* at October Term, 1939, of DAVIDSON.

Civil action in ejectment.

Plaintiff seeks to recover possession of a house and lot situate on the Lexington-Thomasville Highway in Davidson County. In deraigning title, he offered in evidence commissioner's deed tending to show that he purchased the property at a judicial sale on 12 January, 1939. He then offered registry of deed dated 1 October, 1912, vesting title in Robert C.

Sink. Further, that on 10 October, 1938, John A. Sink brought suit in the Superior Court of Davidson County against Robert C. Sink and wife, defendants herein, to recover $561.46 due for materials furnished and used in the construction of their house on the lot in question and to enforce a material-furnisher's lien upon the premises. This action was duly prosecuted to judgment, commissioner appointed, sale had at which the plaintiff became the last and highest bidder for $1,500, sale confirmed, deed executed by the commissioner, demand by plaintiff for possession, possession denied, and the present action was then instituted.

From judgment of nonsuit entered at the close of plaintiff's evidence, he appeals, assigning error.

McCrary & DeLapp for plaintiff, appellant.
James W. Keel, Jr., and H. R. Kyser for defendant, appellee.

STACY, C. J. It is the position of the defendant that the commissioner's deed under which plaintiff claims title to the *locus in quo* is void for the reason that the sale of the premises was had without first allotting to the defendant his homestead. *Fulton v. Roberts,* 113 N. C., 421, 18 S. E., 510; *Morrison v. Watson,* 101 N. C., 332, 7 S. E., 795; *McCanless v. Flinchum,* 98 N. C., 358, 4 S. E., 359. The first and only reference to homestead appearing on the record is in the cross-examination of the plaintiff: "Q. Mr. Sink didn't have any homestead allowed to him in this judgment of John A. Sink? A. Not that I know about." This, it seems to us, is insufficient to overcome the presumption of regularity in the judicial proceeding. *Corey v. Fowle,* 161 N. C., 187, 76 S. E., 734; *Mobley v. Griffin,* 104 N. C., 112, 10 S. E., 142. *Non constat* that he may not have had a homestead allotted in other lands, or that he was entitled to homestead in the present land. At any rate, the burden was on the defendant to show that no homestead had been allotted to him. *Fulton v. Roberts, supra.* This he has not carried.

It may be that upon a proper showing, the case will ultimately be controlled by the decision in *Cumming v. Bloodworth,* 87 N. C., 83, rather than the conclusion reached in *Cameron v. McDonald,* 216 N. C., 712. However, upon the record as presented, *prima facie* at least, it would seem that the plaintiff has shown enough to defeat the motion to nonsuit. *Mobley v. Griffin, supra; Fulton v. Roberts, supra.*

Reversed.

CITY OF WINSTON-SALEM v. FORSYTH COUNTY.

(Filed 8 June, 1940.)

Taxation § 19—

Improved and unimproved property bought in by a municipality to protect its tax and street assessment liens, and held by it solely for the purpose of favorable resale, the improved property being rented out, *is held* subject to *ad valorem* taxes levied by the county in which the property is situated.

APPEAL by plaintiff from *Nettles, J.*, at April Term, 1940, of FORSYTH.

Civil action to recover *ad valorem* taxes paid under protest, and alleged to have been wrongfully and illegally collected.

A jury trial was waived and the matter submitted to the court under stipulation of the parties.

The city of Winston-Salem, in order to protect its tax and street assessment liens, has from time to time during the past ten years purchased at such foreclosure sales a number of lots or pieces of real estate, some of which are improved and rented out; and others are unimproved and vacant. All are held by the city awaiting favorable resale. None is expected to be used for a public purpose, unless the holding of it for resale is for a public purpose within the meaning of the law.

Taxes were levied against the properties by Forsyth County for the years 1937 and 1938, amounting in the aggregate, with penalties, to $1,733.03. Payments were made under protest. Demand for refund duly filed, and this suit is to recover back the taxes on the ground that the properties are exempt by law from the payment of taxes to Forsyth County.

From judgment denying recovery or refund of the taxes, this appeal is prosecuted.

Manly, Hendren & Womble, I. E. Carlyle, and W. F. Womble for plaintiff.

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

STACY, C. J. The judgment will be affirmed on authority of what was said in *Benson v. Johnston County*, 209 N. C., 751, 185 S. E., 6, and *Warrenton v. Warren County*, 215 N. C., 342, 2 S. E. (2d), 463. The divergent views of the law upon the subject were fully set forth in these cases, "and it is not deemed necessary to beat the same old bush with the same old stick to run out the same old rabbit for another chase," as was graphically expressed by the late *Justice Brogden* in *Meece v. Credit Co.*, 201 N. C., 139, 159 S. E., 17.

Affirmed.

RENA WARREN v. PILOT LIFE INSURANCE COMPANY, A CORPORATION.

(Filed 8 June, 1940.)

1. Insurance § 41—Proof of death by violence, nothing else appearing, raises presumption that death resulted from accidental means.

In an action on a provision of a policy providing double indemnity if death results by accident or accidental means, proof that death resulted from violence, whether offered by plaintiff or established by defendant's evidence, nothing else appearing, raises the presumption that death resulted from accidental means, and is sufficient to take the case to the jury, and places the burden of going forward with the evidence upon insurer, but when insurer goes forward with the evidence and, from all the evidence, the only reasonable inference is that insured's death resulted from injuries intentionally inflicted by another, it is proper for the court to instruct the jury that if it believes the evidence to answer the issue in insurer's favor.

2. Trial § 27a—

Where there is no conflict in the evidence, whether it is sufficient to prove the fact in issue is a question of law for the court, and when only one inference can be drawn therefrom, the court may properly charge the jury to answer the issue accordingly if they believe the evidence.

3. Insurance § 41—Evidence held to entitle insurer to peremptory instruction that death did not result from accidental means.

In this action on a double indemnity clause in a life insurance policy, plaintiff beneficiary introduced no evidence. Defendant insurer's evidence tended to show that insured and his fiancee were sitting in a parked automobile, that a man suddenly opened the door on her side of the car, grabbed her around the shoulders, that in his right hand he held a pistol diagonally in front of her face pointing toward insured, that she knocked the pistol up with her hand and that at that instant the gun fired, fatally injuring the insured, and that after inflicting the fatal wound and dragging the girl from the car he returned to the car and looked in, and then attempted to ravish her. *Held:* The only reasonable conclusion that can be drawn from the evidence is that insured's death resulted from injuries intentionally inflicted by another, and the evidence entitles defendant insurer to a peremptory instruction that if the jury believes the evidence to answer the issue as to whether the insured died as a result of accidental means in the negative.

4. Same—Evidence that pistol was discharged at same instant the arm of the hand holding the pistol was struck is insufficient to show that blow caused the pistol to fire.

Where a person strikes the arm of another who is holding a pistol pointed at insured, the fact that at the instant the blow is struck the pistol fires, inflicting fatal injury, does not prove that the blow caused the pistol to fire, and is no sufficient evidence that the death of insured resulted from an accident, since it leaves the question in mere specula-

tion and conjecture, it being a matter of common knowledge that a pistol is fired by pulling the trigger, and that ordinarily a blow will not cause a pistol to discharge.

5. Evidence § 5—

It is a matter of common knowledge that a pistol is discharged by pulling the trigger, and that ordinarily it is not discharged by a blow.

6. Trial § 24—

Where the substantive testimony is insufficient to be submitted to the jury upon the fact in issue, evidence competent only for the purpose of corroboration or contradiction, the substantive testimony cannot justify the submission of the issue to the jury.

7. Appeal and Error § 49a—

While decisions on former appeals constitute the law of the case, where the evidence upon the subsequent hearing is materially different from that upon the prior hearings, the former holdings that the evidence should be submitted to the jury are not controlling.

DEVIN, J., dissenting.

CLARKSON, J., concurs in dissent.

APPEAL by defendant from *Bone, J.*, at January Term, 1940, of PITT. New trial.

From judgment on verdict for plaintiff defendant appealed.

Smith, Wharton & Hudgins and J. B. James for appellant.

Albion Dunn and H. Hannah, Jr., for appellee.

BARNHILL, J. This is the same case reported in 212 N. C., 354, 193 S. E., 293, and 215 N. C., 402, 2 S. E. (2d), 17, where the material facts are set forth.

In actions such as this upon the provision of a policy of insurance against death by accident or accidental means, where unexplained death by violence is shown, nothing else appearing, without the existence of some presumption, the cause of death might be left in the field of speculation. Was the death caused by accidental means, or was it a case of suicide, or was it an intentional and unlawful killing? Under these circumstances the law presumes the lawful rather than the unlawful. Thus the rule arises that where an unexplained death by violence is shown, nothing else appearing, it is presumed that the death resulted from accidental means. When, however, there is evidence tending to explain the cause of death, it becomes a question of fact for the determination of the jury. On the issue thus raised, under the decisions of this Court on former appeals in this case, such decisions constitute the law of the case and we are bound thereby.

Even so, the question here presented is different from those discussed in the former opinions and the substance of the testimony of Miss

Phelps is material. It is more in detail than on the former trial and throws an entirely different light upon the occurrence.

She testified, in part, as follows: "The door on the car opened from the rear to the front. It was opened, and a man reached in with his left arm, placed it around my shoulders. I put this hand up and he grabbed it with his left hand; I put this hand up in front of me and he had a pistol in his hand, and when I put my hand up, as best as I remember, the gun went off. Alexander was bent over playing the radio this way (witness leaning), and as the door opened he shot. . . . I saw the pistol and knocked it up and at that instant the gun fired . . . the gun was in front of my face. I saw it and then my right hand went up. I don't remember whether that was done to protect myself."

In response to a question as to how the pistol was pointed the witness illustrated by the use of a pencil which was held diagonally in front of her face and pointed downwardly to her left. That was toward the deceased.

Conceding that when death by violence is shown, nothing else appearing, a defendant, who seeks to avoid liability on the grounds that the death resulted from bodily injuries inflicted intentionally by another, has the burden of going forward with evidence—that is, that evidence of death by external violence is sufficient to take the case to the jury, *Warren v. Ins. Co.*, 215 N. C., 402, 2 S. E. (2d), 17, something more than unexplained death by violence here appears.

There is no unqualified admission in the answer. Thus in the absence of evidence from the defendant, the plaintiff, without introduction of evidence, would not be entitled to judgment on the pleadings or to a directed verdict. And yet the judge held that the burden of going forward with the evidence rested upon the defendant without any evidence whatsoever from the plaintiff. She was not even required to offer so much of the admission in the answer as tended to show death by external violence. The defendant was thereby deprived of the right, at least, to cross-examine the principal witness heretofore relied upon by the plaintiff. Whether this constituted error we need not now decide, for the defendant elected to offer its evidence from which it appears that the death of the deceased was proximately caused by external violence.

The defendant, having proceeded with its proof as required by the court, then tendered its prayer for instructions. If all of the evidence offered by the defendant—the plaintiff having offered none—tends to explain the death by violence and to show that the death resulted from a wound intentionally inflicted by another, then as a matter of law, the defendant was entitled to have the court instruct the jury in accord with its prayer. Even though the evidence was such as to require the submission of an issue, whether the testimony offered, if believed and

accepted, is sufficient to prove a contested fact presents a question of law. *Spruill v. Ins. Co.,* 120 N. C., 141—in which there was a directed verdict as to suicide under a similar provision—*S. v. Prince,* 182 N. C., 788, 108 S. E., 330; *Reinhardt v. Ins. Co.,* 201 N. C., 785, 161 S. E., 528; McIntosh's P. & P., 632; *Peterson v. Sucro,* 101 Fed. (2d), 282, and cases there cited. The rule as approved by the cited and many other decisions is simply stated in McIntosh's P. & P., *supra,* as follows: "If the facts are admitted or established and only one inference can be drawn from them, the judge may draw the inference and so direct the jury."

Thus on this appeal we have presented the one question: Does the evidence offered by the defendant, if believed, establish an intentional killing?

The occurrences related by Miss Phelps were instantaneously contemporaneous. The door opened and a man caught her around her shoulders. She put her hand up and the pistol fired. As the door opened he shot. She knocked the pistol up and at that instant the gun fired. Thus, it appears that the door was opened, she was grabbed and the pistol fired at the same instant. When the pistol fired it was pointed diagonally in front and across her body, downward to the left where the deceased was sitting leaning over adjusting his radio. After inflicting a fatal wound upon the deceased and after dragging Miss Phelps from the car Tate then went back to the automobile and looked in, apparently for the sole purpose of discovering whether he had effectively eliminated resistance from that source. Having satisfied himself in that respect he proceeded in his efforts to ravish her.

There is only one reasonable inference to be drawn from this evidence. Tate, a man of diabolical heart, bent on mischief, for the purpose of criminally assaulting the woman and with the intent to remove any possible interference, deliberately incapacitated the man so that he might not come to her aid. As stated by *Devin, J.,* in *Warren v. Ins. Co., supra,* "Indeed all the evidence tends to show that his (Tate's) purpose with respect to her (Miss Phelps) was to assault her." That purpose Tate could not hope to accomplish without disabling, by violence, the deceased who was her companion and fiance. That this was his object is plainly demonstrated by the manner in which he threw open the automobile door, aimed his pistol at Miss Phelps' escort and threw his other arm around Miss Phelps. He wanted her alive and not dead. He wanted the man either dead or so incapacitated that he could not render her aid and assistance. He acted accordingly by deliberately shooting the man and then assaulting the woman.

The pointing of the pistol at the deceased constituted a misdemeanor and one who commits an unlawful act is presumed to intend the natural

consequence thereof and, upon the evidence on this record, eliminating consideration of the intent of Tate to commit a felony, he would be guilty of murder in the second degree even though he first pointed the pistol at Miss Phelps and it was so deflected when fired as to inflict a fatal wound on Warren.

Conceding that the presumption of intent does not apply in a civil action as against a third party, still the only reasonable inference to be drawn from this testimony leads irresistibly to the conclusion that Tate shot intentionally for the purpose of incapacitating the deceased. He had the pistol drawn, he was bent on an unlawful purpose which could be accomplished only when Miss Phelps was alive and only in the event that her companion was incapacitated. Can it be said with any degree of reason that the evidence shows other than that he intended to use the weapon to prevent resistance from or interference by her companion?

It is true there is evidence that Miss Phelps, in her struggle, threw up her hand and struck the pistol at the time it was pointed toward the deceased, but there is no evidence that in striking the pistol she either materially deflected it or caused it to discharge. Thus, this item of testimony does not contradict the other testimony, nor does it require a different conclusion.

It is argued, however, that this blow might have caused the pistol to fire. It is a matter of common knowledge that pistols are fired by pulling the trigger and that, ordinarily, a pistol will not explode from a blow. The one is the usual and expected. The other the unusual and exceptional. Certainly there is no evidence that this one could be fired in that manner.

The mere simultaneousness of the blow and of the discharge of the pistol does not prove, and is alone not evidence of, the one as the cause of the other. It is as reasonable to suppose that the discharge of the pistol caused the blow to be struck as it is to assume that the striking of the blow caused the murderer to fire the shot. It will be noted that Miss Phelps does not even say that "immediately" after she struck the blow the pistol fired. She says the blow and the shot were simultaneous. Accepting her precise statement, it negatives the idea that the blow caused the shot to be fired.

When we venture to assume that by striking the pistol in her struggle with Tate Miss Phelps caused it to fire we are venturing into a field of pure surmise and speculation which is unreal, unreasonable and unnatural. There is nothing in the evidence to warrant that conclusion. If we are to thus speculate it is as reasonable to conclude that when Tate saw the deceased leaning over and reaching toward the cowl of his automobile in adjusting his radio, he apprehended that the deceased was reaching for a weapon and then shot in order to kill him before he could do so.

"The sufficiency of the evidence in law to go to the jury does not depend upon the doctrine of chances. However confidently one in his own affairs may base his judgment on mere probability as to a proposition of fact and as a basis for the judgment of the court, he must adduce evidence of other than a majority of chances that the fact to be proved does exist. It must be more than sufficient for a mere guess and must be such as tends to actual proof." *S. v. Prince, supra.*

Accepting every syllable of Miss Phelps' statement as true, there is no evidence tending to show or permitting the inference of an accidental killing. To the contrary, all of the evidence, considered in the light most favorable to the plaintiff, tends to show that the deceased suffered death as the result of a gunshot wound intentionally inflicted by another. On the testimony in this record no other conclusion is sound but must rest upon conjecture unsupported by any reasonable inference to be drawn from the evidence. The prayer tendered by the defendant should have been given.

It is true that the record contains the evidence of the witness Whitehurst as to statements relating to the occurrence made to him by Miss Phelps. These statements are, in some respects, in conflict with the testimony of Miss Phelps and are more in line with her former testimony. But this is not substantive evidence. It was competent only for the purpose of corroboration or contradiction, and it could be considered by the jury only as it affected her credibility. Her testimony was the only substantive evidence upon which the jury was required to answer the issue. Under the instruction requested it was left for the jury to determine whether, in view of all the circumstances, they would accept and believe her statements.

Our position here cannot be considered in conflict with the prior opinions of this Court on former appeals in this case. In the first trial Miss Phelps testified: "The gun was pointed in my face and I pushed it out of the way like that, and a second later it fired." At the second trial she testified: "The first time I saw the gun it was pointed in my face and I pushed it out of the way like that, and a second later it fired." This Court was of the opinion that these statements were sufficient to support the inference that Tate assaulted Miss Phelps with a deadly weapon and, by reason of the fact that she pushed the pistol out of the way, the jury might be justified in finding that as to Warren the killing was accidental. Through her more detailed statement as to how the pistol was pointing and as to the manner and time of its firing it is made now to appear that the pistol was in fact pointed at the deceased and fired at the very instant she struck it. Therefore, on this appeal the evidence is substantially different from the testimony on the former appeals. The inferential holding on the former appeals that the evi-

dence did not justify a judgment of nonsuit or a directed verdict is, therefore, not the law of this case on this evidence.

New trial.

DEVIN, J., dissenting: I am constrained to take a different view of this case from that expressed in the majority opinion.

This is a Court of errors. Our appellate jurisdiction is limited to the review upon appeal of decision of the courts below upon matters of law or legal inference. Art. IV, sec. 8, Const. of N. C. This case has been thrice tried in the Superior Court. Three different juries, in trials presided over by three different judges, upon substantially the same testimony, have reached the same conclusion. If these verdicts were not in accord with our own views, nevertheless honest and intelligent jurors, in determining the facts from testimony of the witnesses before them, are as likely to be right as are the members of a court of review.

Twice new trials have been awarded by this Court for incidental errors discovered in the rulings of the trial judges. That the ultimate decision was for the jury was unquestioned.

This is the third appeal. The case was tried below, in conformity with the two decisions of this Court, and again the verdict of twelve good men and true was in favor of the plaintiff.

I am unable to discover any error of law in the trial.

Let us briefly review the history of this case as revealed by the records on appeal. Plaintiff instituted this action to recover upon a policy of insurance on the life of her son, the policy containing provision for double indemnity upon proof that insured sustained bodily injury resulting in death "through external, violent and accidental means." Defendant did not deny his death was caused by external and violent means, but alleged that the insured's death resulted from bodily injuries intentionally inflicted by another. In the first trial, in 1937, Judge Frank Daniels presiding, there was verdict for the plaintiff and judgment accordingly. Defendant's motion for judgment of nonsuit was denied. Defendant then requested peremptory instruction in its favor to the effect that if the jury found the facts to be as testified they would answer the determinative issue "Yes," that the death resulted from bodily injuries intentionally inflicted. Exception to refusal to nonsuit and to give this instruction were brought forward in defendant's assignments of error. Upon the consideration of the appeal here it was held by this Court, *Winborne, J.*, speaking, that the burden rested "upon the defendant to prove facts bringing the case within that provision," that is, that the death resulted from bodily injuries intentionally inflicted by another. However, for error in charging the jury that the burden was on defendant to show another intentionally shot and killed the insured, instead of

saying that the burden was on the defendant to show that the death of insured resulted from bodily injuries intentionally inflicted by another, new trial was awarded.

The case was next tried with Judge Frizzelle presiding. He charged the jury, in respect to the burden of proof, in accord with the opinion of this Court on the former appeal. There was verdict and judgment for plaintiff, and defendant again appealed. The same exceptions as to burden of proof, nonsuit and peremptory instruction were again brought forward and were again considered on the second appeal. Thereupon this Court, after stating the rule set out in *Gorham v. Ins. Co.,* 214 N. C., 526, 200 S. E., 5, and *Life Ins. Co. v. Gamer,* 303 U. S., 161, with respect to the burden resting on defendant, used this language: "However, considering the pleadings in this case, we are not disposed to hold for error the instructions given by the court below, of which the defendant now complains. This was the view expressed by this Court in the former appeal which has thus become the law of the case." Error was found, however, in the admission of testimony of a witness that the person who fired the shot from which the death of insured resulted was a stranger to him. This being beyond the personal knowledge of the witness, was held incompetent. This was the only error discovered in the record.

In neither case did the Court question the right of the plaintiff to have her case passed on by a jury. The defendant's exceptions to the refusal of the trial judges to give the repeated requests for peremptory instruction were each time presented to this Court, and not sustained.

The third trial was before Bone, Judge presiding. Again the case was tried in exact accord with the previous decisions of this Court, with the same result. Again the jury, under instructions from the court to which no exception was noted, refused to find an intentional slaying within the meaning of the policy and defendant's pleading. In this trial the exceptions to the admission of testimony were without merit and were not argued here. There was no exception to the charge as given. The only exception argued was to the refusal of the court to peremptorily instruct the jury to answer the issue in favor of the defendant, that is, that the death of insured was due to injuries intentionally inflicted.

The majority opinion does not question the rule that the previous decisions of the Court constitute the law of the case, equally binding on the trial judge and this Court. But it is said the evidence is different this time. Let us examine that more closely. In all three trials the testimony of the same witness was offered, that of Miss Phelps. To my mind there is no material difference between her testimony this time and what she said on former trials. Here is what she said in the last

trial: "When the door opened I was seated against the right door. I didn't know anyone was there until the door opened. The door on the car opened from the rear to the front. It was opened and a man reached in with his left arm, placed it around my shoulder. I put this hand (left) up and he grabbed it with his left hand. I put this hand (right) up in front of me and he had a pistol in his hand, and when I put my hand up, as best I remember, the gun went off. Alexander (the insured) was bent over playing the radio this way (witness leaning), and as the door opened he was shot. When he fired the gun it fired just the one time. I saw the pistol and knocked it up, and then that instant the gun fired. The door opened and a man stood in the door and put his left arm around me and held my left hand. The gun was in front of my face. I saw it and then my right hand went up."

But that was not all the evidence. The defendant Insurance Company also offered the testimony of S. A. Whitehurst: "She (Miss Phelps) said that the pistol was in front of her face and the door came open. In other words, she hit it and knocked it from in front of her face, and the assailant grabbed her, and the moment he grabbed her the pistol fired. She knocked the gun up, and in other words she didn't know when it came down—that they were in a tussle then and he was trying to drag her out of the car. She said she struck his arm. She said she knocked the gun up the first instant he grabbed her and then they went into a tussle. Apparently, from what she told me, she and the assailant were in a tussle and I understood that about that time the gun fired. I don't know that the instant she threw up her arm and knocked it up the gun fired, but that they were in a tussle when the gun fired."

I submit that this evidence is not conclusive of the intentional slaying of the deceased. In all the former considerations given by the Court to this testimony, no such conclusion was reached, else the case had been disposed of on the first appeal. "There is only one reasonable inference to be drawn from this evidence," says the learned writer of the majority opinion. But three juries who heard it found differently. To my mind this evidence warrants the inference that Willie Tate had no intention of shooting Alexander Warren. Plainly his purpose was to assault the young lady. In order to do so the evidence is consistent with the view that he may have intended to "hold up" the young man at the point of a pistol, or to overawe both with the display of a weapon. That was the reported method employed by rapists in other parts of the State whose crimes had been widely published.

But in this case Willie Tate met violent resistance from the young lady. When he put his arm around her to pull her out of the car and presented the pistol in front of her face, she fought back. "They were in a tussle, and he was trying to drag her out of the car." The pistol

was in front of her face. She knocked it up. The pistol fired and Warren was killed. What kind of pistol was used does not appear.

Notwithstanding this evidence would make out against Willie Tate a case of murder, as a homicide committed in the attempt to perpetrate a felony, at the same time it would not necessarily defeat recovery on an insurance policy issued to insure against death by external, violent and accidental means. It is a possible and not unreasonable inference from this evidence that the striking of the assailant's arm caused the pistol to be discharged, or it was discharged in the course of the "tussle" between him and his intended victim. Who knows? But the burden was on the defendant to show that the bodily injuries to Warren were intentionally inflicted. The jury took the view that the defendant had failed to do so, and answered the issue against it, under correct instructions from the trial judge.

Under this evidence and with the previous decisions of this Court before him, what else could Judge Bone have done than to try the case as he has done? To my mind, after careful study, the trial was free from error of law and should be affirmed.

CLARKSON, J., concurs in this opinion.

DABNEY M. CODDINGTON AND WIFE, MARTHA CODDINGTON, AND WILLIAM I. CODDINGTON, v. EDWARD W. STONE AND WIFE, MARGUERITE D. STONE.

(Filed 8 June, 1940.)

1. Wills § 33g—Entire beneficial interest held to vest in beneficiaries at time of testator's death with right of full enjoyment postponed.

The will in question devised all of testator's estate, real and personal, in trust for testator's three children by name and not as a class, with provision that when the youngest child should reach the age of twenty-one the estate should be divided into three parts and one part turned over to each of the children, and that each should thereupon become the absolute owner thereof and the trustee discharged. The will also appointed the trustee guardian for the children and provided that so much of the income of the estate as should be necessary for their maintenance and education should be expended for that purpose and that any surplus income should be added to the *corpus* of the estate. *Held:* Under the general rule, the entire beneficial interest vested upon the death of the testator with the right of full enjoyment postponed during the trust period and the provision that upon the termination of the trust "each of my sons should thereupon become the absolute owner of his respective share" does not affect the result, the words being construed as merely indicating that at that time each should hold his share free of the trust.

2. Same—

Where an estate is devised to a trustee of an active trust for the sole benefit of named beneficiaries, with direction to divide up and deliver the estate to them at the expiration of the trust period, ordinarily the beneficial interest will be *held* to vest immediately upon the death of the testator with right of enjoyment postponed, and this rule is applicable to an estate in trust of mixed personalty and realty.

3. Same—

Where an estate is devised in an active trust for the sole benefit of named beneficiaries, with direction that the estate be divided up and given to the beneficiaries at a stated time, the failure of the testator to provide for any limitation over upon the death of a beneficiary during the trust period, and the absence of provision for any other contingency, is indicative of his intent that the entire beneficial interest should vest immediately upon his death.

4. Same—

The rule that the entire beneficial interest vests immediately upon the death of testator when the estate is devised in an active trust for named beneficiaries and not to a class, with provision for the division of the estate among them at a stated time, without provision for any limitation over in case of the death of any of the beneficiaries, is in accord with the rule of construing a will against partial intestacy, since otherwise if one of the beneficiaries should die during the trust period, testator would die intestate as to his share.

5. Same—

The rule that the entire beneficial interest vests immediately upon the death of testator when the estate is devised in an active trust for named beneficiaries with provision for the division of the estate among them at the expiration of the trust, is in accord with the policy of the law favoring the early vesting of estates.

6. Taxation § 32e—

Under the provisions of the will in suit the entire beneficial interest in the estate vested in testator's three sons upon testator's death with the right of full enjoyment postponed until the termination of the trust. One of the sons died during minority, prior to the termination of the trust, leaving his two brothers as his sole heirs at law. *Held:* The surviving brothers took under the laws of descent and distribution and the estate so inherited is subject to the appropriate State and Federal inheritance taxes and is encumbered by the lien for such taxes.

APPEAL by defendants from *Sink, J.*, at March Term, 1940, of MECKLENBURG. Reversed.

The plaintiffs brought suit to compel the defendants to carry out their contract for the purchase of the lands described in the complaint.

The case was heard by Sink, J., upon agreed facts, of which the following are pertinent to the opinion and decision of the Court:

C. C. Coddington, Sr., died on 2 December, 1928, seized and possessed of a fee simple title described in the contract of purchase and sale be-

tween the parties. He left a will which was duly probated. Under the will, all the property of the testator was given in trust to the Union National Bank of Charlotte, North Carolina. The bank was made executor and the power given it to "sell, invest, reinvest, and change the investment" of the property from time to time, to collect rents, income and profits, and use as much of the same as was necessary "for the support, maintenance and education of my sons, Charles C. Coddington, Jr., Dabney M. Coddington, and William I. Coddington, until the youngest one of my said sons shall attain the age of twenty-one years"; any surplus of the income from the property during the trust period not necessary for the support and education of these three sons was required to be added to the *corpus* of the estate and held in trust in the same manner as the original *corpus*.

The present controversy hinges on Item III of the will, which is as follows: "ITEM III. When my youngest son, William I. Coddington, reaches the age of twenty-one years, I hereby direct the said bank to divide said property and estate into three equal parts and to turn over and deliver one of such parts to each of my sons, Charles C. Coddington, Jr., Dabney M. Coddington and William I. Coddington, and each of my sons shall thereupon become the absolute owner thereof and the said bank shall be discharged from any further duties as trustee." There was no provision in the will for other disposition of the property upon the death of any of the beneficiaries, and no residuary clause.

At the time of his death the testator was a widower with three sons, his only children and heirs at law—had he died intestate—C. C. Coddington, Jr., aged 13, Dabney M. Coddington, aged 11, and William I. Coddington, aged 9. The estate was worth more than a million dollars.

C. C. Coddington, Jr., died at the age of 18 years, in the year 1932, and William I. Coddington, the youngest of the children, became 21 years of age on 13 November, 1938. C. C. Coddington, Jr., was never married and left as his sole heirs at law his two brothers, Dabney M. Coddington and William I. Coddington.

The Union National Bank of Charlotte, North Carolina, qualified as executor under the will of C. C. Coddington, Sr., administered the estate and paid all State and Federal taxes then due. Purporting to act under the terms of the will, the executor divided the estate between William I. Coddington and Dabney M. Coddington at the time that William I. Coddington became 21 years of age, and the trust then terminated.

There has been no administration on the estate of C. C. Coddington, Jr., and there have been no inheritance taxes paid upon his estate either to the State of North Carolina or to the Federal Government. C. C. Coddington, Jr., left no estate except such as might have been a vested interest in his father's estate under the will aforesaid, and if such estate

did vest in him it is sufficient in value to require return and payment of inheritance taxes to the Federal Government and to the State of North Carolina. C. C. Coddington, Jr., left no debts or other obligations which would be a lien upon the property.

Upon the agreed state of facts the judge was of the opinion that no State or Federal inheritance taxes were chargeable upon the property distributed to the surviving children by reason of the death of C. C. Coddington, Jr., before William I. Coddington became twenty-one years of age, and that the property was, therefore, clear of any lien thus attaching. He gave judgment for the plaintiffs, from which the defendants appealed, assigning errors.

Cochran, McCleneghan & Lassiter for plaintiffs, appellees.
W. C. Davis for defendants, appellants.

SEAWELL, J. The only question argued before this Court was whether the will of Charles C. Coddington, Sr., conferred on his son, Charles C. Coddington, Jr., an inheritable estate at the death of the testator, or whether the purport and effect of the will was to vest the estate only when the youngest son became twenty-one years of age, at which time the will directs the estate to be divided into three parts and turned over to the beneficiaries. In other words, the question is whether the time at which distribution is required to be made is annexed to the substance of the gift, or merely operates to postpone its enjoyment. It was assumed that if C. C. Coddington, Jr., had an estate of inheritance at his death, which passed to his surviving brothers, the succession is subject to an inheritance tax, both State and Federal, and such tax would constitute a lien or encumbrance on the land, which is the subject of the purchase and sale contract between the parties; and it was assumed, conversely, that if no such inheritable estate passed at the death of C. C. Coddington, Jr., there was no tax due and no lien. Actually there may be other provisions of the State Inheritance Tax Law, the applicability of which might be considered in case no estate of inheritance vested at the time of the testator's death, but we need not consider them in view of the conclusion we have reached.

Whether the date appointed in the will for the completion of the trust and the division and turning over of the estate is a time annexed to the substance of the gift, marking the creation of the estate and the time of its vestment, or whether it operates as a mere postponement of the complete enjoyment of the estate vesting at the death of the testator, is, in this case, reduced to a question of testamentary intent, to be determined by the will itself, the situation as it existed between the testator and the beneficiaries under the will, aided by certain rules of construc-

tion arising out of both experience and policy which the courts are accustomed to apply.

If it be argued that the circumstance that the gift of the estate is expressed only in the clause requiring it to be divided and turned over at a certain time may indicate, *prima facie,* a contingency, the answer is that, taking the will altogether, it contains so many circumstances and provisions as to be controlling in the particular case against such presumption. *Hooker v. Bryan,* 140 N. C., 402, 53 S. E., 130.

We understand from the record that Mr. Coddington must have been a man of intelligence and business acumen, having built up a fortune of over a million dollars. He had three young children for whom to provide. We must assume, nothing else appearing to the contrary, that he was normal in his affections, his social impulses, his sense of obligation to his children and their immediate posterity, and the obligation that rested upon him to make a wise and just disposition of his great property, if he undertook to make any at all. But the will is amazingly brief and direct, considering the size of the estate involved; and if we accept the theory that he did not intend to have his estate to vest in any of his children upon his death, it is remarkably defective in its scheme of disposition, in its want of provision for obvious contingencies which must have presented themselves to the normal mind. We must assume from the record that he was acquainted with the vicissitudes of life as well as of business, and may well understand that their consideration were especially within his contemplation while engaged in the solemn act of composing his will. Yet he made no provision or disposition of his property or limitation over in the event of the death of any of the named beneficiaries, or all of them, before the date appointed for the division and delivery of the trust estate. At that time Charles, had he lived, would have been twenty-five years old and Dabney twenty-three. Had any of the sons died before that date, leaving a wife or children, these would have been left unprovided for if the estate did not vest at the death of the testator. *Perry v. Rhodes,* 6 N. C., 140; *Sutton v. West,* 77 N. C., 429; *Sims v. Smith,* 59 N. C., 347. This is but one of the many contingencies which might have happened.

The absence of any provision of this kind, and of any limitation over upon the contingency of the death of the beneficiary, has been considered to raise a strong inference that it was the intention of the testator to confer an immediate estate, vesting at his death. *Meyers v. Williams,* 58 N. C., 362; *Allen v. Van Meter* (Ky.), 1 Met., 264; *Young v. Stover,* 37 Pa., 105; *Goebel v. Wolf,* 113 N. Y., 405, 21 N. E., 388; *Robinson's Estate,* 13 Phila., 299 (set out in Note to *Shackley v. Homer,* 55 L. R. A. [N. S.], 1159); *Sammis v. Sammis,* 14 R. I., 123; *Foster v. Holland,* 56 Ala., 474; *Ordway v. Dow,* 55 N. H., 11.

It is generally held, nothing else appearing in the will to the contrary, that where an estate is devised to a trustee in an active trust for the sole benefit of persons named as beneficiaries, with direction to divide up and deliver the estate at a stated time, this will have the effect of vesting the interest immediately on the death of the testator. The intervention of the estate of the trustee will not have the effect of postponing the gift itself, but only its enjoyment. *Ordway v. Dow, supra; Tayloe v. Mosher,* 29 Md., 443. The rule is, we think, applicable to an estate in trust of mixed personalty and realty. *Safe Deposit & Trust Co. v. Wood,* 201 Pa., 420, 50 Atl., 920; *Sammis v. Sammis, supra.* In estates of this sort no distinction can be maintained between legacies, formerly governed by the rules of the civil law applied in the ecclesiastical courts, and devises governed by the rules of the common law, if such distinction has ever been strictly regarded by the courts of this State. *Hooker v. Bryan, supra.*

In approval of this principle and in support of the main proposition that under a will of this type the estate vests in the beneficiary immediately upon the death of the testator, the following North Carolina cases may be cited: *Guyther v. Taylor,* 38 N. C., 323; *Williams v. Smith,* 57 N. C., 254; *Fuller v. Fuller,* 58 N. C., 223. In *High v. Worley,* 32 Ala., 709; *Foster v. Holland, supra;* and *Shafer v. Tereso,* 133 Iowa, 342, 110 N. W., 746, the absence of a limitation over or any provision for a contingency or expression thereof was held to vest the interest in the beneficiary at the time of the death of the testator. *Hocker v. Gentry,* 3 Met. (Ky.), 463; *Sutton v. West, supra; Sims v. Smith, supra; Warrant v. Hembree,* 8 Ore., 118; *Goebel v. Wolf, supra.* In the latter case, the fact that there was nothing on the face of the will to indicate that the testator contemplated the death of any of his children during minority was considered, among other things, as indicative of the testator's intention to give them immediate interests. *Ordway v. Dow, supra; Robinson's Estate, supra; Re Lincoln Trust Co.,* 139 N. Y. S., 682; *Boraston's Case,* 3 Coke, 19a.

Of further significance is the fact that the executor-trustee is also made a guardian for C. C. Coddington, Jr., and the brothers, and is given the power to use such part of the income of the trust as might be necessary for the maintenance and education of the named beneficiaries during the suspensive period when the estate was left in the hands of such executor-trustee-guardian for its preservation and administration in the interest of the minor beneficiaries. The appointment of such a guardian would hardly have been necessary, under the discretion given the executor-trustee, except for a desire to bring such executor into a closer fiduciary relationship to the property destined for the beneficiaries, both with regard to the interest and income and with regard to the *corpus*

of the estate which it was handling. *Green v. Green,* 86 N. C., 546; *Branstrom v. Wilkinson,* 7 Ves. Jr., 431; *Bowman v. Long,* 23 Ga., 242; *Nelson v. Pomeroy,* 64 Conn., 257, 29 Atl., 534. The fact that the residue of the interest is returned to the *corpus* of the estate for further accumulation has been regarded as favorable to the construction of the immediate vestment of the gift; *Pierson v. Dolman,* L. R., 3 Eq., 315, 36 L. J., ch. (N. S.), 258; and this does not weaken the inference that the guardianship was of the whole estate involved.

It is true here that the whole income of the large estate was not required by the will to be devoted to the needs of the beneficiaries. Had it been so, under the great majority of decided cases, it would have been conclusive. *In re Harrar's Estate,* 91 Atl., 503; *Provenchere's Appeal,* 67 Pa., 463; *Partridge v. Clary* (Mass.), 117 N. E., 332; *Cropley v. Cooper,* 86 U. S., 167, 22 L. Ed., 109; *Fidelity Union Trust Co. v. Rowland* (N. J.), 132 Atl., 673; *Lippincott v. Stottsenberg* (N. J.), 20 Atl., 360. The best considered cases, however, regard the same presumption in favor of the immediate vesting to exist where only a portion of the income of the estate is intermediately given to the beneficiary, especially where there is no disposition of interest or income save that to the ultimate beneficiary. This is expressed in 2 Simes, Law of Future Interests, section 356, as follows: "This would seem to be for the reason that the gift of income shows that the testator intended the legatee or devisee to take some benefit from the gift of the principal immediately on the testator's death, and that the postponement of possession was merely for the benefit of the donee. The same presumption in favor of the vested character of a gift obtains where only a portion of the income is to be given for maintenance." *Witty v. Witty,* 184 N. C., 375, 114 S. E., 482; *Fox v. Fox,* L. R., 19 Eq., 286; *In re Williams,* L. R., 1, ch. 180.

Closely connected with the common sense reasoning which negatives any intention of the testator to leave the disposition of his property incomplete is the rule against intestacy. "An intestacy is a *dernier ressort* in the construction of wills, and it has been said that the abhorrence of courts to intestacy under a will may be likened to the abhorrence of nature to a vacuum." 28 R. C. L., p. 228. The presumption is against partial intestacy as well as against complete intestacy; *Austin v. Austin,* 160 N. C., 367; and an important failure to complete the scheme of testamentary disposition so as to provide for contingencies too obvious to be ignored, especially those which might interfere with the expressed testamentary intent with regard to the particular legacy or devise, raises a strong presumption that the testator understood himself to be making a final disposition in his gift of the property. Having undertaken to make a will at all, it is not consistent with sound reason-

ing that the testator would have left his estate dangling. On the theory that the gift is contingent, this would be the result in the case of the death of one of the sons, which happened, or, in larger measure, upon the death of them all, before the termination of the trust. *Lavender v. Rosenheim,* 110 Md., 150, 72 A., 669; *In re Cross,* 205 N. C., 160, 170 S. E., 660; *Holmes v. York,* 203 N. C., 709, 166 S. E., 889; *West v. Murphy,* 197 N. C., 488, 149 S. E., 371.

Proceeding upon the same line of experience, as well as of policy, the law favors the early vesting of property interests. In some respects the rule will be found in its supporting principles, both of fact and policy, closely approximating the rule disfavoring intestacy. Much weight is given to it by the courts. In *In re Mansur's Will* (Vt.), 127 Atl., 297, the Court puts it this way: "This presumption is so favorably regarded that no estate will be held contingent unless positive terms are employed in the will indicating that such is the intention." And in another leading case it is thus expressed: "The law favors the early vesting of estates and presumes in favor of the vesting of remainders in interest on the death of the testator, if the language used is consistent with an intention to postpone the enjoyment only. This presumption is so favorably regarded that no estate will be held contingent unless positive terms are employed in the will indicating a contrary intention." *Re Robinson's Estate,* 98 Atl., 826.

We do not regard as importantly bearing on the time of the vesting the expression in the will that when the property is delivered "each of my sons shall thereupon become the absolute owner thereof and the said bank shall be discharged from any further duties as trustee," since this language is not inconsistent with the intention to vest the property on the death of the testator. In *In re Lincoln Trust Co., supra,* the phraseology respecting the delivery of the estate at the termination of the trust was that the trustee should convey to the beneficiary, and yet the Court held the estate to have vested on the death of the testator and the conveyance to be with respect to a right the beneficiary already had. The words used may be regarded as meaning only that thereafter the estate should be held free of the trust.

The case of *Witty v. Witty, supra,* supports so many of the principles herein laid down that its separate citation opposite each one of them would have been unnecessary repetition. We call attention to the discussion of these subjects in that case in the opinion of the Court by *Stacy, J.*

The intention of Mr. Coddington is so reasonably apparent that we do not have to depend on technical rules of instruction, no matter how appropriate. It is the actual experience out of which these rules are evolved which we consider of importance in the instant case—the factual

situation and reasoning which make them applicable. On any other hypothesis except an intent to vest the estate in his children by name and moiety at his death, having undertaken to dispose of his property by will, we must attribute to Mr. Coddington a futility of effort rarely found in one in his position.

As to the quality of the estate which thus vests, it must be noted that the beneficiaries are named as individuals, not as a class, and the "roll call" principle does not apply. There is no contingency named in the will, and none contemplated, by which the estate once vested may be defeated. Since the time named for the distribution is, as we have held, not annexed to the substance of the gift but merely postpones its enjoyment, the entire beneficial interest in one-third of the estate vested in C. C. Coddington, Jr., at the death of the testator, and upon his own death, in turn, passed from him to his surviving brothers under the laws of descent and distribution.

The property in question is, therefore, subject to the State inheritance tax, and to such Federal tax as may be appropriately imposed, and is encumbered by the lien of such taxes. The plaintiffs are, therefore, not at this time able to convey to the defendants an unencumbered title in accordance with their contract.

The judgment is

Reversed.

MARTHA LIGHTNER BOONE AND ALLEN J. JERVEY v. DANIEL F. BOONE.

(Filed 8 June, 1940.)

1. Injunctions § 5—Equity may enjoin resort to action at law to prevent irreparable injury.

When a party makes a valid agreement not to institute a civil action, and to permit him to maintain the action would result in irreparable injury to the adverse party, equity will enjoin him from instituting the action not to protect against oppressive or vexatious litigation but to specifically enforce the contract, the order being directed to the party and not to the court, since equity has the power to prevent actions at law when resort to legal proceedings would result in unjust injury wholly irremedial in that tribunal.

2. Injunctions § 11—Temporary order will be continued if it appears that primary equity can be maintained and continuance is necessary to protect rights.

In a suit for a permanent injunction to prevent irreparable injury, the court, upon the hearing of the order to show cause, may ascertain the probable effect of a continuance or dissolution of the temporary order, and should continue the order to the final hearing if there is probable

cause for supposing that plaintiff will be able to maintain the primary equity alleged and there is reasonable apprehension of irreparable injury should the temporary order be dissolved, or if a continuance appears necessary to protect plaintiff's right until the controversy can be determined.

3. Evidence § 40—

While parol evidence is inadmissible to vary, contradict or add to a written instrument, where part of the agreement is written and part oral, parol evidence is competent to establish the oral part unless it is required by law to be in writing.

4. Frauds, Statute of, § 9: Husband and Wife § 19—

While provisions of a deed of separation relating to realty are required to be in writing, an agreement between the parties that the husband would not maintain an action for divorce upon certain specified grounds and would not institute any action tending to injure her character and reputation, need not be in writing.

5. Injunctions § 11—Held: Temporary order restraining institution of action for alienation of affections was properly continued to the hearing.

Plaintiffs instituted this action to permanently enjoin defendant, husband of the *feme* plaintiff, from instituting action against the male plaintiff for alienation of affections. Upon the hearing of the order to show cause it appeared from plaintiffs' allegations and affidavits that *feme* plaintiff and defendant had executed a deed of separation, that upon valid consideration moving to him, he agreed, among other things, not to institute suit for divorce on the ground of adultery nor to institute any suit that would tend to injure her character or reputation, that this part of the agreement was not written to prevent it from being publicly recorded. Defendant averred that the entire separation agreement was written except the agreement that he would not institute suit for divorce on the ground of adultery. *Held:* The agreement not to institute the suits specified is not required to be in writing, and therefore plaintiff might establish such agreement, and the dissolution of the temporary order might result in irreparable injury, since evidence of misconduct, whether real or fabricated, would be admissible in his suit for alienation, and the continuance of the restraining order until the facts are ascertained and the controversy determined is necessary to safeguard plaintiff's rights, and the male plaintiff is entitled to join in maintaining the suit as the party for whose benefit the agreement was made.

6. Contracts § 19—

A third party may maintain an action on a contract made for his benefit.

APPEAL by defendant from *Pless, J.*, at Chambers in Marion, North Carolina, on 6 January, 1940.

Civil action to enjoin defendant from instituting civil action against plaintiff Jervey for the alienation of the affections of plaintiff Martha Lightner Boone.

Plaintiffs allege substantially these facts: (1) That the plaintiff Martha Lightner Boone and defendant are and have been for a number

of years husband and wife, between whom some time previously certain differences and disagreements arose which caused a breach of their marital relations and resulted in their separation; that in consequence he and she entered into negotiations for the purpose of adjusting, composing, settling and forever setting at rest all matters of differences and disagreements between them; that on 29 and 30 September, 1939, in conference held in Winston-Salem, North Carolina, defendant made certain charges which reflected upon the character of plaintiff Martha Lightner Boone, and others, all of which she denied, and now denies, and threatened to sue for divorce and for the custody of their children; that "in order to avoid the publicity of said charges and the effect that such litigation would have upon her and her children, her co-plaintiff, Allen J. Jervey, and all other persons against whom such charges had been made, or who might be affected thereby, she stated to defendant and his counsel that she was willing to pay a substantial consideration for an adjustment and compromise that would settle all matters between her and the defendant, as well also as to all other parties whose names were connected with, or whose character and reputation might be involved in the charges . . ." that after considerable discussion and the submission of proposals and counter proposals, said plaintiff and defendant reached an agreement whereby they entered into a deed of separation, which is asked to be taken as a part of the complaint and in which after reciting that "whereas, irreconcilable differences have arisen between the parties hereto; and, whereas, it is desired that the custody of the children and certain financial differences existing between the parties be adjusted," it is agreed, "in consideration of the premises, and the further consideration of one dollar," (1) that the custody and control of their children be given unconditionally to their father, the defendant—Martha Lightner Boone, plaintiff, their mother, to have privilege of visiting them as specified; (2) that she release him from all claim of support, maintenance and alimony, and thereby release and quitclaim to him all her right in any property which he then owned or should thereafter acquire as therein set forth, as well as release him from any indebtedness of any and every nature whatever that he may then owe her, which she alleges was $19,000 theretofore turned over to him to handle and invest for her; (3) that in the event of the happening of certain contingency, she transfer her portion of certain trust fund for the education of their son; (4) that she shall not disturb a certain trust fund of approximately $15,000 for the education of their daughter; and that he in return release to her "any right, interest, and estate which he would otherwise have in any property, real or personal," which she then had or should thereafter acquire as therein set forth.

Plaintiff Martha Lightner Boone further alleges that the defendant,

in consideration of the considerations on her part for said agreement, as set forth in the deed of separation, also agreed to and with her "(a) that he would not bring an action for divorce on the grounds hereinbefore mentioned, and would not do any act which would in any way reflect upon or discredit the character and reputation of the said plaintiff; (b) that he would not prosecute any action against the plaintiff Allen J. Jervey on the grounds hereinbefore alleged, nor against any of the other parties hereinbefore mentioned, and that the consideration paid by the plaintiff would be accepted as full compensation for all the damages that the said defendant claimed he had sustained by reason of the said alleged charge hereinbefore mentioned"; that "had it not been for the promises and assurances of the defendant that he would not do any act or bring any suit that would in any wise reflect upon the character and reputation of the plaintiff, and that he would forego any and all actions against any and all parties involved in the charges set forth above, said plaintiff would not have paid the consideration hereinbefore alleged in settlement on the controversy between her and said defendant"; "that on 7 October, 1939, defendant, through his attorney, threatened to bring suit against plaintiff Allen J. Jervey for the alienation of the affections of plaintiff Martha Lightner Boone;" that the bringing of such action would be in direct violation of said agreement and would deprive said Martha Lightner Boone of a substantial part of the consideration for which she entered into said agreement, particularly that part of same whereby she sought to protect her own character and reputation and the character and reputation of her co-plaintiff; that said agreement was made for the benefit of both of the plaintiffs hereto as well as for and on behalf of the other parties mentioned, and for the purpose of saving them harmless from the suits which the defendant was threatening to institute prior to the execution of said agreement; that notwithstanding both plaintiffs deny that Allen J. Jervey alienated the affections of said Martha Lightner Boone from defendant, yet if defendant is permitted to carry out his said threat and bring suit against said Jervey therefor, plaintiffs will be deprived of a substantial part of the benefits to which they are entitled by reason of the said agreement; that regardless of the result they will suffer irreparable injury for which they have no adequate remedy at law to protect their said rights; and that by reason of the agreements defendant is estopped to maintain the threatened suit against plaintiff Allen J. Jervey.

Defendant, while admitting the execution and terms of the deed of separation between him and plaintiff Martha Lightner Boone, and not denying the threat to sue Allen J. Jervey as alleged, denies all other material allegations of the complaint, except he admits that "it was understood between the parties to the agreement that the defendant, when

he brought suit against the plaintiff to sever the bonds of matrimony, would base his suit upon two years separation, and not on adultery." And by way of further defense, defendant asserts alleged grievous wrongs.

Upon hearing of motion of plaintiffs for injunction, pursuant to order to show cause, both plaintiffs and defendant offered affidavits in support of their respective allegations. Affidavits for plaintiffs tended to show in substance, among other things, that as a part of the terms for the separation agreement on 30 September, 1939, between defendant and his wife, defendant agreed that he would not bring suit against his wife for divorce on the ground of adultery, nor would he bring any suit which would tend to injure her character or reputation, nor would he institute any of the threatened suits; and that this part of the agreement was not incorporated in the deed of separation upon the assurance of defendant and the attorneys that in drawing separation agreements it was not customary to mention things of that nature for the reason that such agreements were spread upon the public records. In reply to this, defendant in affidavit filed, stated "that every item discussed on September 30, 1939, at the time the agreement was drafted was dictated to the stenographer, except the simple agreement that your affiant would not institute suit against Martha Lightner Boone for divorce and allege fornication and adultery."

The judge below reciting that "it appearing from the pleadings and the affidavits filed that the questions presented are grave, and that if the issues raised by the pleadings with respect to the contract alleged in the complaint are answered by the jury in favor of the plaintiffs, the damages that would be sustained by the plaintiffs by the dissolution of the restraining order would be irreparable and that the object of the contract, if found in plaintiffs' favor, can only be attained by the parties to the same conforming faithfully to its terms," ordered, among other things, that the restraining order theretofore issued be continued until the trial of the cause.

Defendant appeals therefrom to Supreme Court, and assigns error.

J. E. Shipman for plaintiff, appellee.

Monroe M. Redden, Walter E. Johnson, Jr., and Fred M. Parrish for defendant, appellant.

WINBORNE, J. Bearing in mind that the principal relief sought in this action is permanent injunction against defendant violating an alleged agreement not to institute the threatened suit, we are of opinion that in the present state of the pleadings and the proof offered, the court below properly ruled in continuing the injunction to the hearing.

The doctrine that courts of equity may exercise their power to prevent actions at law when necessary to protect the rights of the parties is recognized and well settled. The order issues to the party, and not to the court. 14 R. C. L., 408, Injunctions, sec. 109; McIntosh, 982, sec. 862; *Wierse v. Thomas,* 145 N. C., 261, 59 S. E., 58, 15 L. R. A. (N. S.), 1008, 122 Am. St. R., 446; *Bomeisler v. Forster,* 154 N. Y., 229, 48 N. E., 524, 39 L. R. A., 240.

It is said that the authorities are agreed that where a party has an unfair advantage in a proceeding in a court of law, which must necessarily make the court an instrument of injustice, and it is therefore against conscience that he should use that advantage, a court of equity will restrain him from doing so—the object being to prevent an unfair use of a court of law in order to deprive another of his just rights or to subject him to some unjust injury which is wholly irremediable in that tribunal. 14 R. C. L., 408; Injunctions, 109. Thus, in *Bomeisler v. Forster, supra,* a case in which the factual situation is quite similar to that in the present case, the Court of Appeals of New York said: "This case presents those separate features, which make the interference of a court of equity necessary in order that the plaintiff may have the full benefit of the contract, which as the court has decided, was made between him and this defendant. . . . The difference to the plaintiff between a trial of the action at law, in which all the scandalous matters would be made public and his reputation more or less affected, according as credence might be given to the statements and charges of the plaintiff therein, and a trial of the action in equity, where the issue would be confined to the question of whether there had been a release and settlement of all claims against him, which formed the basis of the complaint in the pending action, and an agreement not to sue further upon them, is quite perceptible and substantial. The fact of a release would not prevent, in the former case, the ventilation of all the matters of complaint, real or fabricated; whereas, in the latter case, if it should be found that it was validly made and that there was an agreement not to harass by suits upon claims which had been settled and released, this plaintiff would be spared a public discussion of charges which the settlement between him and the defendant had disposed of. . . . A specific performance of that agreement is indispensable to the security of the plaintiff against defendant's charges and revelations as to his past conduct, whether real or fabricated, which might affect his reputation and character in the community. This security he must be deemed to have obtained by his contract. It is not upon the principle that equitable relief is due to this plaintiff to protect him from oppressive or vexatious litigation, that we think that the decree of the trial court must rest for its correctness; but it is upon the principle that a specific performance

of the defendant's agreement with the plaintiff is essential, if he is to receive its benefits, and, if he was entitled to specific performance, then the remedy of an injunction, restraining the defendant from doing the act which she has contracted not to do, was proper to be granted."

When motion for a restraining order is heard to determine the question as to whether it shall be continued until the final hearing, the judge upon hearing the parties may ascertain the probable effect of the continuance of such order upon the rights of the parties. In *Cobb v. Clegg,* 137 N. C., 153, 49 S. E., 80, *Walker, J.,* speaking of the distinction between the old forms of common and special injunctions, appropriately states: "If the facts constituting the equity were fully and fairly denied, the injunction was dissolved unless there was some special reason for continuing it. Not so with a special injunction, which is granted for the prevention of irreparable injury, when the preventive aid of the court of equity is the ultimate and only relief sought and is the primary equity involved in the suit. In the case of special injunctions the rule is not to dissolve upon the coming in of the answer, even though it may deny the equity, but to continue the injunction to the hearing if there is probable cause for supposing that the plaintiff will be able to maintain his primary equity and there is a reasonable apprehension of irreparable loss unless it remains in force, or if in the opinion of the court it appears reasonably necessary to protect the plaintiff's right until the controversy between him and the defendant can be determined. It is generally proper, when the parties are at issue concerning the legal or equitable right, to grant an interlocutory injunction to preserve the right *in statu quo* until the determination of the controversy, and especially is this the rule when the principal relief sought is in itself an injunction, because a dissolution of a pending interlocutory injunction, or the refusal of one, upon application therefor in the first instance, will virtually decide the case upon its merits and deprive the plaintiff of all remedy or relief, even though he should be afterwards able to show ever so good a case." See, also, *Zeiger v. Stephenson,* 153 N. C., 528, 69 S. E., 611, and *Castle v. Threadgill,* 203 N. C., 441, 166 S. E., 313.

Under these principles and this rule plaintiff Martha Lightner Boone seeks special injunction for the prevention of irreparable injury. The question arises as to whether on the present state of the pleadings and proof there is (1) probable cause for supposing that she will be able to maintain the primary equity alleged, and (2) reasonable apprehension of irreparable loss unless the injunction remain in force, or (3) does it appear reasonably necessary to protect her rights until the controversy can be determined.

In connection with the first, plaintiffs contend and have offered affidavits of Martha Lightner Boone and of the attorney who represented

her at the time, tending to show that the agreement between her and her husband was in part written and in part oral, and that the oral part was expressly omitted from the written to avoid the publicity incident to public record of it. They further contend that the oral part is not required by law to be in writing—and may be proven by parol evidence. On the other hand, while defendant denies, and offers affidavits tending to support his denial, that oral agreement covering all the matters alleged by plaintiffs was made, he admits that a part of the agreement was in parol, that is, that part relating to the ground for divorce to be alleged in the event he sues therefor. Defendant further contends that under the circumstances parol evidence of the alleged oral agreement is inadmissible and incompetent.

It is a well established rule of law that parol evidence will not be admitted to vary, contradict or add to a written instrument. "But the rule applies only when the entire contract has been reduced to writing, for if merely a part has been written, and the other part has been left in parol, it is competent to establish the latter part by parol evidence, provided it does not conflict with that which has been written." *Evans v. Freeman,* 142 N. C., 61, 54 S. E., 847. In this case, as in *Cobb v. Clegg, supra, Walker, J.,* clearly states the principles and reviews the authorities. See, also, *McGee v. Craven,* 106 N. C., 351, 11 S. E., 375; *Colgate v. Latta,* 115 N. C., 127, 20 S. E., 388; *Cobb v. Clegg, supra; Typewriter Co. v. Hardware Co.,* 143 N. C., 97, 55 S. E., 417.

In *Colgate v. Latta, supra,* quoting from Abbott on Trial Evidence, this Court said: "A written instrument, although it be a contract within the meaning of the rule on this point, does not exclude oral evidence tending to show the actual transaction . . . where it appears that the instrument was not intended to be a complete and final statement of the whole transaction, and the object of the evidence is simply to establish a separate oral agreement in a matter as to which the instrument is silent, and which is not contrary to its terms nor to their legal effect."

Applying these principles to the case in hand, while the separation agreement in so far as it affects real property is required by law to be in writing, there is no requirement that an agreement not to bring an action which would reflect upon the character and reputation of another shall be in writing.

(2) In this connection it is proper to say here that the conduct of Martha Lightner Boone, whatever it may or may not have been prior to the date of the alleged agreement, is collateral to the question now before the Court. But if it should be ascertained that defendant made the oral agreement with plaintiff Martha Lightner Boone as alleged by plaintiffs, which is a question for the jury, and she should be denied the injunction here sought, it is readily perceivable that irreparable injury would result, as indicated in the case of *Bomeisler v. Forster, supra.*

(3) Without passing upon or intimating any opinion as to controverted facts, we are of opinion that in order to safeguard plaintiff's rights, whatever they may be, the injunction should be continued until the facts are ascertained and the controversy determined.

As to the right of plaintiff Allen J. Jervey to relief: It is well settled that where a contract between two parties is made for the benefit of a third, the latter is entitled to maintain an action for its breach. *Gorrell v. Water Supply Co.*, 124 N. C., 328, 32 S. E., 720; *Parlier v. Miller*, 186 N. C., 501, 119 S. E., 898; *Land Bank v. Assurance Co.*, 188 N. C., 747, 125 S. E., 631; *Thayer v. Thayer*, 189 N. C., 502, 127 S. E., 553.

The judgment below is

Affirmed.

L. T. PAFFORD v. J. A. JONES CONSTRUCTION COMPANY.

(Filed 8 June, 1940.)

1. Master and Servant § 1—Relationship of master and servant held not to exist between plaintiff and defendant's subcontractor.

Plaintiff was a salesman for a wholesale building material house. In order to sell certain goods to a retailer he agreed to obtain a purchaser for the retailer, and pursuant thereto procured a subcontractor to buy the goods from the retailer upon the condition that plaintiff inspect the material at the first opportunity as it was being used in construction work. It further appeared that the retailer was required to reimburse the subcontractor for any defective material and that the wholesaler collected from the retailer subject to any credit allowed the retailer for defective material. *Held:* In inspecting the material on the construction job, plaintiff was not an employee of the contractor or the subcontractor, and may not invoke the rules governing the liability of the contractor to the employees of the subcontractor in his action to recover for injuries received in a fall down an open elevator shaft while on the premises.

2. Negligence § 4a—Distinction between licensees and invitees.

The distinction between a licensee and an invitee does not depend upon whether there is an "invitation" to come on the premises, but is determined by the nature of the business bringing him to the premises, an invitee being a person who goes upon the premises for the mutual benefit of himself and the person in possession, whose visit is of interest or advantage to the invitor, while a licensee is one who goes upon the premises for his own interest, convenience or gratification with the consent of the person in possession, and is neither a customer nor a servant nor a trespasser.

3. Same—Evidence held to show that plaintiff was mere licensee.

Plaintiff was a salesman for a wholesale building material house. In order to sell certain goods to a retailer he agreed to obtain a purchaser

for the retailer, and pursuant thereto procured a subcontractor to buy the goods from the retailer upon the condition that plaintiff inspect the material at the first opportunity as it was being used in construction work. In performing the work the subcontractor was an independent contractor. *Held:* Plaintiff, in making the inspection of the materials as they were being used in the construction of a building was, at most, a mere licensee of the main contractor in possession of the premises.

4. Negligence § 4d—

The owner or the person in possession of the premises is not under duty to a licensee to maintain the premises in a safe or suitable condition or to warn him of hidden dangers or perils of which the owner has actual or implied knowledge, his duty to the licensee being merely to refrain from doing the licensee willful injury and from wantonly and recklessly exposing him to danger.

5. Same—Evidence held insufficient to be submitted to the jury in this action by licensee to recover for injury sustained in fall down elevator shaft.

It appeared that plaintiff was an experienced building material salesman and in the course of his work frequently visited buildings under construction, that after twice visiting the premises in question to inspect the work, going past "keep out" and "danger" signs, and after having been informed that the material was not working properly in its application, asked to see the unused bags of material and was told by an employee of the subcontractor where the bags were kept, that the room in which the material was stored was dark and no artificial lighting was provided, and that plaintiff fell down an open freight elevator shaft therein to his injury. *Held:* Even conceding that there is evidence of negligence in the breach of duty owed by the main contractor to a licensee, the evidence discloses contributory negligence of plaintiff barring recovery, and defendant's motion to nonsuit was properly sustained.

APPEAL by plaintiff from *Grady, Emergency Judge,* at December Extra Term, 1939, of MECKLENBURG. Affirmed.

Civil action to recover damages sustained by plaintiff when he fell down an open elevator shaft in a building being constructed by defendant as general contractor for Belk Brothers Company.

The defendant contracted to construct a five-story addition to the building of Belk Brothers Company in Charlotte, N. C. It let the subcontract for the wall plastering work to D. Draddy who was accountable to the defendant for the result only.

Plaintiff was a salesman for Certain-teed Products Corporation, which sold wall plastering and similar products to dealers and distributors. Plaintiff's employer had stored at Plasterco, Virginia, a quantity of its products, the use of which it intended to discontinue and which it wished to sell before 31 December, 1937. Plaintiff was instructed to attempt to dispose of this material prior to that date. Acting on these instructions

plaintiff induced Wiggins Lumber Company to purchase one car of such material on condition that the plaintiff would first find a purchaser therefor.

In compliance with this agreement plaintiff induced Draddy, the subcontractor, to purchase a carload of material from the Wiggins Lumber Company. He agreed to purchase on plaintiff's assurance as to the quality of the merchandise and on condition that it was up to standard and not defective; that he would receive a discount and that plaintiff would, at the first opportunity, inspect the material as it was being actually used on some project or construction job.

The subcontractor notified the plaintiff that he would be using the material on the morning of 22 February. Accordingly, plaintiff went to the third floor of the building under construction on the morning of 22 February and inspected the application of the plastering for a period of about an hour. He observed the men working and that the material was not satisfactory in that it was setting too fast, which indicated that it was defective and not up to standard. He returned to the building on the same afternoon and made inquiry of the workmen as to the material. He was told in reply that the material was no better. He then asked where the bags of plastering were kept. Having received information that they were kept in the storage room plaintiff went to inspect the bags.

The space used as the storage room was back of the passenger elevator and was the service room into which the freight elevator opened. It was formed by the stairway wall, the back walls and the elevator shaft walls. There was one elevator shaft being constructed for future use and a door thereto opened into the room being used as a storage room. This shaft was being used for the builders' service elevator. There were three windows in the wall to this room.

After plaintiff had entered the room and inspected the bags he started to leave. From then on he has a complete lapse of memory until some time after the accident. He was found at the bottom of the elevator shaft which was being used for the contractor's temporary material elevator.

Plaintiff testified that it was cloudy and was too dark in that section of the building to do any work without artificial light; that there was no artificial light, no guard around the elevator shaft; that he did not see the elevator shaft opening; and that it was so dark in there he could not see a hole in the floor. He testified that the difference in the light condition in the storage room and the other part of the building "was almost the difference between daylight and dark or daylight and dusk, or daylight and dusk at least." He further testified that there was no artificial light, no guard around the elevator shaft; that he did not see

the elevator shaft opening and that it was so dark in there he could not see the hole in the floor.

At the conclusion of all the evidence the defendant renewed its motion to dismiss as of nonsuit first made when plaintiff rested. The motion was allowed and judgment was entered dismissing the action as of nonsuit. Plaintiff excepted and appealed.

C. T. Carswell and Joe W. Ervin for plaintiff, appellant.
J. Laurence Jones and Stewart & Moore for defendant, appellee.

BARNHILL, J. Certain pertinent facts appearing on this record require consideration in determining the question here presented.

1. The plaster material plaintiff was inspecting was sold to the subcontractor by the Wiggins Lumber Company and not by plaintiff. Plaintiff testified: "I turned this plaster over to T. J. Wiggins Lumber Company and they paid for it, less this credit, and they in turn sold it to Draddy . . . any credit we gave in this thing was given to the Wiggins Lumber Company, and they paid us. They could have sold the material to whom they wanted to."

2. There was no contract relation between plaintiff and either the defendant or Draddy. If the material proved to be defective Wiggins Lumber Company was required to reimburse the subcontractor. Plaintiff testified: "Mr. Draddy's contract and order was with T. J. Wiggins Lumber Company."

3. Plaintiff's promise to inspect the material as it was being applied on this or some other job was for his and his employer's benefit, to induce Draddy to make the purchase from Wiggins Lumber Company and to thus enable plaintiff's employer to dispose of a stock of doubtful value. "It was understood between Mr. Draddy and myself that I would personally inspect this material at the first opportunity I had. At the first opportunity I had after it arrived on some project or construction job. That is the only place that I could inspect it, at a place where it was being used, and by seeing it myself and talking with the men who used it, and Mr. Draddy, or any plastering contractor." This promise to inspect was one of the inducements the plaintiff offered Draddy to persuade him to change brands and to buy from Wiggins Lumber Company the material plaintiff was seeking to sell to that company.

4. Plaintiff had twice inspected the work and talked with the employees and had ascertained that some of the material was defective before he went to the storage room. He was informed as to the location of the storage room at his request by one of the workers. When the plaintiff visited the building on the morning of 22 February he found

that: "The material was setting too fast, which is an indication of defective material, or not up to standard. It was not working properly on trial. I stayed there about an hour." When he went back that afternoon he found that it was no better. "When they told me that, I asked them where they were keeping the bags of plaster. From what they told me, I found that the bags were back of the stairway toward the old building on the Trade Street side from where they were working. I went . . . to find the bags."

5. Plaintiff had over 17 years of experience in the plastering business during which time he frequently visited buildings in the process of construction, and well knew the conditions to be encountered under such circumstances. Likewise, he saw the "Keep Out" and other warning signs, both on the outside and on the inside of the building.

6. When the plaintiff entered the storage room where the material was kept pending its use, he not only knew that the building was in the process of construction but he likewise knew that the room into which he was entering was dark and without artificial light.

Plaintiff devotes much of his brief to a discussion of the master and servant doctrine of liability, contending that under the facts and circumstances of this case the plaintiff was an employee—if not of the defendant, then of the subcontractor—and that defendant was under obligation to render him the same protection it owed to other employees of Draddy. This position cannot be maintained. In the first place, no such relationship is alleged. On the contrary, plaintiff expressly alleges that he was invited to go and inspect the material as it was in the process of use and application by the subcontractor. Secondly, the evidence does not tend to establish such relationship. As to Draddy, neither he nor his employer was even the vendor of the material. It had been purchased from the dealer on plaintiff's assurance that the dealer and his company, through the dealer, would guarantee the quality and that he would inspect, on this or some other job, while the plastering was being used, to aid in discovering whether it was defective.

The record is devoid of suggestion that the cause was tried on this theory in the court below.

Furthermore, if he was an employee then, as defendant aptly argues, the question as to the applicability of the Workmen's Compensation Act would immediately arise.

Plaintiff was on the premises in the interest of his employer and for his own benefit to make the inspection he had promised as an inducement to Draddy to purchase the material from the Wiggins Lumber Company. His promise was to inspect, at the first opportunity, on some project or construction job. This simply happened to be the first opportunity and the first project where the material was being used.

To constitute one an invitee of the other there must be some mutuality of interest. *Crossgrove v. A. C. L. R. R. Co.,* 118 S. E., 694; *Petree v. Davison-Paxon-Stokes Co.,* 168 S. E., 697. Usually the invitation will be inferred where the visit is of interest or mutual advantage to the parties, while a license will be inferred where the object is the mere pleasure or benefit of the visitor. *Bennett v. R. R. Co.,* 102 U. S., 577, 26 L. Ed., 235; *John P. Pettijohn & Sons v. Basham,* 100 S. E., 813.

The distinction between a visitor who is a mere licensee and one who is on the premises by invitation turns on the nature of the business that brings him there rather than on the words or acts of the owners which precedes his coming. Permission involves leave and license but it gives no right. In a general sense, one upon the premises of another by invitation is a licensee; but in a strict and somewhat technical sense, to come upon premises under an implied invitation means more than a mere license—means that the visitor is there for a purpose connected with the business in which the occupant is engaged. *Pauckner v. Wakem,* 231 Ill., 276, 83 N. E., 202; *Franey v. Union Stock Yard & Transit Co.,* 85 N. E., 750; *Albert v. N. Y.,* 78 N. Y. S., 355.

To entitle one to rely upon an implied invitation to enter, his purpose must be of interest or advantage to the invitor. So if his design is to visit employees (*Dixon v. Swift,* 98 Me., 207, 56 Atl., 761; *Woodwine v. R. R.,* 36 W. Va., 329, 15 S. E., 81, 16 L. R. A., 271, 32 Am. St. Rep., 859); or to sell his wares (*Norris v. Contracting Co.,* 206 Mass., 58, 91 N. E., 886, 31 L. R. A. [N. S.], 623, 19 Ann. Cas., 424); or to deliver those he has sold (*Muench v. Heinemann,* 119 Wis., 441, 96 N. W., 800); or to solicit employees to take insurance (*Indian Refining Co. v. Mobley,* 134 Ky., 822, 121 S. W., 657, 24 L. R. A. [N. S.], 497); or to collect debts from them (*Berlin Mills v. Croteau,* 88 Fed., 860, 32 C. C. A., 126); or in search of his servant (*Plummer v. Dill,* 156 Mass., 428, 31 N. E., 128, 32 Am. St. Rep.); or to look over the machinery (*Benson v. Traction Co.,* 77 Md., 535, 26 Atl., 973, 20 L. R. A., 714, 39 Am. St. Rep., 436); or in search of employment (*Larmore v. Crown Point Iron Co.,* 101 N. Y., 391, 4 N. E., 752, 54 Am. St. Rep., 718); he is merely a licensee. *Meiers v. Fred Koch Brewery,* 229 N. Y., 10, 127 N. E., 491.

A licensee is a person who is neither a customer nor a servant nor a trespasser and does not stand in any contractual relation with the owner of the premises (here the contractor in possession) and who is permitted, expressly or impliedly, to go thereon merely for his own interest, convenience or gratification. *Crossgrove v. A. C. L. R. R. Co., supra; Petree v. Davison-Paxon-Stokes Co., supra.* A license involves the idea of permission on the one side—its acceptance on the other. A licensee is rightfully on the property but this right depends on the licensor's consent—consent that may be revoked at any time. He is doing what

without such consent would be unlawful. The consent carries with it no more than the right to use the property in the condition in which it is found. No greater obligation is implied. A mere consent means no more. *Meiers v. Fred Koch Brewery, supra.*

So far as the evidence discloses the defendant was under no obligation to permit the plaintiff to have ingress and egress to the building under construction, and it owed him no duty to maintain the building in a safe and suitable condition. It is not contended that there was any express invitation extended by the defendant to the plaintiff to visit the building, nor were there any circumstances shown in the nature of inducement from which such invitation by the defendant should be implied. The purchase of the material by the subcontractor was conditional. It was to be replaced if defective. The plaintiff visited the premises in the interest of his employer in an effort to meet the condition or to ascertain whether the condition thus imposed had been complied with. The inducement he had held out to Draddy to persuade him to use material of doubtful quality was opposed to and not in furtherance of the best interest of the contractor. In no sense was he present by virtue of any enticement, allurement or inducement held out to him by the defendant; nor was his mission of advantage to the defendant, and the plaintiff entered the premises after seeing the "Keep Out" and other signs. The defendant's passive acquiescence, if such be granted, gave plaintiff, as against this defendant, only the right of a licensee.

The owner or person in possession of property is ordinarily under no duty to make or keep property in a safe condition for the use of a licensee or to protect mere licensees from injury due to the condition of the property, or from damages incident to the ordinary uses to which the premises are subject. There is no duty to provide safeguards for licensees even though there are dangerous holes, pitfalls, obstructions or other conditions near to the part of the premises to which the permissive use extends. Neither is the owner or person in charge ordinarily under any duty to give licensees warning of concealed perils, although he might, by the exercise of reasonable care, have discovered the defect or danger which caused the injury. It follows that, as a general rule, the owner or person in charge of property, is not liable for injuries to licensees due to the condition of the property, or as it has been expressed, due to passive negligence or acts of omission. 45 C. J., 799, *et seq.*, sec. 203; *Brigman v. Construction Co.*, 192 N. C., 791, 49 A. L. R., 773; *Money v. Hotel Co.*, 174 N. C., 508; *Briscoe v. Lighting Co.*, 148 N. C., 396. The duty imposed is to refrain from doing the licensee willful injury and from wantonly and recklessly exposing him to danger. *Jones v. R. R.*, 199 N. C., 1, 153 S. E., 637; *Brigman v. Construction Co., supra; Adams v. Enka Corp.*, 202 N. C., 767, 164 S. E., 367; *Dunnevant v. R. R.*,

167 N. C., 232, 83 S. E., 347; *Briscoe v. Lighting Co., supra; Blackstone v. Chelmsford Foundry Co.,* 170 Mass., 321, 49 N. E., 635; *Hillman v. Boston Elev. Ry.,* 207 Mass., 478, 93 N. E., 653, 32 L. R. A. (N. S.), 198. The licensee who enters on premises by permission only goes there at his own risk and enjoys the license subject to its concomitant perils. 45 C. J., 798, sec. 203; *Cleveland C. C. & St. L. Ry. Co. v. Means,* 104 N. E., 785, and cases there cited.

Thus it has been held that a workman hired by the lessor of a building to close up windows with brick, who walks in to see the conditions without asking the permission of the tenant and is injured by falling into an open elevator shaft, is, as to the tenant, merely a licensee, if not a trespasser, and the tenant is not liable for the injury (*Forsythe v. Shryack-Thom Groc. Co.,* 283 Mo., 49, 223 S. W., 39, 10 A. L. R., 711); the owner and lessee of premises owe a mere licensee no duty to enclose an open hoistway or elevator well (*Marcovitz v. Hergenrether,* 302 Ill., 162, 134 N. E., 85); and the owner is not liable for injuries received by a licensee on his property due to unguarded or insufficiently guarded elevator shafts (*Casey v. Adams,* 234 Ill., 384, 84 N. E., 933). The *Bashman case, supra,* deals with an injury to an employee of a subcontractor and is of interest on the point under discussion.

Even if we concede that there is some evidence of negligence on the part of the defendant, it affirmatively appears that, from an observation of the warning signs, the obvious condition of the building at the time he entered, his long experience in the plastering business and in visiting buildings under construction, the plaintiff was fully aware of the fact that the building was under construction and not in a state of repair; that he entered the storage room at his own request and in furtherance of his own interest; and that he did so knowing that the room was dark and no artificial lighting was provided. He took his chance and lost. *Wilson v. Dowtin,* 215 N. C., 547, 2 S. E. (2d), 576, and cases cited.

The judgment below is

Affirmed.

JOHN H. BRITTAIN v. ATLANTIC & YADKIN RAILWAY COMPANY AND WESTERN UNION TELEGRAPH COMPANY, INC.

(Filed 8 June, 1940.)

1. Master and Servant § 27: Negligence § 19a—

Plaintiff was injured when the motorcar upon which he and other employees of defendant railroad company were being transported to work collided on the tracks with a motorcar of defendant telegraph company. *Held:* The motion of the defendant telegraph company for judgment as of

nonsuit should have been allowed, there being no evidence in the record upon which it might be held for negligence, but the evidence was properly submitted to the jury upon the issue of the negligence of defendant railroad company.

2. Torts § 8a—

Plaintiff attacked the releases set up by defendant employer on the ground that they were procured by fraud. *Held:* Previous releases signed by plaintiff for prior accidents, offered to show that plaintiff had knowledge of what the releases in controversy were, were properly excluded as irrelevant, and further, evidence of fraud in the procurement of the releases in controversy was properly submitted to the jury.

3. Trial § 31—

Exceptions to the charge on the ground that the court unduly dwelt upon the contentions of plaintiff are not sustained, it appearing from an examination of the entire charge that defendant was not prejudiced or discriminated against in the manner in which the contentions were stated.

4. Trial § 19—

The weight of the evidence is for the determination of the jury.

5. Trial § 24—

Where there is any evidence to support plaintiff's case, it must be submitted to the jury.

APPEAL by defendants from *Clement, J.*, at August Term, 1939, of GUILFORD. As to defendant Western Union Telegraph Company, Inc., reversed. As to defendant Atlantic & Yadkin Railway Company, no error.

This is an action to recover damages because of injuries alleged to have been sustained through the joint negligence of the defendants.

The plaintiff, an employee of the Atlantic & Yadkin Railway Company, and serving as a section laborer, complained that some time in July preceding the trial, and while in the performance of the duties imposed upon him by his employer, he was riding in defendant's motorcar, which was driven by one of its agents, and plaintiff's superior, at a rapid rate of speed along the railway near Summerfield, N. C., when suddenly and without any warning the motorcar of the defendant Western Union Telegraph Company, Inc., proceeding southwardly along the railway at a rapid rate of speed, collided head-on with the motorcar of its codefendant, which was carrying the plaintiff. The plaintiff alleges that in the emergency he was required to jump from the speeding motorcar to a place of safety and, in so doing, suffered serious and permanent injuries.

The negligence attributed to the defendant Atlantic & Yadkin Railway Company was (a) that it did not have its motorcar equipped with adequate brakes, in proper condition, and sufficient to stop the car in case of emergency; (b) that the car itself was old, worn out, with defec-

tive brakes, and other defective equipment, and could not be stopped in an emergency within a reasonable distance, which was known to defendant, or could have been known to it by the exercise of reasonable care and inspection; (c) that the company's motorman in charge of the car was operating the same at an unreasonable and improper rate of speed under the circumstances, and in a manner so as to endanger the life and limb of the passengers on the car, including plaintiff, and that said motorman knew, or could have known by the exercise of ordinary care, the defective condition of the brakes in the car; and that the motorman failed to keep a proper lookout; (d) that the defendant Atlantic & Yadkin Railway Company, the employer, failed to exercise reasonable care to provide the plaintiff a reasonably safe place in which to work and reasonably safe tools and appliances.

Of the defendant Western Union Telegraph Company, Inc., it is alleged, (e) that said defendant, through its motorman, acting within the scope of his employment, drove its motorcar along the railway of its codefendant in a careless and negligent manner and at such a speed as to endanger the life and limb of the plaintiff and others on the railway's motorcar; (f) that the defendant Western Union Telegraph Company, Inc., through its motorman in charge of said car, failed to give any timely warning of its approach and that after the oncoming car of the Atlantic & Yadkin Railway Company had been discovered, or could by the exercise of ordinary care have been discovered approaching and its position of peril known, that the defendant Western Union Telegraph Company, through its servant and agent, failed to exercise due care to avoid a collision, although it had a last clear chance to do so, and that the motorman, the servant and agent of the defendant, proceeded without applying any brakes to the car, or if they were applied they were inadequate to stop the car and prevent a collision; and that the car was old, defective, and out of date; (g) that the motorman failed to keep a proper lookout for traffic on the railway and negligently and recklessly drove his car head-on into the motorcar on which plaintiff was riding.

In all of these acts the plaintiff alleged that the defendants were concurrently negligent.

The defendants denied the material allegations of the complaint, and the defendant Atlantic & Yadkin Railway Company set up as a special defense a release alleged to have been obtained by the defendant from the plaintiff; and the Western Union Telegraph Company, Inc., claimed the benefit of this release because of the release of its joint tort-feasor and because of a subsequent release taken by the defendant Atlantic & Yadkin Railway in behalf of itself and the Telegraph Company.

The plaintiff replied to this further defense, alleging that the releases relied on by the defendants were procured through fraud and misrepre-

sentation, were wholly inadequate as a settlement for the injuries sustained by plaintiff, were without any adequate consideration, inoperative and void.

Plaintiff's evidence, summarized, is to the effect that he had been working for the Atlantic & Yadkin Railway Company about 37 years when he sustained the injury complained of. He was a section worker, engaged in such work as putting in crossties, pulling road joints, and putting in switches and broken rails, making a wage of $2.03 a day.

On the day of his injury he went to work at 7:30 o'clock. He went from the tool house to his work on a motorcar, which he described as something like a hand car with a gasoline motor in it. The passengers, or workers, sat on boards which ran each side the length of the car.

Captain Tilley, described as plaintiff's "boss," was driving the motorcar on the day plaintiff got hurt. Plaintiff and his colaborers were working about four miles from Summerfield. They got on the motorcar after it was loaded up and started down the hill toward Summerfield. Suddenly Tilley put on his brake and said: "Look out yonder, boys, yonder comes the other fellow; they are going to hit." Tilley jammed on the brakes but it did not have much effect and everybody got to jumping. Plaintiff states that the car ran about 200 yards and they hit together. Plaintiff lay down on the ground when it happened. Plaintiff further testified that the car was running about twenty miles an hour when Tilley said "Look out," and plaintiff saw the Western Union car coming. All tried to get off, including Captain Tilley. Captain Tilley said, "Boys, jump." The other motorcar was coming right around the curve, plaintiff didn't know exactly how far. Plaintiff said they had not seen the Western Union car approaching until Captain Tilley said, "Look out, boys, jump." The Western Union car, plaintiff testified, was going faster than the car he was on. The motorcar that hit the Western Union car kept "backing it up." Plaintiff states that he was unconscious.

Plaintiff's testimony tended to show that he was badly hurt. The transverse processes of the first lumbar vertebra were broken, there was a fracture of the fourth and fifth lumbar vertebrae. The posterior arches of the fourth and fifth lumbar vertebrae were broken on each side and the front of the fifth vertebra seemed slightly broken. There was trouble also with the sacroiliac, that is, the joint in the small of the back where the spine joins the pelvis. There was injury also to the left knee.

Other testimony corroborated the plaintiff as to the order to get off the car, and tended to show that at that time the cars were about thirty-five or forty feet apart.

With regard to the release, the plaintiff testified that he went to the office of the Atlantic & Yadkin Railway Company for the purpose of

obtaining a pass and to receive compensation for the time he was kept from work. He said that Mr. Brown, who had this matter in charge for the Railway Company, told him to come next day and he would let him have all the money he needed. He went back the next morning about ten o'clock and stayed there until Mr. Faulconer came with "them papers there fixed up 'by times,' $176.14." He stated that the draft and release which had been identified and which was for $176.14 he thought was for his time, that he was getting $2.03 a day when he was hurt, and they counted up how long he had been off. He thought when Mr. Faulconer gave him the $176.14 he was paying him for the time he had lost from work, that he knew he asked Mr. Faulconer for his time but did not remember Mr. Faulconer telling him he was giving him his time. That Mr. Faulconer had told him that it was for his time. He stated that he said to Mr. Faulconer: "Mr. Faulconer, how much is this? I cannot see it," and Mr. Faulconer said: "John, it is $176.14." While going down in the elevator a man standing in the elevator said: "John, what is that paper in your hand?" and he replied, "A paper." "Captain, how much is that?" And the man said: "$176.14," and plaintiff said, "Thank you." He stated that he did not know the man but that people call all colored folks "John."

The plaintiff testified that on previous occasions he had taken papers home with him; that he had always signed for previous accidents the same kind of instrument he signed then, but on those occasions someone had read them to him; that he did not know anything about the paying of the hospital bill, as they did not ask him. That Mr. Faulconer said to him: "Here is your time, $176.14," and that he went to Summerfield and got the money. That he got the $176.14 that Mr. Faulconer promised to give him for his time and took it and spent it.

As to the second release, the plaintiff testified that he went to the office to get a pass and that he signed the second release believing that it was an application for the pass; that he did not read the pass request. He denied that Mr. Brown read the paper to him. He stated that he did not have his glasses with him but had his sister's glasses, which were no good and that he could not see out of them enough to read, that he could read the paper and short words but long words like that he couldn't do anything with them; that none of the papers he signed were read over to him; that Mr. Faulconer did not tell him the paper he was signing was a release nor that he was making full settlement for all his injuries, nor did they give him any of the papers that he had signed to take home with him.

The defendants placed the releases in evidence and introduced testimony tending to contradict the plaintiff with respect to his allegations and testimony as to the fraud.

At the conclusion of the plaintiff's evidence and also at the conclusion of all the evidence the defendants separately made motions for judgment as of nonsuit, which were denied.

There was evidence to the effect that plaintiff left the office with the voucher-release and went to the bank, and that in order to get the money he had to sign again, twice, which he did.

There were four issues submitted to the jury; the first two were issues as to fraud covering the first and second releases above referred to, the third was as to the negligence of the defendants, and the fourth as to damages. All of the issues were answered in favor of the plaintiff, and upon the verdict thus rendered judgment was rendered against the defendants in the sum of $7,693.72, from which defendants appealed, assigning errors.

Frazier & Frazier and W. T. Whitsett for plaintiff, appellee.

Francis R. Stark and King & King for defendant Western Union Telegraph Company, Inc., appellant.

Hobgood & Ward and Harry Rockwell for defendant Atlantic & Yadkin Railway Company, appellant.

SEAWELL, J. We see no evidence in the record under which the defendant Western Union Telegraph Company, Inc., might be held for negligence, and the motion of this defendant for judgment as of nonsuit should have been allowed.

The defendant Atlantic & Yadkin Railway Company offered certain documents appearing to have been releases previously signed by plaintiff for other injuries, explaining that in offering them it was to show that the "plaintiff had had such papers as this before," which defendant claimed might have a bearing on the fact of his knowledge of what the papers or releases in controversy were. This evidence was excluded by the court as irrelevant, and in this we find no error.

As to this defendant, the evidence was sufficient to go to the jury in support of the contentions of the plaintiff, and its motion for judgment as of nonsuit was properly overruled.

The other exceptions relate to instructions to the jury. Most of them appear to have been taken on the principle that defendant was prejudiced by the extent to which the court dwelt upon the contentions of the plaintiff. An examination of the entire charge leaves us with the impression that the defendant was not discriminated against in such a manner as to create prejudice in the minds of the jury upon the pertinent issues. There was certainly not a sufficient discrimination as to relieve the defendant from the duty of calling to the court's attention such contentions as may have been inadvertently omitted. *Sorrells v.*

Decker, 212 N. C., 251, 193 S. E., 14; *S. v. Sinodis,* 189 N. C., 565, 127 S. E., 601. The defendant Atlantic & Yadkin Railway Company did call to the attention of the court its contentions as to the first release, which had been taken out of the office, and the court, thereupon, called the jury's attention to that. The objection here is that the court did not state to the jury the contention of the defendant as to the effect this might have on the charge of deception and fraud. But we see no reversible error in the manner in which it was presented to the jury.

It is not our function, and certainly not that of the trial judge, to pass upon the weight of the evidence. When there is any evidence to support plaintiff's case, it must be submitted to the jury. *Lumber Co. v. Power Co.,* 206 N. C., 515, 174 S. E., 427; *Newbern v. Leary,* 215 N. C., 134; *Fox v. Army Stores,* 215 N. C., 187. Try as he may, the trial judge in his instructions to the jury may not always be so fortunate as to maintain a strictly even balance in the statement of the contentions. In that respect, however, we find no substantial and reversible error in the present case.

On the appeal of the defendant Western Union Telegraph Company, Inc., the judgment below denying the motion for judgment as of nonsuit is

Reversed.

On the appeal of the defendant Atlantic & Yadkin Railway Company, we find

No error.

SAUTE MION, FATHER, AND TERESA MION, MOTHER OF ALFRED MION, EMPLOYEE, DECEASED, v. ATLANTIC MARBLE & TILE COMPANY, INC., EMPLOYER; UNITED STATES CASUALTY COMPANY, AND AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, CARRIER.

(Filed 8 June, 1940.)

1. Master and Servant § 40f—Injury sustained while employee was returning from project to office to check out held within course of employment.

The evidence tended to show that defendant's employees were required to check in at the office in the morning, were then transported to the job, and after completion of the day's work were transported back to the office where they received instructions as to the next day's work before checking out, their working time being computed from the time of checking in until the time of checking out, that on the date in question they were carried to the job in a truck, but that the president's car was sent to bring them back because of rain, that when the employee in question started to get in the car there were already six persons, including the driver, in the car, that the foreman said he could crowd in the car or

ride in with another employee who was driving his own car, and that the employee was fatally injured in an accident occurring after they had reached the city in which plaintiff's place of business was maintained and while they were on their way to defendant's office to check out. *Held:* The evidence is sufficient to support the finding of the Industrial Commission that death resulted from an accident arising out of and in the course of the employment, the general rule of nonliability for an accident occurring while an employee is being transported to or from work in a conveyance of a third person over which the employer has no control, not being applicable upon the evidence in this case.

2. Master and Servant § 45b—Evidence held to support finding that risk was covered by policy embracing liability under the North Carolina Compensation Act.

Defendant employer was engaged in business in both North and South Carolina, but its one office is situate in a city in North Carolina. The employee in question resided in that city and the contract of employment was executed in this State. On the day in question the employee, after reporting to defendant's office, was transported by the employer to a job in South Carolina, and was fatally injured in an accident occurring in North Carolina while he was returning to the employer's office to check out in the course of his employment. Defendant insurer wrote two policies, one covering work performed in North Carolina and the other work performed in South Carolina. The policies had different expiration dates and neither was renewed, the employer taking out a policy in another company covering its liability, but the accident occurred while the policy covering the operations in North Carolina was still in force. *Held:* The evidence supports the Commission's finding that defendant insurer is liable under the policy covering operations in North Carolina which provided for the payment of claims incident to or connected with the business operations of the employer conducted from its office in this State and for which it is liable under the North Carolina Compensation Act.

3. Master and Servant § 41a—Commission's finding of average weekly wage held not supported by the evidence.

The employee in question was employed practically continuously for thirty-three weeks prior to the injury resulting in death, but during that period his wages were twice increased. *Held:* In the absence of a finding supported by evidence that the average weekly wage for the entire period of employment would be unfair, compensation should have been based thereon, and the computation of the average weekly wage on the basis of the wage during the period after the last increase in pay is not supported by the evidence. Chapter 120, Public Laws of 1929, sec. 2 (e).

APPEAL by defendants Atlantic Marble & Tile Company, Inc., Employer, and United States Casualty Company, Carrier, from *Olive, Special Judge,* at 5 February, 1940, Extra Regular Term, of MECKLENBURG.

Proceeding under the North Carolina Workmen's Compensation Act, Public Laws 1929, chapter 120, as amended, for an award of compensation for death of Alfred Mion resulting from alleged injury by accident

arising out of and in the course of his employment by defendant Atlantic Marble & Tile Company, Inc.

The hearing Commissioner finds as facts pertinent to the appeal substantially these: (1) That the defendant Atlantic Marble & Tile Company is bound by the provisions of the North Carolina Workmen's Compensation Act, and has more than five employees, and that the average weekly wage of deceased, Alfred Mion, was $27.50; (2) that on 1 August, 1938, the defendant United States Casualty Company was the compensation insurance carrier for the Atlantic Marble & Tile Company in the State of North Carolina, and the defendant American Mutual Liability Insurance Company was such carrier in the State of South Carolina; (3) that on and for several months prior to 1 August, 1938, the deceased, Alfred Mion, a resident of the city of Charlotte, North Carolina, was employed by the Atlantic Marble & Tile Company in Charlotte under contract of employment for work to be performed in North Carolina, South Carolina, and any other state to which the employer might desire to send him, and, pursuant thereto, had been working in North Carolina and elsewhere; (4) that on the morning of 1 August, 1938, the defendant Atlantic Marble & Tile Company, having a contract to do some work on a residence in South Carolina, known as the Johnson Home, sent the deceased, Alfred Mion, in company with five or six other fellow employees, in the company's conveyance to the Curtis B. Johnson residence in South Carolina, where the deceased worked that day, that defendant Atlantic Marble & Tile Company sent its conveyance to bring the employees back to Charlotte at quitting time in the evening of said day, but on account of the conveyance "not being very large and . . . the employees would be somewhat cramped therein, the deceased, Alfred Mion, elected to ride back to Charlotte in the private car of a fellow employee, Albert Boldrini, and that after he had reached the city limits of Charlotte, the car, being driven at the time by Albert Boldrini, was wrecked and the deceased, Alfred Mion, received injuries resulting in his death"; (5) that the employment of deceased for the day did not terminate until he had reached the office of the Atlantic Marble & Tile Company in Charlotte; that he had not reached said office but was on his way thereto when he received the injury resulting in his death; and that such injury arose out of and in the course of his employment.

The hearing Commissioner states that he thinks the findings of fact thus far are not controverted, but that the main controversy seems to be between the American Mutual Liability Insurance Company and the United States Casualty Company as to which of them shall be required to pay for the death of the deceased. With regard thereto, the hearing Commissioner makes these further findings of fact: (6) That the American Mutual Liability Insurance Company was the insurance carrier for

the Atlantic Marble & Tile Company in South Carolina, and on the job where the deceased worked during the day of 1 August, 1938, and that the United States Casualty Company did not receive any premium on any insurance on the Johnson job in South Carolina; (7) that the United States Casualty Company was the compensation insurance carrier for the Atlantic Marble & Tile Company in North Carolina on 1 August, 1938, and that the American Mutual Liability Insurance Company did not receive any premium for any insurance of the Atlantic Marble & Tile Company in North Carolina on said date.

Thereupon, regarding the question as to whether the Industrial Commission of South Carolina or that of North Carolina has jurisdiction, the hearing Commissioner finds "as a fact and concludes as a matter of law under the facts in this case that the North Carolina Industrial Commission has jurisdiction."

From an award in accordance with these facts and conclusions of law, the defendants Atlantic Marble & Tile Company and the United States Casualty Company petitioned for review by the Full Commission on the ground: "(1) That the decision and award of the North Carolina Industrial Commission in this cause, dated April 24, 1939, and each and every finding of fact therein set forth, is unsupported by any competent evidence and is contrary to the weight of the whole evidence; (2) that the aforesaid award and each conclusion of law therein set forth is unsupported by any valid finding of fact based upon any competent evidence; and (3) that the aforesaid decision and award is erroneous in fact and in law."

After hearing on review the Full Commission, concurring in the opinion that North Carolina has jurisdiction and that the United States Casualty Company is the carrier, affirmed the finding of fact, conclusions of law and award of the hearing Commissioner.

In due time the defendants Atlantic Marble & Tile Company and United States Casualty Company excepted to the award of the North Carolina Industrial Commission, and appealed to the Superior Court of Mecklenburg County, North Carolina, specifying particular exceptions, upon hearing of which the judge presiding signed judgment affirming the award of the Full Commission. Said defendants appeal therefrom to the Supreme Court, and assign error.

Gover & Covington and Hugh L. Lobdell for plaintiffs, appellees.

Guthrie, Pierce & Blakeney for employer, appellant.

Helms & Mullis for United States Casualty Company, defendant, appellant.

J. Laurence Jones and James L. DeLaney for defendant American Mutual Liability Insurance Company, appellee.

WINBORNE, J. Upon the evidence appearing in the record on this appeal, the findings of fact upon which the award of the Industrial Commission as affirmed by judgment of the Superior Court is based, appears to be supported by the evidence except with respect to the average weekly wage. We consider the questions in order:

1. Is there sufficient evidence to support the finding of fact that the injury to Alfred Mion, admittedly by accident and resulting in his death, arose out of and in the course of his employment by the Atlantic Marble & Tile Company within the meaning of the North Carolina Workmen's Compensation Act? Public Laws 1929, chapter 120, as amended. We are of opinion and hold that there is.

As of the date of the happening of the accident, 1 August, 1938, the evidence tends to show, among others, these pertinent facts: The Atlantic Marble & Tile Company, whose only office was in Charlotte, North Carolina, had a contract to do tile work in the Curtis Johnson residence in the State of South Carolina, about fifteen miles from Charlotte. It had six men at work there, Albert Calvinson, foreman, Alfred Mion and four others. These employees on the morning of that day were transported by the company from its office in Charlotte—the foreman and two others in a truck, and Mion and another in the president's sedan, but Albert Boldrini went in his own Ford. At the close of work for the day on the job, the company was supposed to furnish transportation from the job to the office. For that purpose the foreman told the driver of the truck to be at the place of the job around 4:30 p.m., but as it was raining he came in the president's sedan. When Alfred Mion came to the car to begin the return trip to Charlotte, six, including the driver, were already in same. There was not any room for him unless he sat in the lap of one of the others. However, the foreman testified that when Mion came up "I said, Come on if you want to sit in somebody's lap, if you want to ride here but if you want to ride with Boldrini. I suggested that he ride with Boldrini." Thereupon, Mion rode with Boldrini in his car. The wreck occurred in North Carolina on the way to and before reaching the office of the company, and Mion was killed.

The evidence further tends to show that it was customary for Mion and other employees to report to and check in at the office in the morning, and to return there at the close of the day to get instructions as to where he or they should work the next day, and then to check out. They were paid wages for the time intervening. Mion was in the act of returning to the office to get instructions for the next day and to check out when he was killed.

In the light of this evidence this case does not come within the rule that ordinarily injury by accident, while the employee is going to or returning from his work in a conveyance of a third person over which

the employer has no control, does not arise out of or in the course of his employment. See *Smith v. Gastonia,* 216 N. C., 517, 5 S. E. (2d), 540, and cases cited. But, rather, the evidence tends to show that at the time of the accident Mion was actually in the course of his employment, performing a part of his duty thereunder and for which he was being paid the same as when actually laying tile. Also, from the suggestion of the foreman it may be inferred that the employer thereby undertook to perform its obligation to transport Mion to the office in Boldrini's car. The cases of *Hunt v. State,* 201 N. C., 707, 161 S. E., 203, and *Martin v. State Highway Board* (Ga.), 189 S. E., 614, relied upon by appellants are distinguishable from the present case.

2. Is there evidence sufficient to support the findings of fact and award as against the United States Casualty Company? We are of opinion and hold that there is.

There is evidence tending to show that: Prior to 5 June, 1938, Atlantic Marble & Tile Company carried workmen's compensation insurance in the United States Casualty Company covering its liability in each of the States of South Carolina and North Carolina—the policy for South Carolina expiring on 5 June, 1938, and that for North Carolina on 5 September, 1938. As these policies expired neither was renewed. But, in lieu thereof, the Atlantic Marble & Tile Company first took out a policy, dated 5 June, 1938, in the American Mutual Liability Insurance Company to cover its workmen's compensation liability in the State of South Carolina effective on that date, and then by rider attached to the said policy for South Carolina, extended the coverage so as to include its workmen's compensation liability in the State of North Carolina—effective 5 September, 1938. There is conflict of evidence as to whether this rider stated the effective date to be 5 June, 1938, or 5 September, 1938. The Commission makes no specific finding on the question. However, regarding what it terms "the main controversy . . . as to which of the two insurance companies shall be required to pay for the death of the deceased," by finding that the United States Casualty Company was the compensation insurance carrier in North Carolina on 1 August, 1938, the Commission finds inferentially that this rider was not a part of the American Mutual Liability Insurance Company policy on that date.

By the terms of the policy in question issued by the United States Casualty Company, a standard workmen's compensation and employer's liability policy, that company in effect agreed with the Atlantic Marble & Tile Company, as respects personal injuries sustained by employees, including death at any time resulting therefrom, to pay to any person entitled thereto under the North Carolina Workmen's Compensation Act, as amended, and in the manner therein provided, "the entire amount of

any sum due, and all installments thereof as they become due." It is provided in the policy that: "This agreement shall apply to such injuries so sustained by reason of the business operations described in said declarations which, for the purpose of this insurance, shall include all operations necessary, incident or appurtenant thereto, or connected therewith, whether such operations are conducted at the work places defined and described in said declarations or elsewhere in connection with, or in relation to, such work places." The business operations are described in the declaration in this manner: "Item 3. Locations of all factories, shops, yards, buildings, premises or other work places of this Employer, by Town or City, with Street and Number: Charlotte, North Carolina, and Elsewhere in North Carolina. All business operations, including the operative management and superintendence thereof, conducted at or from the locations and premises defined above as declared in each instance by a disclosure of estimated remuneration of employees under such of the following Divisions as are undertaken by this Employer: 1.—All industrial operations upon the premises. 2.—All office forces. 3.—All repairs or alterations to premises. 4.—Operations not on the premises."

Pertinent evidence is sufficient to bring the instant case within these terms of the policy. It tends to show that the office of the employer was in Charlotte, North Carolina; that it was customary for employees to check in at the office at the time of beginning work for the day, and to return to the office at the close of the day to receive instructions for the next day, and then to check out—the employees being paid wages for the time intervening—and that, though he had laid tile in South Carolina during the day, Alfred Mion, at the time of the accident in which he received injury resulting in his death, was in North Carolina and on the way to the office to check out. A reasonable inference from this evidence is that at the time of the accident Alfred Mion was in the performance of a duty incident to or connected with the business operations of the company conducted from the office in "Charlotte, North Carolina, and elsewhere in North Carolina."

But the United States Casualty Company contends that the evidence shows that the returning to the office in Charlotte was incident to the operations in South Carolina and covered by the standard policy issued by the American Mutual Liability Insurance Company. While that may be true, and the Industrial Commission might have so found the facts, yet the Commission, upon evidence reasonably susceptible of the inference, has in effect found otherwise. Hence, it is unnecessary to consider other contentions of the Casualty Company.

3. The exception of appellants to the finding of fact that the average weekly wage of Alfred Mion was $27.50, as well as to the conclusion of

law and award based thereon, is well taken. The evidence fails to support it. The North Carolina Workmen's Compensation Act, ch. 120, Public Laws 1929, sec. 2 (e), in defining "Average weekly wages" within the meaning of the act, provides that: "Where the employment prior to the injury extended over a period of less than fifty-two weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided results fair and just to both parties will be thereby obtained. . . . But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing the average weekly wage may be resorted to as will most nearly approximate the amount the injured employee would be earning were it not for the injury."

The evidence shows that Alfred Mion, who came to North Carolina from Pennsylvania, where he was unemployed, entered the employment of Atlantic Marble & Tile Company in the early part of December, 1937, and continued in such employment regularly, except for two or three days at a time, until the date of his death; that he was paid wages at the rate of forty cents per hour during the first two weeks, of fifty cents per hour during the next twenty-four weeks, and of sixty cents per hour during the next seven weeks—those immediately preceding his death; that the wages paid to him during that period averaged approximately $23.00—in fact, witness for claimant states it to be that amount; and that the wages, calculated on the basis of the average wage per hour for the last seven weeks, is $27.50. There is no finding that under the method provided as stated above for ascertaining the average weekly wage, the results here would be unfair to both parties, nor is there evidence tending to show such state of facts.

The factual situation here is distinguishable from *Munford v. Construction Co.*, 203 N. C., 247, 165 S. E., 696.

The case is remanded for correction of error indicated.

Error and remanded.

ALDRIDGE MOTORS, INC., v. S. P. ALEXANDER, TRADING AND DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF ALEXANDER MOTOR COMPANY.

(Filed 8 June, 1940.)

1. Pleadings § 19—

Defendant may demur *ore tenus* at any time on the ground that the complaint fails to state a cause of action.

2. Automobiles § 6—

In the sale of a car by one automobile dealer to another automobile dealer for resale to the ultimate purchaser, there is an implied warranty that the car is merchantable and salable and reasonably fit for the use for which it was sold, and this implied warranty between the dealers is not affected by the fact that the contract between the dealers is approved by the manufacturer.

3. Same: Pleadings § 29—Motion to strike held properly denied, the allegations being germane to plaintiff's cause of action.

This action was instituted by one automobile dealer to recover on an implied warranty that the car purchased by it from another automobile dealer was merchantable and salable and reasonably fit for the purpose for which it was sold. *Held:* Allegations in the complaint to the effect that plaintiff had sold the car to an ultimate purchaser who complained of defects in the electrical system and the later destruction of the car by fire as a result of such defects, and that the ultimate purchaser had recovered judgment against plaintiff dealer on an implied warranty, are germane to the action and defendant dealer's motion to strike such allegations from the complaint was properly denied, but the verdict of the jury in the prior action was properly stricken from the complaint upon motion, since what the jury did in the other case would be harmful and prejudicial.

4. Automobiles § 6: Sales § 18—

In an action between dealers upon an implied warranty, the defense that plaintiff dealer had knowledge of the defect resulting in the destruction of the car in the hands of the ultimate purchaser for some time prior to its destruction, and did not notify defendant dealer until after the ultimate purchaser had filed suit for damages, and that therefore plaintiff was estopped to maintain an action, cannot be taken by demurrer but must be raised by answer.

APPEAL by defendant from *Harris, J.*, at January Term, 1940, of DURHAM. Affirmed.

This is an action brought by plaintiff against the defendant to recover from defendant damages on an implied contract in the sale of a 1938 model Ford Tudor DeLuxe Sedan, on the ground that the said automobile was so defective in electrical materials and workmanship that it ignited on the night of 22 February, 1938, and burned up, due to the defect in its electrical materials and workmanship and that the said automobile had proven to be utterly unfit for the use for which it was sold and purchased.

The statement of facts as set forth in the complaint by plaintiff, are substantially as follows: Aldridge Motors, Inc., the plaintiff in this action, was engaged in the business of buying and selling automobiles during the year 1937. On 12 May, 1937, and prior thereto, the defendant S. P. Alexander, trading as Alexander Motor Company, was the local Ford dealer and on said date the plaintiff and the defendant entered into a contract whereby Alexander Motor Company agreed to sell to

Aldridge Motors, Inc., Ford passenger cars, trucks and parts for resale to the retail trade. This agreement was approved by Ford Motor Company. Under the terms of this agreement the plaintiff was required to keep a record of the sale of Ford motor vehicles sold by it and to report all sales made by it to the defendant and to coöperate with the policies of the company in furthering the interests of owners of Ford automobiles.

On 24 December, 1937, the plaintiff purchased from the defendant a 1938 model Ford Tudor DeLuxe Sedan and immediately sold said automobile to Lokie G. Martin for $875.54 and directed the defendant to deliver said car direct to Mr. Martin. The defendant complied with said instructions and delivered the said car to Mr. Martin on 24 December, 1937. The automobile in question was sold to the plaintiff by the defendant with an implied warranty that it was free from defects in workmanship and materials and that it was reasonably fit for the use for which it was sold and purchased.

That within a week from the time the automobile was delivered to Mr. Martin by the defendant, Mr. Martin made complaint to the plaintiff that the electrical materials and workmanship in said automobile were so defective that the battery in said car became discharged and that the starter would not operate. That the electrical materials and workmanship in said car were so defective that from 24 December, 1937, to 22 February, 1938, Mr. Martin put eight fully charged batteries in said automobile even though said car had been driven less than 2,000 miles during said time.

That on the night of 22 February, 1938, the said automobile ignited and burned up due, as alleged in the complaint, to the defect in its electrical materials and workmanship. It is alleged in the complaint that the car was utterly unfit for the use for which it was sold by the defendant and was a total loss other than a salvage value of $50.00. That subsequent to 22 February, 1938, Mr. Martin made demand on the plaintiff for $875.54, the full purchase price of said automobile. The plaintiff refused to pay Mr. Martin the purchase price of said car and notified the defendant of the claim and demand made by Mr. Martin. That on 27 June, 1938, Lokie G. Martin instituted suit in the Superior Court of Durham County against Aldridge Motors, Inc., the plaintiff in the present action, for $875.54, and for $193.10 for the loss of his garage. Aldridge Motors, Inc., notified Alexander Motor Company that said action had been instituted. Aldridge Motors, Inc., employed counsel and defended the suit. The case was tried during the March Term, 1939, of the Superior Court of Durham County, and in said action issues were submitted to and answered by the jury as follows:

"1. Was the Ford DeLuxe Sedan automobile sold by the defendant

Aldridge Motor Company to the plaintiff, as alleged in the complaint, defective in material or workmanship at the time of its delivery to the plaintiff so that it was not reasonably fit for the use for which it was intended, and in breach of the implied warranty? Ans.: 'Yes.'

"2. If so, was the defective material or workmanship the cause of the destruction of the automobile, as alleged in the complaint? Ans.: 'Yes.'

"3. In what sum, if any, is the plaintiff entitled to recover of the defendant? Ans.: '$775.54.' "

That on the issues as answered by the jury a judgment for $775.54 and costs was rendered against Aldridge Motors, Inc. Aldridge Motors, Inc., paid the full amount of the said judgment and costs in the sum of $32.70, on 1 April, 1939. Whereupon the plaintiff in this present action made demand on the defendant in this action for the amount of the judgment and costs, less the sum of $50.00—the actual salvage value of the automobile. Alexander Motor Company refused to pay said amounts to the plaintiff and thereupon this action was instituted.

The defendant did not demur to the complaint in the court below, but filed a motion to strike all of the allegations contained in paragraphs 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19 of the plaintiff's complaint. The motion was duly heard and denied except as to a part of paragraph 16 of the complaint. From the order entered denying the motion the defendant appealed to the Supreme Court.

W. H. Hofler and Marshall T. Spears for plaintiff.
Hedrick & Hall for defendant.

CLARKSON, J. The defendant in the court below made a motion to strike out all the allegations in the complaint, as follows: Paragraphs 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19. The court below refused the motion of defendant to strike out the above paragraphs of the complaint with the exception of the following: "The court is of the opinion that the issues as set out in paragraph 16 of the complaint should be stricken from said paragraph." We think the court below correct in its decision.

The defendant in his brief and in this Court demurred *ore tenus* to the complaint.

In addition to the question on the motion to strike, there is the further question for our decision: Does the complaint state facts sufficient to constitute a cause of action? We think so. The authorities dealing with the sufficiency of the complaint also dispose of the question raised on the motion to strike.

In *Snipes v. Monds,* 190 N. C., 190 (191), it is held: "Even after answering in the trial court, or in this Court, a defendant may demur *ore tenus,* or the court may raise the question *ex mero motu* that the complaint does not state a cause of action. *Garrison v. Williams,* 150 N. C., 675." *Seawell v. Cole,* 194 N. C., 546 (547); *Key v. Chair Co.,* 199 N. C., 794 (796). The defendant was within his right when he demurred *ore tenus.*

Plaintiff and defendant were dealers—the plaintiff purchased its cars for resale. The plaintiff was required to make a report of all sales to the defendant. Black's Law Dictionary defines a dealer, as follows: "A dealer, in the popular, and therefore in the statutory, sense of the word, is not one who buys to keep, or makes to sell, but one who buys to sell again."

In *Swift & Co. v. Aydlett,* 192 N. C., 330 (334-5), it is held: "The doctrine of implied warranty in the sale of personal property is too well established in this jurisdiction now to be drawn in question. It should be extended rather than restricted. *Poovey v. Sugar Co.,* 191 N. C., 722; *Swift v. Etheridge, supra* (190 N. C., 162). The harshness of the common law rule of *caveat emptor,* when strictly applied, makes it inconsistent with the principles upon which modern trade and commerce are conducted; the doctrine of implied warranty is more in accord with the principle that 'honesty is the best policy,' and that both vendor and vendee, by fair exchange of values, profit by a sale. In *Grocery Co. v. Vernoy,* 167 N. C., 427, the late *Justice Brown* says: 'It is well settled by repeated decisions that on a sale of goods by name, there is a condition implied that they shall be merchantable and salable under that name; and it is of no consequence whether the seller is the manufacturer or not, or whether the defect is hidden or might possibly be discovered by inspection.' "

The case of *Williams v. Chevrolet Co.,* 209 N. C., 29, was an action to recover for defective materials and workmanship in an automobile sold to the plaintiff by Dixie Chevrolet Company, Inc. The first issue in this case was as follows: "Was the Chevrolet automobile, sold by Dixie Chevrolet Company, Inc., to the plaintiff, defective in material or workmanship at the time of its delivery to the plaintiff, so that it was not reasonably fit for the use for which it was intended?" In the opinion in this case, it is said: "The full significance and import of the first issue seems to have been overlooked on all hands. If the automobile purchased by the plaintiff were so defective 'that it was not reasonably fit for the use for which it was intended,' then the plaintiff would be entitled to recover of the seller for want of consideration. *Swift & Co. v. Aydlett,* 192 N. C., 330, 135 S. E., 141; *Register Co. v. Bradshaw,* 174 N. C., 414, 93 S. E., 898; *DeWitt v. Berry,* 134 U. S., 306; 6 R. C.

L., 684, *et seq.* Similarly, the seller would be entitled to recover over against the dealer or manufacturer, irrespective of the terms of the contract of warranty. *Ashford v. Shrader,* 167 N. C., 45, 83 S. E., 29. It is believed that a covenant, however expressed, must be regarded as *nude pact,* and not binding in law, if founded solely upon considerations which the law holds altogether insufficient to create a legal obligation. *Hatchell v. Odom,* 19 N. C., 302. 'If it (the article sold) be of no value to either party, it, of course, cannot be the basis of a sale'—*Ashe, J.,* in *Johnston v. Smith,* 86 N. C., 498. The refusal to warrant against worthlessness would fall with the balance of the supposed contract for want of consideration. *Furniture Co. v. Mfg. Co.,* 169 N. C., 41, 85 S. E. (*Hearse case*)." *Medicine Co. v. Davenport,* 163 N. C., 294; *Grocery Co. v. Vernoy,* 167 N. C., 427; *Furniture Co. v. Mfg. Co.,* 169 N. C., 41; *Swift & Co. v. Etheridge,* 190 N. C., 162; *Gorby v. Bridgeman* (1919), 183 W. Va., 727, 92 S. E., 88; *Olson v. Sullivan* (1925), 109 Okla., 297, 234 Pac., 634; *Little v. G. E. CanSyckle & Co.,* 115 Mich., 480, 73 N. W., 554; Williston on Contracts (Revised Edition, 1937), Vol. 5, sec. 1355, p. 3801.

The underlying principle on which appellee relies in this case is well settled in Williston on Contracts, *supra,* p. 3800, *et seq.:* "As has been seen damages are recoverable for such consequences of a breach as would follow in the usual course of events. It becomes necessary to inquire when consequential damages fall in this category. . . . For example, defects in goods sold will not justify the recovery of consequential damages other than those which might be expected to flow from the defects. Where goods are sold with a warranty to a dealer it must be assumed that the dealer may resell them with a similar warranty to a subpurchaser. Accordingly, if this is done, and the subpurchaser recovers damages from the original buyer, the latter has a *prima facie* right to recover these damages against the seller who originally sold him the goods." Williston on Contracts, *supra,* sec. 1394, p. 3893.

The principal argument in defendant's brief on the question of its demurrer *ore tenus* to the complaint seems to be bottomed on the premise that in the sale of personal property by one dealer to another dealer the law does not raise an implied warranty. While it is true the complaint alleges that the agreement by and between the plaintiff and defendant for the sale of cars by the defendant to the plaintiff was made with the consent and approval of Ford Motor Company; nevertheless, the mere approval of the contract by Ford Motor Company in nowise changes the legal obligations that the law imposes on every vendor and vendee, even though each one be called a dealer. As between dealers there is an implied warranty that the personal property sold is merchantable and salable and reasonably fit for the use for which the property was sold.

Ashford v. Shrader, 167 N. C., 45; *Grocery Co. v. Vernoy,* 167 N. C., 427.

The defendant also contends: "That he was simply notified that a claim had been asserted against Aldridge Motors, Inc., and that a suit had been instituted against Aldridge Motors, Inc., to collect the claim," and argues that plaintiff should be estopped to maintain this action. We think this contention cannot be sustained—this must be raised by answer, and cannot be raised on a demurrer *ore tenus* or a motion to strike. Estoppel such as the defendant tries to raise is a defense which can only be considered when set out in its answer. It would be an affirmative defense and the burden of proof would rest on the defendant.

In *Laughinghouse v. Ins. Co.,* 200 N. C., 434 (436), it is written: "It is insisted that estoppel or waiver must be pleaded and as a rule this is true. *Mfg. Co. v. Assurance Co.,* 110 N. C., 176; *Clegg v. R. R.,* 135 N. C., 148, 154; *Modlin v. Ins. Co.,* 151 N. C., 35; *Shuford v. Ins. Co.,* 167 N. C., 547."

Construing the complaint liberally, we think it sufficiently states a cause of action. Whatever may be the decisions in other states, the cases before set forth is the settled law of this jurisdiction and the majority rule.

We think the court below correct in striking out the issues as set forth in paragraph 16 of the complaint. What the jury did in the other case would be harmful and prejudicial in the trial of this case. In the present state of the record, we think the judgment of the court below must be

Affirmed.

ARETICE COLE v. JOHNSON MOTOR COMPANY.

(Filed 8 June, 1940.)

1. Automobiles § 24b—

As a general rule, where the driver of a vehicle asks third persons to ride therein contrary to the express instructions of the owner employer, and the driver has no apparent authority to ask them to ride, such persons are trespassers as to the owner and he may be held liable by them only for injury inflicted as a result of the wanton or willful act of the driver.

2. Same—Whether salesman acted beyond scope of his authority in asking plaintiff to ride in demonstration car held for jury.

Defendant is an automobile dealer. Its salesman, while going to see a prospective purchaser connected with a university, asked several students and a teacher to ride in the car from one part of the campus to the other where he was going to contact the prospect. Shortly after picking up plaintiff and the others, the car collided with another as the result of

negligence of defendant's salesman. It was in evidence that the salesman had been instructed not to pick up hitchhikers and there was also evidence that the salesman, in the course of his duties, was expected to promote good will by contacting prospective purchasers, acquiring information as to prospects and advertising the car by proper exhibition and demonstration. *Held:* Whether under the circumstances, in picking up plaintiff as a passenger, the salesman was acting within the ostensible scope of his authority and whether he had so violated his instructions as to constitute his acts a deviation from the course of his employment, is for the determination of a jury, and the failure of the court to submit the question to the jury *is held* for error.

STACY, C. J., dissents.

APPEAL by defendant from *Harris, J.*, at January Term, 1940, of DURHAM. New trial.

R. M. Gantt for defendant, appellant.

E. C. Bryson and Marshall T. Spears for plaintiff, appellee.

SEAWELL, J. This action was brought by the plaintiff to recover damages for an injury sustained by her through the alleged negligence of the defendant.

Briefly, the evidence tended to show that Billy Lipscomb, an agent of the defendant for the sale of its automobiles, to whom had been entrusted a demonstration car for the purpose of effecting such sales, was en route to contact a prospective purchaser who lived on or near the West Campus of Duke University—a doctor in Duke Hospital. When passing the East Campus, near the underpass of the public highway leading to his destination, he saw several young women standing at the curb. He stopped the car, opened the door, and several of them, including the plaintiff, entered the car. Near the West Campus, while rounding a sharp turn of the road and driving on the left-hand side, his car collided with an automobile driven by C. L. Hair, and plaintiff received injuries alleged to be serious.

There was sufficient evidence of negligence on the part of Lipscomb to be submitted to the jury, and it is not questioned that Lipscomb was at the time of the collision in the employment of the defendant and about his employer's business.

It is contended by the defendant, however, and evidence to that effect was introduced, that defendant had instructed Lipscomb not to pick up any hitch-hikers or to use the car in any way except for business purposes—not for social purposes. It is contended that in picking up and transporting the plaintiff and her companions Lipscomb deviated from these instructions and departed from the orbit of his employment, and in doing so was not, in this respect, about any business of his employer.

There was considerable evidence as to the scope of permitted activities on the part of the employee in creating good will for the company and in contacting prospective purchasers, and it is contended by the plaintiff that his conduct on this occasion was within the general purposes which might be included in the creation of such good will, in contacting prospects, and obtaining information where they might be found; and was, therefore, to be considered in the prosecution of his employer's business.

The defendant moved for judgment as of nonsuit, which was denied.

The defendant asked that the following issues be submitted to the jury:

"1. Was Billy Lipscomb an employee of the defendant on July 13, 1937, as alleged in the complaint?

"2. If so, was the said Billy Lipscomb at the time of the collision acting in the scope of his employment and about his employer's business, as alleged in the complaint?

"3. If so, was said Billy Lipscomb in inviting plaintiff to ride in said automobile and in riding her in said automobile at said time, and in so doing, acting in the course of his employment, in the scope of his authority and about his master's business, as alleged in the complaint?

"4. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint?

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

The judge declined to submit the third of these issues, and defendant excepted.

The following issues were submitted to the jury, and answered as indicated:

"1. Was Billy Lipscomb an employee of the defendant on 13 July, 1937, as alleged in the complaint? Answer: 'Yes.'

"2. If so, was the said Billy Lipscomb at the time of the collision acting in the scope of his employment and about his employer's business, as alleged in the complaint? Answer: 'Yes.'

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

"4. What amount of damages, if any, is the plaintiff entitled to recover of the defendant? Answer: '$2,000.'"

The court instructed the jury as follows on the second issue:

"I instruct you, gentlemen of the jury, that if the plaintiff has satisfied you from the evidence and by its greater weight that the defendant owned and operated an automobile sales agency in the city of Durham and that in the conduct and operation of said business it employed salesmen for the purpose of demonstrating and selling automobiles and that on 13 July, 1937, Billy Lipscomb was an employee of the defendant and engaged in selling and demonstrating automobiles for the defendant,

and that on July 13, 1937, at about 1:30 or 2:00 o'clock p.m., the said Billy Lipscomb was driving a Buick automobile owned by the defendant from the city of Durham to Duke Hospital for the purpose of making a business call for the defendant on a member of the staff of that institution and that while en route to said hospital on business for the defendant the said Billy Lipscomb drove said automobile through the east campus of Duke University and stopped the automobile momentarily and invited the plaintiff and three other girls to ride with him to the west campus, and that the plaintiff and three other girls got in the automobile and that the said Billy Lipscomb then proceeded immediately on his way to Duke Hospital and while he was en route to said hospital for the purpose aforesaid, and after going only a short distance the automobile driven by the said Lipscomb collided with an automobile driven by Col. C. L. Hair, then, I instruct you that it would be your duty to answer the second issue 'Yes.' "

The principal complaint of the defendant is that it should have been left to the jury, under the third issue proposed by it, whether, in inviting the plaintiff to ride in the demonstration automobile and in transporting her, Lipscomb was acting in the scope of his employment, within his authority, and about his master's business. It is contended by the defendant that there are fact elements in this situation which take away from the court the power to settle the question as a matter of law, and it is suggested that both the limited authority contained in the instructions of the defendant to its employee and the relation of the young women who were picked up and transported to procuring another prospect of sale, or other connection with the authorized activities of the driver, constituted such facts for jury investigation.

Conceding that instructions such as appear in the testimony were given to Lipscomb, the employee, it is questionable whether what he actually did, notwithstanding violation of these specific instructions, was such a deviation from his employment as would put him entirely without the purpose and confines of such employment, and relieve the employer from the consequences of his negligence.

While little analogy can be gotten from cases bearing upon apparent scope of authority in contract dealing, there are comparable principles which should apply to the dealings and the contact which employers have with the public where no contractual duties exist. It certainly cannot be held as consistent with commendable public policy that privately given instructions and limitations of authority may, in all instances, relieve the employer from liability when injury has resulted from the employee's negligence, when not in strict obedience to these instructions. It is not in all cases possible for the court to fix the limits within which such instructions may reasonably affect the employer's

liability, to determine how substantial must be the disobedience to relieve the employer or to negative such liability.

It is, of course, true that if Lipscomb had not given the young women a ride in his employer's car the injury to the plaintiff would not have resulted. Under the circumstances, had she been a pedestrian run down by Lipscomb, or an occupant of the other car, and had been thus injured, through Lipscomb's negligence, recovery would have been in order. It becomes, therefore, a question of the status of plaintiff in defendant's car at the time of the negligent injury.

As a general thing, nothing else appearing, one who is riding in an automobile at the invitation of the driver in charge of the vehicle, extended contrary to the expressed instructions of the employer, and without actual or ostensible authority on the part of the driver, is a trespasser; and can recover only for injury sustained through the wanton or willful act of the employee. Under such circumstances the employer is not liable on the doctrine *respondeat superior* for want of ordinary care on the part of the employee. *Morris v. Dame's Executor,* 171 S. E., 662, 161 Va., 545; *Liggett & Myers Tobacco Co. v. DeParcq,* 66 Fed. (2d), 678; *Albers v. Shell Company of California,* 286 P., 752, 104 Calif. App., 733; *Murphy v. Barry,* 163 N. E., 159, 264 Mass., 557; *Psolta v. Long Island Railroad Co.,* 159 N. E., 180, 246 N. Y., 383, 62 A. L. R., 1163. It is generally denied that there is any implied authority of the employee to invite or permit a third person to ride on a vehicle in his charge. *Wigginton Studio v. Reuter's Admr.,* 71 S. W. (2d), 14, 16, 254 Ky., 128. These considerations, however, do not foreclose recovery in cases where the invitation may be considered within the ostensible scope of authority, where the deviation from actual authority may be slight or where the invitation and transportation may have some reasonable relation to the furtherance of the employer's business. *Garriepy v. Ballow & Nagle,* 157 A., 535, 114 Conn., 46. Such a reasonable relation in proper cases might be inferred from the nature of the business in which the master is engaged, and the servant has the duty of prosecuting or promoting.

In the case at bar the employee was an automobile salesman, and inferences may be made from the evidence that he was expected to promote the good will of the business by contacting prospective purchasers, acquiring information as to persons to whom cars might be sold, and advertising the car which it was his purpose to sell by proper exhibition and demonstration. The young women who were invited to enter the car, and did enter the car, were students of the University, including a teacher, who were passing from the East Campus to the West Campus, where it was the purpose of the salesman to interest a doctor in Duke Hospital in the purchase of a car.

It is worth while to note that Lipscomb in his deposition testified: "My employers had never told me or intimated to me that I should not pick up people and give them rides at this place; it was customary for almost all passing cars to stop and offer rides if room was available." This was interpreted by the defendant to mean that the employer in his instruction to pick up no hitch-hikers had not mentioned this specific place and, therefore, the testimony was not significant as varying the instruction.

The defendant contends that the facts disclosed in the evidence are sufficient to justify the court in saying, as a matter of law, that the driver had violated his instructions, deviated from his employment, and that the employer, therefore, was not liable for ordinary negligence, and that the case should not have been submitted to the jury; or that, if this is not the case, he should have had the benefit of a jury finding upon the evidence relating to the instructions given the employee and the liability of the master arising out of the facts in the testimony relating to the alleged deviation from the employee's duties and departure from the scope of employment. The plaintiff, on the other hand, contends here, as she did in the court below, that it should be held as a matter of law that the driver of the car was within the scope of his employment and furtherance of his master's business in inviting the young women into the car, and that the court properly instructed the jury that if they believed all the evidence in the case they should find the pertinent issue in favor of the plaintiff.

We think there are inferences of fact to be determined upon the evidence which preclude the court from adopting, in their entirety, either the contentions of the appellant or those of the appellee. Upon these facts the jury should have had an opportunity to pass, under proper instructions from the court. *Garriepy v. Ballow & Nagle, supra.*

It is suggested that this opportunity was afforded by the submission of the general issue as to negligence of the plaintiff. It might very well have been submitted upon such an issue under instructions pertinent to that phase of the evidence. An examination of the record, however, discloses that there were no instructions given to the jury upon this very important phase of the evidence, except in so far as the evidence was summarized and the jury told that if they believed it to be true they should find for the plaintiff.

In view of the want of proper instructions to correlate this evidence with the third issue or, in fact, with any issue submitted, we must accept, as an interpretation of the record, that the court undertook to pass upon the important matter of deviation from employment on the part of defendant's employee and all matters connected therewith as a matter of law, taking them away from consideration by the jury.

Defendant's exceptions are sufficient to raise this point for review here, and we hold it to be error.

New trial.

STACY, C. J., dissents.

A. J. MAXWELL, COMMISSIONER OF REVENUE OF THE STATE OF NORTH CAROLINA, v. SOUTHERN FIDELITY MUTUAL INSURANCE COMPANY.

(Filed 8 June, 1940.)

1. Principal and Surety § 12—

Ordinarily, a compensated surety is not relieved of liability by an extension of time given the principal unless it is prejudiced thereby, the rule that a surety is the favorite of the law applying only to gratuitous and not to corporate sureties.

2. Same—Corporate surety held not discharged by extension of time given principal.

This action was instituted on a continuing bond for the payment of gasoline taxes due the Department of Revenue, and the bond expressly provided that the Commissioner of Revenue might demand additional security in his discretion upon twenty days notice in writing. It appeared that upon demand made upon the principal, notes secured by chattel mortgages were given by the principal as additional security and an extension of time was granted, and that after defendant surety had knowledge of the giving of such additional security and the extension of time, the surety wrote the Commissioner of Revenue agreeing to the sale of a filling station owned by the principal, including chattels covered by the chattel mortgages given as additional security, provided the proceeds of the sale should be paid the Commissioner of Revenue and credited upon the taxes, and agreeing that the principal might execute a new series of notes for the balance of taxes due. *Held:* The giving of additional security benefited the surety, and if the Commissioner of Revenue had no right under the terms of the bond to take the additional security and extend the time, defendant surety ratified his acts in so doing and waived all defenses based thereon, and the surety is not discharged of its liability by reason thereof.

APPEAL by defendant from *Williams, J.*, at January Term, 1940, of WAKE. Affirmed.

This is a submission of controversy without action. N. C. Code, 1939 (Michie), section 626.

A brief statement of the facts is as follows: On 14 September, 1932, A. W. Couch, trading as West End Filling Station, Durham, N. C., as

principal, and the defendant as surety, executed and delivered to plaintiff a continuing bond in the amount of $2,500.00 conditioned for the payment of future taxes of the said Couch. That during the months of May and June, 1936, Couch became indebted to the State on account of gasoline taxes in the amount of $5,611.65. That said bond expressly provides that the Commissioner of Revenue should have the right to demand of the said Couch additional security for said taxes; "and the Commissioner of Revenue may, in his discretion, during the life of this bond, by giving twenty days notice in writing, demand of the Distributor named herein other or additional security." That pursuant to this provision of the bond, plaintiff, on 10 July, 1936, demanded and received from Couch additional security for said taxes, the security posted by Couch pursuant to said demand being notes executed by Home Oil Company, a corporation, and a chattel mortgage upon certain personal property of said Home Oil Company. That said collateral notes aggregated $5,641.36 and consisted of eleven $300.00 notes maturing at monthly intervals from said date and a twelfth note of $2,341.36 maturing at twelve months. That at the time said additional security was taken, plaintiff and Couch agreed that if said notes were paid as the same matured the said Couch would have the full twelve months within which to pay his said taxes, but that if default occurred in such payment then the chattel mortgage would be foreclosed and he and his said surety would be held liable for any balance of said taxes then remaining unpaid. That thereafter certain payments were made, but on 28 January, 1937, default having occurred in the payment of said note, plaintiff notified defendant of Couch's delinquency and demanded payment in full of the defendant's said bond.

Letter, in part, dated 29 January, 1937, is as follows: "Since demand has been made on Mr. Couch for the amount stated and no payment having been made, this Department has been instructed to make demand on you for the full amount of his bond."

On 4 February, 1937, representatives of defendant came to Raleigh and conferred with plaintiff and in said conference defendant learned for the first time of said collateral notes and chattel mortgage. Defendant then made no objection to said collateral security. And on 19 February, 1937, defendant wrote plaintiff a letter with respect to said taxes and said bond and advised plaintiff that in a conference with Couch defendant had agreed that Couch might execute a new series of notes for said taxes, but said notes were never executed, although the letter stated that defendant had agreed that Couch should immediately execute the same.

That on 20 March, 1937, defendant wrote plaintiff a letter, as follows: "MR. A. J. MAXWELL, Collector of Revenue,
Raleigh, N. C.

"DEAR SIR: With further reference to our letter of February 19th, we have communicated with Mr. W. A. Couch, in company with Mr. Llewellyn, who, we understand, is financially interested in Bond #MIS-1747, issued to W. A. Couch, trading as Home Oil Company, and in arrears in taxes in an amount of four thousand or more dollars, to your Department; and with whom conferences have been held relative to paying off all amortization of taxes to date. They are desirous of selling the service station at Creedmoor, which is now included in their mortgage to your Department and desire the sanction of the surety before selling. The surety sanctions the sale of service station property located at Creedmoor, with the understanding that the money from such sale is to be turned over to your office upon consummation of such sale. It is estimated and agreed that the amount to be turned over to you is to be a minimum of $250, with such amounts additional not yet determined, added thereto. It is agreed and understood that the minimum amount payable to your office shall not be less than $305, plus delinquent charges, which should run in the neighborhood of $325. The surety further agrees and understands that the payment of this money warrants the refinancing of the W. A. Couch, trading as West End Filling Station, notes and a new agreement is to be entered into upon sanction of your office and the surety.

Yours truly,

SOUTHERN FIDELITY MUTUAL INSURANCE CO.,
A. MOORE SHEARIN, *Secretary and Treasurer.*"

That thereafter plaintiff continued his efforts to collect said taxes from said Couch and from sales of said mortgaged property until 24 May, 1939, when it became apparent that no further sums could be accepted from either source and thereupon plaintiff filled out defendant's regular form of proof of loss and filed the same with defendant in the amount of said bond ($2,500.00). That on 6 July, 1939, defendant denied said claim and refused to pay the same. That defendant did not object to the taking of said collateral notes and chattel mortgage until after plaintiff had filed said claim with it.

That after having received notice of said collateral on 4 February, 1937, defendant, on 19 February, 1937, advised plaintiff by letter that it had agreed that Couch might execute a new series of notes for said taxes. Defendant claimed the benefit of said chattel mortgage and demanded that the proceeds of the sale of the property included therein be credited upon the taxes secured by its said bond, those proceeds being the pro-

ceeds of sale of property owned, not by Couch, but by the Home Oil Company, a corporation. The reason as stated was that it thought that Couch would pay the State the money quicker than he would pay defendant if defendant paid plaintiff the amount of said bond. It is agreed that the net balance due and owing upon said taxes is $3,089.89, which is in excess of the penal sum of the bond here involved.

The judgment of the court below is as follows: "This cause coming on to be heard by the undersigned judge of the Superior Court of North Carolina, regularly assigned to hold the Superior Courts of the Seventh Judicial District and presiding at said term, and being heard upon the statement of controversy without action filed by the parties, after considering the arguments and briefs of counsel, the court is of the opinion that plaintiff is entitled to recover of defendant the full penal amount of the bond which is the subject of this controversy, it appearing that the taxes due plaintiff and secured by said bond are in excess of said amount: It is therefore, on motion of L. O. Gregory, Assistant Attorney-General, attorney for plaintiff, ordered, adjudged and decreed: (1) That plaintiff have and recover of defendant the sum of $2,500.00, with interest from date at the rate of six per cent per annum until paid. (2) That defendant pay the costs hereof to be taxed by the clerk. This the 25th day of January, 1940. Clawson L. Williams, Judge of the Superior Court."

See Motor Vehicle Gasoline Tax, N. C. Code, 1939 (Michie), sec. 2613 (i 12), *et seq.*

The defendant made numerous exceptions and assignments of error and appealed to the Supreme Court. The material one and necessary facts will be considered in the opinion.

Attorney-General McMullan and Assistant Attorney-General Gregory for plaintiff.

M. Hugh Thompson for defendant.

CLARKSON, J. The only question necessary to be considered to determine this appeal is: Did the extension of time of payment of the amount due and payable from A. W. Couch, principal, on 10 July, 1936, and the taking of said chattel mortgage in the manner and form aforesaid, operate to discharge the defendant surety of its liability? We think not.

The defendant is a paid corporate surety. In *Loan Assn. v. Davis,* 192 N. C., 108 (113), the following is written as a "well-settled" principle: "The law does not have the same solicitude for corporations engaged in giving indemnity bonds for profit as it does for the individual surety who voluntarily undertakes to answer for the obligations of another. Although calling themselves sureties, such corporations are

in fact insurers, and in determining their rights and liabilities, the rules peculiar to suretyship do not apply." See 193 N. C., 710.

Citing authorities of a large majority of the states, including the above North Carolina case and United States Supreme Court cases, in 94 A. L. R., 876, the annotation is as follows: "Later cases support the statement in the original annotation, that the rule that sureties are favorites of the law does not apply to surety companies for hire as it does to a voluntary or gratuitous surety."

The surety bond given by defendant in its very terms says that during the life of the bond the Commissioner of Revenue may take from the distributor "other or additional security." The plaintiff took from the distributor additional security by way of chattel mortgage. It was not prejudicial to the defendant for the delinquent distributor, W. A. Couch, to give to plaintiff additional security, but beneficial.

Williston on Contracts, sec. 1212-A, p. 3493, says: "While the law will allow the accommodation surety to escape liability by the assertion of certain defenses even though he has suffered no harm, in general, the corporate surety may not take advantage of such defenses unless he can show injury. Thus, an extension of time or a stay of execution granted by the creditor to the principal, usually a defense to the unpaid surety, will not discharge the compensated surety unless he has been prejudiced thereby." And in sec. 1222, p. 3515, he states that such companies are not entitled to the defense of the extension of time unless they can "show prejudice resulting therefrom."

Arant, the latest work on Suretyship, sec. 68, p. 299, says that the decisions, "Make it quite clear that the creditor's mere extension of time does not discharge a compensated surety; such sureties are required almost invariably to show injury as a condition to discharge." Principal and Surety, 50 Corpus Juris, sec. 252; Principal and Surety, 21 R. C. L., sec. 202. The leading case on this subject is *Guaranty Co. v. Pressed Brick Co.*, 191 U. S., 416, 24 S. Ct., 142, 48 L. Ed., 242, cited and followed in *Standard Electric Time Co. v. F. & D. Co.*, 191 N. C., at 659.

If plaintiff had no right under the terms of the bond to take the additional security and extend the time, it was waived and ratified by defendant. Defendant's agent gave the sensible reason for agreeing to the additional security—"Couch would pay the State the money quicker than he would pay defendant." In a letter of 20 March, 1937, from defendant to plaintiff, signed by its secretary and treasurer, "The surety sanctions the sale of service station property located at Creedmoor," etc., provided the proceeds are turned over to plaintiff. It even sets forth the minimum amount of sale.

In *Brimmer v. Brimmer*, 174 N. C., 435 (440), we find: "It is also well settled that although the agent had no authority, express or implied,

that the principle is responsible for his acts if he ratifies them; that taking benefit of the transaction with knowledge is a ratification (*Starnes v. R. R.,* 170 N. C., 224), and that when the agent acts outside of his powers, the principal must adopt the whole transaction or repudiate the whole. 'He cannot accept the beneficial part and reject what is left of it.' *Publishing Co. v. Barber,* 165 N. C., 482."

In *Bank v. Grove,* 202 N. C., 143 (147), is the following: "Where an agent who is not authorized to do so borrows money on behalf of his principal and applies it in satisfaction of the legal obligations of his principal and the latter knowingly retains the benefits of such payments, the transaction constitutes as between the principal and the lender the relation of debtor and creditor. Having received the benefits of the unauthorized act the principal will be deemed to have ratified the act and to have barred his repudiation of it to the injury of the other party. He cannot accept the benefits without bearing the burdens; he must duly repudiate the transaction or perform the contract in its integrity (entirety). *Lane v. Dudley,* 6 N. C., 119; *Miller v. Lumber Co.,* 66 N. C., 503; *Rudasill v. Falls,* 92 N. C., 222; *Christian v. Yarborough,* 124 N. C., 72; *Hall v. Giessell,* 179 N. C., 657." *Jones v. Bank,* 214 N. C., 794.

In Principal and Surety, 50 Corpus Juris, sec. 254, p. 155, the rule is laid down as follows: "Since the right to a discharge by extension of time is a personal privilege of the surety, he may waive such right or lose it through ratification or estoppel. . . . Waiver may be shown by acts subsequent to the extension, such as the surety's subsequent promise to pay the debts or his acknowledgment of its continued existence, by his giving the creditor written notice to sue, or by his acceptance of security from the principal after extension. An agreement by a surety for a further extension of time of payment after a previous extension to the principal is a waiver of the latter's defense. Acceptance of premium by a compensated surety after an extension of which it had knowledge is a waiver of the discharge."

We cannot sustain any of the contentions made by the defendant. The briefs of the litigants are able and well prepared. The defendant, under the facts and circumstances of this case, has not been discharged from its liability on its bond.

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

Affirmed.

F. G. DANIELS AND WILLIE LEE DANIELS v. MONTGOMERY WARD & COMPANY.

(Filed 8 June, 1940.)

Negligence § 16—

Allegations that defendant sold a defective gasoline and kerosene stove to a customer who advised defendant that he was familiar with the mechanism of the stove and thought he could repair same so that it might be safe for use, that some time thereafter the stove exploded in the customer's apartment causing fire which spread to plaintiff's apartment, without allegation of any specific defect in the stove proximately causing the damage alleged, *is held* insufficient to state a cause of action.

APPEAL by plaintiff from *Harris, J.*, at October Civil Term, 1939, of DURHAM.

Civil action for recovery of damages resulting from alleged actionable negligence.

The complaint of plaintiff alleges, briefly stated, that some time during the latter part of September, 1938, defendant sold a preway, coraflame gasoline and kerosene stove to one B. E. Riggs, and delivered same to him at his apartment adjacent to that occupied by plaintiffs; that defendant knew and advised Riggs that there was some defect in the stove; that Riggs advised defendant that he, himself, was familiar with the mechanism of the stove and thought he could repair same so that it might be safe for use; that defendant sold and delivered the stove to Riggs and same was used by his family for a short time; that on 1 October, 1938, when the wife of Riggs undertook to light the stove to heat water, it exploded and ignited the Riggs apartment and the fire later spread to that occupied by plaintiffs, burning their clothes and personal effects; that though defendant knew, or by the exercise of ordinary care should have known, that the stove would likely explode and cause such injury and damage, it negligently offered same for sale and sold it for use by Riggs and his family, as the proximate result of which plaintiffs have been damaged.

Defendant demurred to the complaint for that it failed to state facts sufficient to constitute a cause of action in that, *inter alia,* it does not allege any specific defect in the stove for which defendant might be liable and which is the proximate cause of the alleged damage to property of plaintiffs.

From judgment sustaining demurrer plaintiffs appeal to Supreme Court, and assign error.

Forrest A. Pollard and Fuller, Reade, Umstead & Fuller for plaintiff, appellant.

Victor S. Bryant and John D. McConnell for defendant, appellee.

PER CURIAM. Admitting the truth of the allegations of fact contained in the complaint, and relevant inference of fact necessarily deducible therefrom, as we must do in testing the sufficiency thereof, we concur with the ruling below that a cause of action is not stated.

Affirmed.

NEILL MACRAE, EMPLOYEE, v. UNEMPLOYMENT COMPENSATION COMMISSION OF NORTH CAROLINA, EMPLOYER.

(Filed 19 June, 1940.)

1. Master and Servant § 40b—Evidence held to sustain finding that contraction of tuberculosis resulted from accident within meaning of Compensation Act.

The evidence tended to show that defendant's employees were crowded into inadequate office space, that claimant was required to work at the same desk with a fellow employee who, it was later ascertained, was then suffering with active tuberculosis, that the fellow employee involuntarily and unexpectedly coughed directly into claimant's face, and that as a result thereof claimant who had theretofore been healthy, contracted tuberculosis resulting in the disability in suit. *Held:* Such coughing was untoward, unfortunate and unusual in its proximity to and its effect upon claimant, and constituted an "accident" and the evidence is sufficient to support the finding of the Industrial Commission that claimant's disease resulted "naturally and unavoidably from an accident"; Michie's Code, sec. 8081 (i), subsec. (f), arising out of and in the course of the employment.

2. Same—Sec. 50½ (a) of the Compensation Act relates only to diseases inherent in or incident to the nature of the employment.

Chapter 123, section 50½ (a), Public Laws of 1935, providing that only the occupational diseases therein specified should be compensable, relates only to occupational diseases, which are those resulting from long and continued exposure to risks and conditions inherent and usual in the nature of the employment, and this section does not preclude compensation for a disease not inherent in or incident to the nature of the employment when it results from an accident arising out of and in the course of the employment, Michie's Code, 8081 (i), subsec. (f).

3. Master and Servant § 55d—

If a finding of fact by the Industrial Commission is supported by competent evidence the finding is conclusive notwithstanding that other evidence may have been admitted which might be objectionable under technical rules of evidence appertaining to courts of general jurisdiction.

4. Master and Servant § 52b—

Expert opinion evidence as to the manner in which claimant contracted the disease resulting in disability *held* to have been elicited by hypothetical questions assuming only such facts which the evidence directly, fairly and reasonably tended to show, and the expert testimony was competent.

5. Master and Servant § 52c—

Findings of fact by the Industrial Commission may be based on circumstantial as well as direct evidence.

BARNHILL, J., dissenting.

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

APPEAL by defendant from *Williams, J.*, at January Term, 1940, of WAKE. Affirmed.

This is an action brought by plaintiff against defendant, under the N. C. Workmen's Compensation Act (Laws 1929, ch. 120; N. C. Code, 1939 [Michie], ch. 133-A).

The hearing Commissioner found certain facts and made an award as follows:

"The Commissioner finds as a fact from the evidence and admissions that both the plaintiff and the defendant are bound by the provisions of the North Carolina Workmen's Compensation Act, the defendant having five or more employees; and that the defendant is both a governmental and State Agency; and that the plaintiff's average monthly wage was $75.00. The Commissioner finds as a fact that the Unemployment Compensation Commission has its offices over the Sir Walter Garage on Fayetteville Street, in the city of Raleigh, and that the space occupied by the Unemployment Compensation Commission is inadequate for the work to be done and for the several hundred employees that are required to occupy it. The Commission further finds as a fact that among these numerous employees for several weeks prior to 1 February, 1939, was a young man, by the name of Frank Tyson, and the plaintiff, Neill MacRae, both of whom were young men; that during the month of February, 1939, these two young men were placed across a very narrow table or desk to do their work; and the Commissioner further finds that during the month of February, 1939, the said Frank Tyson was suffering from an active case of pulmonary tuberculosis, and that they had to work in such close proximity to each other that when the said Frank Tyson coughed—which he did frequently—the vapors and sprays from his mouth would fly into the face of the plaintiff, Neill MacRae; and that on one occasion, on or about the 15th day of February, 1939, that the said Frank Tyson coughed while suffering with an active pulmonary tuberculosis and that some of the sputum from his cough flew into the mouth of the plaintiff, Neill MacRae; that thereafter, on or about the 26th day of February, 1939, the said Frank Tyson became disabled on

account of his pulmonary tuberculosis, that he was carried to one of the tubercular sanatoriums in the State where he is now undergoing treatment for said condition.

"The Commissioner further finds that prior to the association of the plaintiff, Neill MacRae, with the said Frank Tyson, he was not known to have had any tuberculosis; that after the said Frank Tyson was removed from the employment of the Unemployment Compensation Commission, the plaintiff, Neill MacRae, continued to work on until some time in the latter part of April, or the first part of May he began to notice night sweats and have sleepless nights; and in the early part of June, upon examination, he was found to be suffering with tuberculosis. The Commissioner finds as a fact from the evidence that from the time the plaintiff was exposed to tuberculosis from Frank Tyson until the latter part of April or the first part of May was ample time for tuberculosis to develop from the inception of the tubercular germs. The Commissioner further finds as a fact that the reception of spray from the coughs of Tyson—who was known to be infected with tuberculosis—and especially the sputum that went into the mouth of the plaintiff in this case was ample exposure to pass the germs from one person to another.

"The Commissioner further finds as a fact that the plaintiff, Neill MacRae, became totally disabled to work on June 10, 1939, and is still totally disabled to work on account of tuberculosis. The Commissioner finds as a fact from the evidence and the greater weight of the evidence that the reception of the sputum sprays and the sputum itself from the mouth of Tyson into the face and mouth of the plaintiff was the cause of the development of the tuberculosis in the plaintiff; and, the Commissioner further finds as a fact that the reception of said spray and sputum flying through the air, under the circumstances as described in the evidence in this case, amounted to an injury by accident.

"Therefore, the Commissioner finds as a fact that the plaintiff received an injury by accident arising out of and in the course of his employment for the defendant, and that as a result of said injury he developed tuberculosis; and that he has been totally disabled from carrying on any labor on account of said condition since June 10, 1939; that he is in need of hospital and medical care. . . . Therefore, let an award issue directing the defendants to pay to the plaintiff compensation for total disability from June 10, 1939, until the time of this hearing based upon an average wage of $75.00; and, if the plaintiff and the defendants cannot agree on the period of disability thereafter then the case will be reset for a further hearing for that purpose.

"Defendants will tender to the plaintiff hospital and medical treatment such as his condition may require and pay the bills therefor when approved by this Commission. Defendants will pay the costs of the hear-

ing. Each of the plaintiff's doctors who testified at the hearing is allowed a fee of $10.00. Buren Jurney, Commissioner."

To the findings of fact and conclusions of law of the hearing Commissioner, defendant excepted, assigned error and appealed to the Full Commission. The Full Commission affirmed the findings of fact and conclusions of law and award of the hearing Commissioner.

In the judgment of the Full Commission, in part, is as follows: "The defendant contends that the plaintiff is disabled as the result of diseased condition and that this disease is not one of those listed under section 50½ (b) of the Compensation Law, and further plead section 50½ (a), which reads, in part: 'The disablement or death of an employee resulting from an occupational disease described in paragraph (b) of this section shall be treated as the happenings of an injury by accident within the meaning of the North Carolina Workmen's Compensation Act and the procedure and practice and compensation and other benefits provided by said act shall apply in all such cases except as hereinafter otherwise provided. The word "accident" as used in the Workmen's Compensation Act, shall not be construed to mean a series of events in employment, of a similar or like nature, occurring regularly, continuously or at frequent intervals in the course of such employment, over extended periods of time, whether such events may or may not be attributable to fault of the employer, and disease attributable to such causes shall be compensable only if culminating in an occupational disease mentioned in and compensable under this act. . . .'" Laws 1935, ch. 123, sec. 1.

To the foregoing opinion of the Full Commission, the defendant 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, Clawson L. Williams, Judge presiding, at the January, 1940, Term of Wake County Superior Court, by consent of the parties upon appeal of the defendants from the award, opinion and findings of fact of the Full Industrial Commission of North Carolina, and upon a record certified to this court by the Industrial Commission, and after argument of counsel and consideration of the evidence and record herein, and it appearing to the court that the findings of fact, award, and opinion of the Full Industrial Commission is amply supported by competent evidence, that plaintiff's disability and disease complained of herein resulted naturally and unavoidably from an accident arising out of and in the course of plaintiff's employment by defendant, and that defendants' questions to medical experts as appear in the record were properly overruled by the Industrial Commission:

"It is therefore considered, ordered and adjudged and decreed that the findings of fact, award, and conclusions of law of the North Carolina

Industrial Commission as set forth in the opinion of said Commission appearing in the record, be and the same are hereby in all respects approved and affirmed; and that plaintiff have and recover of the defendant the amounts and compensation as set forth in the award of the Industrial Commission, together with the costs of these proceedings of this action; and it is further ordered that the costs of these proceedings to the plaintiff, including reasonable attorneys' fees to be determined by the Industrial Commission, shall be paid by the defendant as part of the bill of costs herein, in accordance with section 8081 (rrr) of the North Carolina Workmen's Compensation Act. This 24th day of January, 1940. Clawson L. Williams, Judge presiding."

To the foregoing judgment, findings and ruling of the court below, the defendant excepted, assigned error and appealed to the Supreme Court.

Dr. J. J. Combs, admitted to be an expert, testified, in part: "I examined MacRae on July 7, 1939, as the result of my findings and examination my conclusion is that his disability is pulmonary tuberculosis. It is my opinion he has tuberculosis. . . . I have found in my experience that a person exposed, say in February, could break down with tuberculosis in two or three months after that. If he was exposed to tuberculosis and had not been exposed until about the middle of February, then the condition you found him with would not be inconsistent with that exposure. I might cite a case. A patient was admitted to the sanatorium about March 15, 1938, a colored man, for advanced tuberculosis. His wife was brought in subsequent to his admission and fluoroscoped and I could find no evidence of tuberculosis. The last of May, 1938, the patient came in with far advanced, rapidly advancing tuberculosis. Now, I attributed it to the exposure to her husband. Neill's condition could be attributed to exposure about the middle of February."

The following question was asked Dr. Combs: "Q. I'll ask you a hypothetical question, Doctor. Doctor, if the Commission should find as a fact from the evidence presented in this case that Neill MacRae was a man about 22 years of age, normal health and habits, in good physical condition throughout his life, weighing on an average of about 145 pounds, that in connection with his employment in the office of the Unemployment Compensation Commission in Raleigh he worked during part of the time upon various occasions with one Frank Tyson who developed symptoms of tuberculosis in the form of coughing and other symptoms during February, 1939, and by examination about February 28th, March 1st, 2nd and 3rd, 1939, Frank Tyson was found to have a very highly active case of pulmonary tuberculosis and his sputum at those times contained tubercular bacilli, that about the middle of Febru-

ary, 1939, while Neill MacRae was working with said Tyson in the course of said employment, said Tyson unexpectedly and involuntarily coughed direct into the face of Neill MacRae, expectorating sprays or sputum into MacRae's mouth, that about the latter part of April and the first part of May, 1939, Neill MacRae began to feel fatigue easily, he experienced night sweats during the first part of May at intervals, which continued at more frequent intervals during May, 1939; that MacRae experienced some fever and high temperature during May and developed a nonproductive cough in the first part of May, continuing and increasing in severity during that month; that he was found to have pulmonary tuberculosis by examination about June 5, 1939, which now disables him, and which is of the same type, and nature and character of the disease from which Tyson was found to be suffering, would you or do you have an opinion satisfactory to yourself based upon such findings, with no history of exposure of MacRae to other persons as to whether or not Neill MacRae's present disability and disease is attributable and resulted naturally and unavoidably from Tyson's coughing into MacRae's face as described? Q. Do you have an opinion? Ans.: Yes, sir, my opinion is that Mr. MacRae's present condition, chronic pulmonary tuberculosis, is attributable to his exposure to Mr. Frank Tyson while at work in view of the fact that there is no other history of contact. Q. And as described in the question? Ans.: Yes, sir."

Dr. Earl W. Brian, an expert, testified, as did Dr. Combs, to a like hypothetical question: "Q. Do you have an opinion? Ans.: Yes, sir. Q. What is your opinion? Ans.: My opinion is that MacRae contracted his tuberculosis from Frank Tyson as a result of his working in close proximity with Tyson. . . . Q. Do you think the sputum that went into his mouth and the sprays that went into his face caused it? Ans.: You are trying to make the point that this one particular cough produced the disease in MacRae. Q. Based upon those findings and remembering the facts, I am trying to clarify it. Ans.: Yes, sir, I think he got his tuberculosis as a result of Tyson's coughing in his face or near enough for him to inhale the organisms. . . . Q. What effect does the lack of ventilation or air flow or flow of air current in a room in which a tubercular patient is present with other healthy persons have in the transmittal of the disease germs of tuberculosis from one person to another. Ans.: The course given to people in a room, one infected with tuberculosis and the other free, the infected person coughing, if the air is being continually swept away there is much less likelihood of the uninfected person developing the disease than if the air is, shall we say stagnant, not being swept away, certainly the presence of still air would be in favor of developing the disease in the uninfected person."

The hypothetical questions were based on the examination of Neill

MacRae by the above physicians, also on their testimony, and other evidence. The testimony of Neill MacRae was corroborated by Mrs Ellen MacRae, Mrs. Thomas O'Berry, Mrs. Alice Smith and Mrs. Irene S. Burns. The main exceptions and assignments of error made by defendant and other necessary facts will be set forth in the opinion.

Smith, Leach & Anderson for plaintiff.

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

CLARKSON, J. The question involved: Does the record contain any competent evidence sufficient to sustain the finding of the Full Commission that the plaintiff received an injury by accident arising out of and in the course of his employment by defendant? We think so.

N. C. Code, 1939 (Michie), sec. 8081 (i), subsec. (f), is as follows: "'Injury and personal injury' shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form, except where it results naturally and unavoidably from the accident."

We think plaintiff's disease is the result of an injury by accident within the meaning of subsection (f), *supra,* of the act. It is not an occupational disease. The occupational disease section of the Compensation Act, Laws 1935, ch. 123, sec. 50½ (a), applies only to diseases which result from the cumulative effect of long, continued exposure to risks and conditions inherent and usual in the nature of the employment.

The language of the occupational disease section of the act, sec. 50½ (a), is heretofore set forth in the opinion of the Full Commission, as relied on by defendant to defeat plaintiff's claim. We have gone into the question of occupational disease in the recent case of *Blassingame v. Asbestos Co., ante,* 223. The hearing Commissioner found, and there was competent evidence to sustain the findings: "The Commissioner finds as a fact from the evidence and the greater weight of the evidence that the reception of the sputum sprays and the sputum itself from the mouth of Tyson into the face and mouth of the plaintiff was the cause of the development of the tuberculosis in the plaintiff; and, the Commissioner further finds as a fact that the reception of said spray and sputum flying through the air, under the circumstances as described in the evidence in this case, amounted to an injury by accident." This finding was affirmed by the Full Commission, who also found: "In the instant case, the Commission is of the opinion that the coughing and the sputum accidentally hitting the plaintiff and entering his mouth constitutes an injury by accident."

In *Smith v. Creamery Co., ante,* 468, the evidence tended to show that the injured employee was employed to deliver milk, that in delivering

milk to a cafe in the regular course of his employment he attempted to lift a box containing chipped ice, and weighing from 125 to 150 pounds, out of a large box in order to place the milk he was delivering beneath it, that while lifting the box he felt a sharp pain and that it was later determined that he had suffered a hernia. The clear and well written decision by *Mr. Justice Seawell* says: "The Court certainly does not intend to say that compensation may be awarded for an injury which is not the result of fortuitous circumstances or for an injury which is but the natural and probable result of the employment. We only go so far as to hold that in considering the constituent element of 'accident' it is competent to take into consideration the sudden and unexpected rupture of the parts supporting the viscera, as happened to the plaintiff, under the strain of lifting, as part of the fortuitous circumstances making up the accident. It was not, as in *Slade v. Hosiery Mills, supra* (209 N. C., 823), and *Neely v. Statesville, supra* (212 N. C., 365), a natural and probable result of the work being done, and the facts of the case justified the finding on the part of the Commission, as affirmed by the court, that plaintiff sustained his injury by accident arising out of and in the course of his employment."

We think the above case is analogous to the present action. It was in evidence that Frank Tyson, who had a very highly active case of pulmonary tuberculosis and his sputum at those times contained tubercular bacilli, about the middle of February, while Neill MacRae was working with said Tyson in the course of said employment, said Tyson unexpectedly and involuntarily coughed directly into the face of Neill MacRae, expectorating sprays or sputum into MacRae's mouth. Almost immediately thereafter the plaintiff, a strong, healthy young man, commenced to have bodily fatigue and went down and down, and on 5 June of that year was found to have pulmonary tuberculosis.

Dr. Brian testified, in part: "Q. Do you have an opinion? Ans.: Yes, sir. Q. What is your opinion? Ans.: My opinion is that MacRae contracted his tuberculosis from Frank Tyson as a result of his working in close proximity with Tyson. . . . At any time any patient is coughing up tuberculosis bacilli, another patient may get the disease from him. . . . I'd classify tuberculosis as a communicable infectious disease. It is communicated from one person to another by physical conditions. The reception into the body of sputum containing tubercular bacilli is the most favorable medium of transmitting the disease."

Plaintiff's tubercular disability is directly attributable to his infection when Tyson involuntarily and unexpectedly coughed spray and sputum into plaintiff's face and mouth. Such coughing was untoward, unfortunate and unusual in its proximity to and its effect upon plaintiff. It was unintentional and the result of Tyson's negligent failure or inability

to protect himself therefrom because both hands were engaged in holding a tray. Yet, by the simple act of placing a handkerchief or hand over his mouth, Tyson might have prevented the spread of the spray and sputum. This overt, positive action is sufficient to satisfy the definition of accident. Injuries resulting from either willful or negligent actions of a fellow employee constitute injuries by accident. *Conrad v. Foundry Co.*, 198 N. C., 723; *Chambers v. Oil Co.*, 199 N. C., 28; *Tscheiller v. Weaving Co.*, 214 N. C., 449.

The Court, in *Barron v. Texas Employers Insurance Assn.*, 36 S. W. (2d), 464 (Texas, 1931), held that exposure of a workman to gas emitted by an oil well "in quantities somewhat larger than the gas to which he had previously been exposed, constituted an injury by accident." The workman became weak and nauseated from the exposure and suffered pains in his lungs, and later he was found to have tuberculosis. In the opinion of the Court it was said, at p. 465: "A disease acquired in the usual and ordinary course of employment which common experience has recognized to be incidental thereto is an occupational disease and not within the contemplation of the Workmen's Compensation Act; but an injury resulting from the accident is something which occurs unexpectedly and not in the natural course of events. It is one which may possibly be prevented by the exercise of due care and caution on the part of the employer. Schneider on Compensation Laws, p. 419, sec. 223; *Gay v. Hocking Coal Co.*, 184 Iowa, 949, 169 N. W., 360." . . . Further in the opinion (at p. 467), "A disease contracted as a direct result of unusual conditions connected with the work and not as an ordinary or reasonably to-be-anticipated result of pursuing the same should be considered an accidental injury."

To the same effect is *Ætna Life v. Harris*, 83 S. W. (2d), 1087 (Texas, 1935).

In *Dove v. Alpena Leather Co.*, 164 N. W., 253 (254), (1917), the Michigan Court upheld an award where the plaintiff became infected with a disease as the result of inhaling germs while handling hides in a poorly ventilated room. In the opinion it is said: "The accidental feature of this case is that by chance the septic germ or germs were taken into the respiratory organs and carried into his system, which . . . was unusual in the work at which he was engaged." *Connelly v. Furniture Co.*, 240 N. Y., 83, 147 N. E., 366, 39 A. L. R., 867; *Claess v. Dolph*, 161 N. W., 885 (Mich.).

We think the exceptions and assignments of error made by defendants to the evidence are not material. In *Tindall v. Furniture Co.*, 216 N. C., 306 (310), it was said by *Devin, J.*, for the Court: "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 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."

We think the hypothetical questions within the rule frequently approved by this Court; they "assume facts which the evidence directly, fairly and reasonably tends to establish, and were competent. The probative force was for the Commission." *Blassingame v. Asbestos Co., ante*, 223 (236).

We think that plaintiff's disease was proximately produced by infection from germs transmitted him in droplets of spray and sputum coughed up and expectorated into his face and mouth by a negligent fellow employee in the course of his employment by defendant; that the unusual circumstances and conditions under which said injury was produced constituted an accident arising out of his employment; and that the evidence fully supports the Commission's findings and award. It is well settled law that the Commission could base its findings of fact on circumstantial as well as direct evidence.

In II Schneider, Workmen's Compensation Law (2d Ed.), part sec. 554, at pp. 2002-3, we find: " 'The courts may not interfere with the findings of fact, made by the Industrial Commissioner, when these are supported by evidence, even though it may be thought to be error.' 'The rule . . . is well settled to the effect that, if in any reasonable view of the evidence it will support, either directly or indirectly, or by fair inference, the findings made by the Commission, they must be regarded as conclusive' (citing a wealth of authorities). Courts cannot demand the same precision in the finding of Commission as otherwise might be if the members were required to be learned in the law.' " This statement was quoted with approval in *Blassingame v. Asbestos Co., supra* (233-4).

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

Affirmed.

BARNHILL, J., dissenting: The original Workmen's Compensation Act, ch. 120, Public Laws 1929, in sec. 2 (f) thereof, defines "injury" and "personal injury." The definition provides that the terms *"shall not include a disease in any form,* except where it results naturally and unavoidably from the accident."

Under this provision "injury by accident" and "disease" are not synonymous but the terms are used in contrast to each other. If the framers of the act had intended disease, that is, where the disease is the injury itself, to have been included it would not have been necessary to have added the last clauses in the section and they are mere surplusage.

"Injury" in its broadest sense, perhaps, would include injury by disease. But the Legislature expressly excludes this interpretation. To be compensable the disease must naturally and proximately follow injury by accident. There must be first an injury by accident from which disease develops before there can be any compensation; that is, the injury by accident must precede the disease and be its producing cause. *Richardson v. Greenburg,* 176 N. Y. Supp., 651; *Meade Fibre Corp. v. Starnes,* 247 S. W. (Tenn.), 989; *Hendrickson v. Continental Fibre Co.,* 136 Atl. (Del.), 375; *Blair v. Ice & Storage Co.,* 165 N. W. (Neb.), 893, 11 A. L. R., 792. The Industrial Commission adopted this view in *Stewart v. Rainey Hospital.* See opinions of Industrial Commission II, 125.

The express mention of a disease which is the consequence of an injury would seem to exclude all other diseases which are not. Thus if an employee suffers a traumatic injury by accident arising out of and in the course of his employment and pneumonia naturally and proximately results, the injured employee would be entitled to compensation for disablement produced by the disease *as a part of the result of the injury.* But the essential link between the injury and the disease must be shown, and it is not sufficient to show that it probably exists, but that it does, in fact, exist.

Following the adoption of this statute this Court in *McNeeley v. Asbestos Co.,* 206 N. C., 568, based its conclusion upon the negligence of the employer which, as to the employee, constituted an accident. In *Swink v. Asbestos Co.,* 210 N. C., 304, the injury not being the result of negligence, compensation was denied.

Then the Legislature, probably for the purpose of clarifying the law, and its intent, following the decisions in the *McNeeley* and *Swink cases, supra,* by ch. 123, sec. 1, Public Laws 1935, materially amended ch. 120, sec. 2 (f), 1929. It is there provided that "the word 'accident,' as used in the Workmen's Compensation Act, shall not be construed to mean a series of events in employment, of a similar or like nature, occurring regularly, continuously or at frequent intervals in the course of such employment, over extended periods of time, whether such events may or may not be attributable to fault of the employer, and disease attributable to such causes shall be compensable only if culminating in an occupational disease mentioned in and compensable under this article."

By this act the Legislature included within the provisions of the Workmen's Compensation Law all occupational diseases which are ex-

pressly mentioned and designated and specifically excluded all other diseases *"even though such disease is attributable to the negligence of the employer"* unless such disease naturally and proximately results from an injury by accident.

The act of 1929 as thus supplemented and amended by the 1935 act now leaves the law in this state: if the disease is occupational then compensation is allowed although the disease develops from a series of events of similar or like nature, whether such series of events is attributable to negligence of the employer or not. If the disease is not occupational compensation is denied even though caused by the negligence of the employer, unless it results naturally and unavoidably from an injury by accident.

Thus, in deciding whether a non-occupational disease is compensable, we must bear in mind that: (1) The express mention of a disease which is the consequence of the injury excludes all diseases which are not; (2) the disease must be preceded by the injury; (3) the disease cannot constitute the injury itself; (4) in the statute "disease" and "injury by accident" are placed in contrast to each other; (5) disease is never comprehended in the term "injury by accident"; and (6) the accident and the disease cannot be the same transaction, event or series of events.

Pulmonary tuberculosis with which the plaintiff is suffering is not an occupational disease mentioned in the statute.

But the majority opinion proceeds upon the theory that the pulmonary tuberculosis from which the claimant is suffering is not the result of "a series of events in employment, of a similar or like nature, occurring regularly, continuously or at frequent intervals in the course of such employment, over extended periods of time." It takes the position that there was one occurrence only, to wit, the accidental coughing of claimant's fellow employee directly into claimant's mouth as a result of which "I could feel something wet come all over my face and go into my mouth" and that this produced the tuberculosis. This position is not sustained either by the evidence or by the findings of fact of the hearing Commissioner and the Full Commission.

The evidence discloses that claimant was closely associated in his employment with a fellow employee who was suffering from active tuberculosis and that during working hours he was compelled to undergo continuous exposure and that at frequent intervals, in the course of such employment over an extended period of time, his fellow employee coughed and in so doing emitted spray. Claimant testified: "I was with Tyson (the infected fellow employee) from September, 1938, to February, 1939, during the course of my work with the Employment Compensation Commission with the exception of short periods while I was transferred to some other department in the building. During February,

1939, in the course of my work at the Commission I worked with Tyson at the west end of the addressograph bank of files, pulling plates from frames, with the exception of a few days which I worked in another department, that is, with these few days in the first part of February—associated with him constantly during the month of February, 1939, with the exception of the first few days of the month.

"During January and February, 1939, I noticed that Tyson coughed oftener than he had been before. . . . During February, 1939, he had fits of coughing and he coughed very often, I'd say he coughed incessantly throughout the day. I was in very close contact with him during that month. We were working on a very small improvised stand which was about 3 feet square, and our work necessitated us sitting across from each other or side by side and I remember him coughing right in my face, of course accidentally, but several times."

Then the claimant described a particular occurrence some time in February as follows: "I remember on that particular day we were working down at the west bank of files pulling plates he accidentally coughed directly into my mouth which happened to be open at that time. . . . We were working side by side, and it just happened my head was turned toward him when he coughed . . . we were sitting side by side and engaged in conversation and I turned to ask him a question and at the moment I turned to him he coughed in my face, and his hands, he was using his hands to pick up a drawer at that time. That is the reason I remember he didn't have his hands over his mouth. I remember that I could feel something wet come all over my face and go into my mouth." He then testified: "I remember other particular occasions in which he coughed and I was in the area of the spray from the mouth, any number of times; I don't remember any particular occasions, no particular dates, but I was in his spray any number of days. I mean that I felt his breath and his spray go into my face."

This testimony clearly indicates a series of events occurring over a period of time within the meaning of sec. 1, ch. 123, Public Laws 1935.

The claimant does not undertake to say, and we may as well concede that he could not truthfully say, that he was inoculated at any particular time or as the result of any particular coughing.

The physicians who testified in behalf of claimant did not undertake to say that claimant became infected at any particular time or as a result of any particular occurrence.

The majority opinion, in its statement of facts, quotes in full the hypothetical question asked one of the expert witnesses, and apparently relies upon the answer thereto as evidence of inoculation as the result of a particular incident. An analysis of this question and the answer does not justify this conclusion. The question was not confined to one

incident. It included the suppositious finding that claimant worked during part of the time or upon various occasions with Frank Tyson who developed symptoms of tuberculosis in the form of coughing and other symptoms during February, 1939, and that about the middle of February, 1939, Tyson unexpectedly and involuntarily coughed directly into the face of Neill MacRae, expectorating sputum or spray into his mouth. The doctor answered: "My opinion is that MacRae contracted his tuberculosis from Frank Tyson as a result of his working in close proximity with Tyson. . . . I think that MacRae's working in close proximity to Tyson undoubtedly caused his tuberculosis." He was then asked: "Do you think the sputum that went into his mouth and the sprays that went into his face caused it?" (NOTE. The sprays went into his face on numerous occasions.)

"A. You are trying to make the point that this one particular cough produced the disease in MacRae?"

"Q. Based upon those findings and remembering the facts, I am trying to clarify it.

"A. Yes, sir, I think he got his tuberculosis as a result of Tyson's coughing into his face or near enough for him to inhale the organisms. . . . I cannot answer as to which is the most likely to produce it, the large dosage or the numerous small doses. . . . We do not have a record of human tuberculosis authentic to draw a conclusion of that, as to whether we can attribute the development of the disease to small dosages over a period of time or the reception of a large dose at a single instance wherein sufficient time the disease developed."

If the hypothetical question is to be construed as relating to the one incident only, then it was prejudicial in that it ignores other evidence of causation offered by plaintiff. Even so, the witness declined to confine the cause to this one incident. He said: "I think he got his tuberculosis as a result of Tyson's coughing into his face or near enough for him to inhale the organisms." And the plaintiff testified that Tyson coughed "right in my face . . . several times . . . he coughed incessantly throughout the day during February. . . . I was in very close contact with him during that month working on a stand 3 feet square."

If the question is to be so considered the defendant, as it had a right to do, examined him as to the other evidence of causation. *Va. Beach Bus Line v. Campbell,* 73 F. (2d.), 97; *S. v. Stewart,* 156 N. C., 636, 72 S. E., 193; *S. v. Holly,* 155 N. C., 485, 71 S. E., 450; *Godfrey v. Power Co.,* 190 N. C., 24, 128 S. E., 485. In his answers to the additional questions propounded by counsel for the claimant and by counsel for the defendant the witness made it very clear that he was not confining the cause of infection to any one incident.

I may here note that it is a matter of common knowledge that what goes into the mouth usually reaches the alimentary, and not the respiratory, tract. In this connection this witness testified: "It is the presence of fine droplets of moisture coming out of the lung of the coughing patient and going into the respiratory tract of the recipient and inhaled in the lung" that causes the tuberculosis. And again: "I don't have positive proof he was infected at that time, no. I will testify that it is possible he did and in my opinion, likely he did."

Dr. Combs, witness for the employer, being tendered to and examined by claimant, testified: "My opinion is that Mr. MacRae's condition, chronic pulmonary tuberculosis, is attributable to his exposure to Mr. Frank Tyson while at work in view of the fact that there is no other history of contact." This answer was given in response to a hypothetical question similar to the one propounded to Dr. Brian. This witness testified further: "I couldn't attribute to that one case or one exposure when he had been exposed over a period of time; that may be a factor. . . . I'd say that would be an important factor but I couldn't say that would be the proximating factor because he could have developed the tuberculosis from the other exposure he had."

Thus it appears that each expert witness examined declined to give as an opinion that the one occurrence when Tyson coughed into the face of the claimant causing sputum to go into his mouth caused the tuberculosis. There is no evidence that such sputum as entered the mouth of the claimant was charged with tubercular germs or that he became inoculated at that time, and there is no sufficient evidence from which the existence of these facts may be assumed.

The individual Commissioner did not so find. After finding the facts in relation to the plaintiff's exposure to Tyson and that Tyson was during the month of February suffering from an active case of pulmonary tuberculosis, he further found, "that they had to work in such close proximity to each other that when the said Frank Tyson coughed—which he did frequently, the vapor and spray from his mouth would fly into the face of the plaintiff Neill MacRae; and that on one occasion, on or about the 15th of February, 1939, that the said Frank Tyson coughed while suffering with active pulmonary tuberculosis and that some of the sputum from his cough flew into the mouth of the plaintiff Neill MacRae." He further found "the Commissioner finds as a fact from the evidence and the greater weight of the evidence that the reception of the sputum sprays and the sputum itself from the mouth of Tyson into the face and mouth of the plaintiff was the cause of the development of the tuberculosis in the plaintiff; and, the Commissioner further finds as a fact that the reception of said spray and sputum flying through the air under the circumstances as described in the evi-

dence in this case, amounted to an injury by accident." This finding must be related to the evidence which discloses that the sprays were constantly flying through the air and into claimant's face over a considerable period of time.

The findings and conclusion of the hearing Commissioner were approved by the Full Commission. In addition the Commission made the following finding: "In the instant case, the Commission is of the opinion that the coughing and the sputum accidently hitting the plaintiff and entering his mouth constituted an injury by accident."

This finding is somewhat ambiguous. If related to the evidence it refers necessarily to the coughing over a period of time. If we arbitrarily confine it to one incident, the one incident intended is not made very clear. And if we assume that it refers to the one incident now relied on by plaintiff there is no finding that the claimant's infection resulted. No doubt the coughing into the face of the plaintiff under the circumstances outlined in the evidence was repulsive and offensive and could be classified as an injury. Even so, it does not follow, and it is not found, that the inoculation then occurred. To so find would require a degree of omniscience not possessed by man for, as testified to by the expert witness, in substance, we are constantly exposed to disease-producing germs and the medical science has not yet pointed the way to determine the exact moment or occasion of infection.

Apparently the majority recognize the defect in the findings of fact and the absence of that finding which, if supported by evidence, is essential to the plaintiff's claim. The majority opinion seeks to supply the missing link. It is there stated: "Plaintiff's tubercular disability is directly attributable to his infection when Tyson involuntarily and unexpectedly coughed spray and sputum into plaintiff's face and mouth." This finding of fact is not incorporated in either the opinion of the individual Commissioner or in the opinion of the Full Commission and it is not supported by evidence. Nor are we, if I understand the rules clearly, permitted to make such a finding of fact.

It is again later stated in the opinion: "We think that plaintiff's disease was proximately produced by infection from germs transmitted to him in droplets of spray and sputum coughed up and expectorated into his face and mouth by a negligent employee in the course of his employment by defendant; that the unusual circumstances and conditions under which said injury was produced constituted an accident arising out of his employment." Neither this finding of fact nor this conclusion is to be found either in the opinion of the hearing Commissioner or in the opinion of the Full Commission. Nor is there any evidence sufficient to support the finding by this Court, even if we had the power to so supplement the record.

We may concede that claimant probably contracted tuberculosis in the course of his employment. This is not sufficient. It must be shown that he did in fact become inoculated in the course of his employment and *by accident.*

How can it be said that the transmission of bacilli from one person to another, the whole operation being invisible, intangible and without any *situs* of inception, and which takes place without the knowledge of the employee receiving the bacilli and unknown to the employee from whom the bacilli are contracted, assumes the proportion and classification of an accident? The whole transaction from the inception to the time the disease becomes clinically recognizable is one indivisible and connected operation. The whole transaction is progressive. The disease may be received in the system and never become active; it may progress to the point that lesions are formed, and it is impossible to say at what point the accident occurred.

Bacteria are daily received into the body, by contact or inhalation, without resultant disease. The fact of their presence is not the fact of disease. Is it possible to say that there is a blow, a traumatism, or a violent act when microscopic organisms whose bodies are not visible, whose touch cannot be felt and whose presence cannot be known passes into the lungs with the air by which they are carried?

Granted that there is an impact of bacteria whenever they enter the body so that accidental injury occurs, then every day of our lives we receive accidental injuries; and on the testimony in this case the claimant received such injuries practically every hour during which he was on duty throughout the full month of February. *Richardson v. Greenburg, supra.* To attempt to so classify such an occurrence is comparable to undertaking to put big threads through the eyes of little needles.

Further, it must appear that the injuries (and disease, under the act is not treated as an injury but as the result of the injury) arose out of the employment. The term "arising out of" excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workman would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. The event must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence. *Harden v. Furniture Co.,* 199 N. C., 733; *Plemmons v. White's Service, Inc.,* 213 N. C., 148; *Walker v. Wilkins,* 212 N. C., 627.

The "storm" of bacilli, *Walker v. Wilkins, supra;* the "bite" of the tubercular germ, *Plemmons v. White's Service, Inc., supra;* the "assault" by a fellow employee, *Harden v. Furniture Co., supra,* were not incident to the employment. The hazard was common to life. In no sense did the causative danger arise out of the employment.

To hold that plaintiff's disease is compensable will convert the Workmen's Compensation Act into a species of compulsory medical insurance as against the infectious and contagious diseases. If the employer is responsible for pulmonary tuberculosis then he would also be responsible for a case of influenza, common colds or poliomyelitis whenever the evidence tends to show there was an exposure to an infected fellow employee during working hours. These are risks not connected with any business and against which no employer can guard.

The employer assumes only the risks incident to the business or employment. *Chambers v. Oil Co.,* 199 N. C., 28; *Beavers v. Power Co.,* 205 N. C., 34; *Goodwin v. Bright,* 202 N. C., 481.

It may be well to note further that if we consider the additional findings by the Full Commission to be supplemental of and in addition to the findings of the hearing Commissioner so as to confine "the injury by accident" to the one incident then there is a conflict of findings by the Full Commission. It adopted the findings and conclusions of the individual Commissioner and then, on this theory, made a contrary finding.

The language in the opinion of the hearing Commissioner, approved by the Full Commission, clearly indicates that the Commission realized that in allowing compensation it was skating on thin ice. Notice is served therein that the decision in this cause is not to be considered a precedent. I agree that the condition of claimant is unfortunate and the circumstances under which he apparently contracted his disease are regrettable. However, the law that applies to one must apply to all. The Legislature has excluded the disease with which the claimant is suffering from the list of diseases compensable under the act. In my opinion the judgment below should be reversed.

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

STATE OF NORTH CAROLINA ON RELATION OF C. G. ELLIS, H. B. BAINES, W. J. EASON, C. E. CARTER, H. R. HOFLER, J. D. ROUNTREE, E. L. RICE, M. B. HOBBS, M. L. BYRUM, W. O. HILL, W. F. HILL, H. O. HOFLER, AND MARY IOLIA LILLEY, ADMINISTRATRIX OF JOSHUA MULLEN, DECEASED, AND THE ABOVE NAMED RELATORS INDIVIDUALLY, v. B. H. BROWN, W. W. POWELL, C. E. SAWYER, H. V. BEAMON AND FIDELITY & CASUALTY COMPANY, INC (FIDELITY & CASUALTY COMPANY OF NEW YORK).

(Filed 19 June, 1940.)

1. Principal and Surety § 15: Counties §§ 5, 7; Pleadings § 16—Causes alleged held not to affect all parties, and cause in tort was joined with causes on contract, and demurrer was properly sustained.

Plaintiffs, sureties on the bond of the clerk of the Superior Court, sought to recover in this action against the county accountant for alleged negligence in failing to properly audit the books of the clerk, against the members of the board of county commissioners for alleged negligence in employing incompetent accountants and in failing to employ competent ones after discovering the neglect of both the county accountant and the clerk, and against the members of the board of county commissioners as statutory bondsmen, C. S., 335, in approving the bond of the county accountant in a penal sum less than that required by statute. *Held:* Defendants' demurrers for misjoinder of parties and causes of action were properly sustained, since one of the causes sounds in contract while the others sound in tort, and since the causes alleged do not affect all the parties to the action.

2. Principal and Surety § 15: Counties §§ 5, 7—Sureties on clerk's bond may not hold accountant and commissioners liable for alleged negligence in regard to audit of books of clerk.

This action was instituted by the sureties on the bond of the clerk of the Superior Court against the members of the board of county commissioners and the county accountant to recover for loss sustained by plaintiffs in making good defalcations by the clerk. Plaintiffs alleged negligence on the part of defendants in failing to have a proper audit and accounting of the books of the clerk. *Held:* There is no causal connection between the negligence alleged and the damage sustained by plaintiffs, since defalcation of the clerk causing the loss could have occurred regardless of whether defendants had performed their statutory duties in regard to auditing the clerk's books, and defendants' demurrers for failure of the complaint to state a cause of action were properly sustained.

APPEAL by plaintiffs from *Thompson, J.*, at Chambers in Elizabeth City, N. C., 13 January, 1940. From GATES.

This is an appeal from a judgment sustaining demurrers and dismissing the action. The complaint alleges in substance: Plaintiffs or relators are citizens and taxpayers of Gates County and were sureties on the official bond of R. S. Boyce, former clerk Superior Court of Gates

County. The defendant Brown was chairman of the Board of Commissioners of Gates County and the defendants Powell and Sawyer were members of the board. The defendant Beamon was County Accountant of Gates County, and the defendant Fidelity & Casualty Company of New York was surety on his official bond as such accountant in the penal sum of $4,000.00. The commissioners negligently and wrongfully failed to require bond in the sum of $5,000.00 as prescribed by law (C. S., 1334 [69]), and are therefore, by statute (C. S., 335), also liable as sureties on the official bond of the county accountant in the penal sum of $5,000.00. During the entire time he was county accountant the defendant Beamon negligently and wrongfully failed to perform his duties with respect to examination and auditing of the records, accounts, receipts and disbursements of the said R. S. Boyce, clerk Superior Court, as required by the County Fiscal Control Act (C. S., 1334 [53], *et seq.*), or to require the said clerk to keep records and make reports and accountings as prescribed by said act. The defendant county commissioners also negligently and wrongfully failed to require the county accountant and clerk Superior Court to perform the duties aforesaid as required by the County Fiscal Control Act and also negligently and wrongfully failed to perform certain duties imposed upon the commissioners themselves by other statutes with reference to examining the records of the clerk's office and requiring reports from the clerk. When it was finally brought to the attention of the commissioners that the clerk was probably short in his accounts they employed an unauthorized and incompetent person to make an audit instead of having it done by the county accountant or some accountant approved by the Local Government Commission as required by law. As a result said audit was not properly conducted and erroneously reported no shortage. As a proximate result of the aforesaid negligent and wrongful failure on the part of the commissioners and county accountant to perform the duties required of them the said R. S. Boyce, clerk Superior Court, was enabled to embezzle and did embezzle a large sum of money, which the plaintiffs were required to make good by paying a judgment against them as sureties on his official bond. The said Boyce, former clerk, is utterly insolvent and is now serving sentence for said embezzlements.

The defendant commissioners filed a demurrer and the defendant Beamon and his surety a separate demurrer, both on the ground of misjoinder of parties and causes of action and both also upon the ground that the complaint failed to state facts sufficient to constitute a cause of action. The court sustained the demurrers and entered judgment dismissing the action, to which the plaintiffs excepted, assigned error and appealed to the Supreme Court.

Claude J. Gray and W. D. Pruden for plaintiffs, appellants.

Ruark & Ruark, McMullan & McMullan, Godwin & Godwin, and T. W. Costen, Jr., for defendants, appellees.

SCHENCK, J. The action is by the State in behalf of the relators who were sureties on the official bond of the former clerk of the Superior Court of Gates County. The clerk defaulted and as a consequence the relators were compelled to pay a judgment against them amounting to $6,500.00 and $41.60 cost of court.

Complaint is first made against the defendant Beamon, the county accountant, and the surety on his official bond, the defendant Fidelity & Casualty Company of New York, for failure to properly audit and supervise the accounts of Boyce, clerk of the Superior Court.

The defendants Brown, Powell and Sawyer, as commissioners of Gates County, are also sought to be held liable as statutory bondsmen of the county accountant because they approved his bond for $4,000.00 when the statute required a bond in at least $5,000.00.

The defendants Brown, Powell and Sawyer are joined additionally for employing incompetent accountants and failing to employ competent ones after discovering the neglect of both the clerk and the county accountant.

The first cause of action alleged against the county accountant and the surety on his official bond is separate and distinct from the causes of action alleged against the commissioners of the county. The one sounds in contract; and the others in tort. The alleged liabilities are different; they arise out of different situations, and they do not affect all the parties to the action. Their inclusion in the same complaint therefore constitutes a misjoinder of causes of action. C. S., 507; *Bank v. Angelo,* 193 N. C., 576, and cases there cited; *Street v. Tuck,* 84 N. C., 605.

We are also persuaded that there is not only a misjoinder of causes, but that there is also a deficiency in the facts alleged to constitute any cause of action against the defendants. The proximate cause of the loss sustained by the relators was the defalcation of their own principal. Without this intervening, independent, wrongful act of a responsible agency or third person, no injury would have resulted from the matters and things of which the relators now complain, *Butner v. Spease, ante,* 82. The wrong alleged to have been committed and the loss alleged to have been sustained do not stand in the relation of cause and effect. The loss alleged to have been sustained by the plaintiffs was not the direct or immediate result of the defendants' alleged acts. The only direct and immediate cause of the loss alleged to have been sustained by the plaintiffs was the dishonesty and embezzlement of the clerk, their principal, whose honesty and fidelity was the express obligation of their

undertaking. The defendants could have done all that they are alleged to have done and have left undone all they are alleged to have left undone and yet no injury to the plaintiffs would have resulted; they could have observed the statutes to the very letter and the loss to the plaintiffs would have been the same. The clerk could have embezzled the funds with or without strict compliance with the statutes by the defendants. Therefore, there was no causal connection between the alleged acts of the defendants and the loss alleged to have been sustained by the plaintiffs. *Hudson v. McArthur,* 152 N. C., 445.

The taproot of this case is the criminal conduct of the former clerk of the Superior Court of Gates County. The relators as sureties vouched for his honesty. They have stepped into his shoes and made good his peculations. Liabilities, and not rights, flow from criminality. *Reynolds v. Reynolds,* 208 N. C., 428.

We conclude that the demurrers were properly sustained, and that the judgment dismissing the action should be affirmed. It is so ordered.

Affirmed.

WINNIE WOOD WALSTON ET AL. v. SUSAN MORGAN ET AL.

(Filed 28 February, 1940.)

APPEAL by plaintiffs from *Nimocks, J.,* at November Term, 1939, of PASQUOTANK.

Petition for partition.

Petitioners and respondents are owners of a tract of land in Pasquotank County containing approximately 78 acres. Those owning 5/8 in interest prayed for actual partition of 56 acres and a sale of the remaining 22 acres. The owners of 3/8 in interest alleged that partial partition under C. S., 3227, could not be had without substantial loss and prayed for a sale of the whole tract.

Upon facts found by the court favorable to the view of those holding the minority interest the entire tract was ordered to be sold for partition, it being recited in the judgment that "upon the foregoing, the court being of the opinion that a sale of said lands is proper and necessary, and that, as a matter of law, the court is without right to order a partition according to either of the modes or methods proposed and requested by the petitioners." From this order the petitioners appeal.

R. Clarence Dozier for plaintiffs and certain respondents, appellants.
McMullan & McMullan for appellees.

Per Curiam. The judge of the Superior Court concluded that a sale of the entire tract was necessary and proper on the facts found and set out in the record. What has occasioned the appeal is the further statement in the judgment that the court was without right, as a matter of law, to order actual partition in part and sale in part. This, however, is predicated "upon the foregoing" and the court's opinion based thereon that a sale of the whole tract was "proper and necessary." As thus understood, it would seem that only a discretionary order is presented for review. *Taylor v. Carrow,* 156 N. C., 6, 72 S. E., 76.

Affirmed.

ADA McCOY v. I. H. VANHOOK and DELIA VANHOOK; CHARLES A. ROGERS, Executor; NORA VANHOOK, ANNIE VANHOOK, HARVEY D. VANHOOK, LEX VANHOOK and KATE VANHOOK.

(Filed 28 February, 1940.)

Appeal by plaintiff from *Pless, J.,* at December Term, 1939, of Macon. No error.

This was a civil action instituted in Macon Superior Court by the plaintiff, Ada McCoy, against the defendants, to recover judgment on a note owned and held by plaintiff against the defendant I. H. Vanhook, and to have I. H. Vanhook, a nonresident, declared the beneficial owner of the land described in the complaint and a trust declared therein and subjected to the payment of said indebtedness.

Since the institution of the suit Delia Vanhook has died leaving a will and testament naming Chas. A. Rogers as executor of her estate, and devising all property claimed by her, real and personal, including the subject matter of this action, to Nora Vanhook, Annie Vanhook, Harvey D. Vanhook, Lex Vanhook and Kate Vanhook, who were made parties to the action.

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

"1. Is I. H. Vanhook indebted to the plaintiff, and, if so, in what amount? Ans.: 'Yes, $1,970.74.'

"2. Did I. H. Vanhook furnish money with which to purchase the land described in the complaint? Ans.: 'No.'

"3. If so, what amount? Ans.: 'Nothing.'

"4. At the time of furnishing said money did I. H. Vanhook retain, in the State of North Carolina, sufficient property available for the satisfaction of his then creditors? Ans.: 'No.'

"5. If so, was the money so furnished by I. H. Vanhook derived from property in North Carolina then available for the satisfaction of his then creditors? Ans.: 'No.'

"6. Did his so furnishing such money hinder, delay or defeat the plaintiff in the collection of her debt against I. H. Vanhook? Ans.: 'No.'

"7. Did Annie Vanhook furnish money with which to purchase the land described in the complaint, and, if so, what amount? Ans.: 'Yes, $400.00.'"

The court below rendered judgment on the verdict. The plaintiff made numerous exceptions and assignments of error and appealed to the Supreme Court.

Gray & Christopher for plaintiff.
Jones & Jones and G. L. Houk for defendants.

PER CURIAM. After reading the record and able briefs of the litigants we do not think that any of the exceptions and assignments of error made by plaintiff can be sustained. The controversies were mainly those of facts, which outside of the issue of indebtedness found for plaintiff against I. H. Vanhook, were found for defendants.

We think that the exceptions and assignments of error made by plaintiff to evidence and the charge of the court below were not to her prejudice.

The setting is of interest: The plaintiff recovered a judgment against I. H. Vanhook for a deficiency in a land mortgage held by plaintiff, which she claimed was worthless mountain land. Nora Vanhook, one of the defendants, lives at the old Vanhook Home Place in Macon County, N. C. At the time of the trial she was about 78 years of age. I. H. Vanhook, on 11 November, 1891, left for Alaska. There were left at home Delia Vanhook, Nora Vanhook, R. A. Vanhook, who married Annie Vanhook. The two sisters whom I. H. Vanhook left at the Old Home Place loaned him every cent of their money to start life with, and this he paid back. Nora Vanhook testified, in part: "My sister, my youngest brother and myself looked after our parents, and Harve (I. H. Vanhook) sent us money to help us. Harve Vanhook never sent any money to me for the purpose of buying him any land. If he wanted any land he would have come and bought it. Harve never did tell me he wanted any of this money sent me to buy land for him. We were trying to save our home and saved every penny we could get. My sister-in-law put in four or five hundred dollars, and my sister and I put in every penny we could get. My brother has sent us money since he has been there. We paid off these obligations. We were not buying any land for him. When we needed money to pay off these obligations my

brother would send it to us if he had it." It seems that I. H. Vanhook was never unmindful of his duty to see that his aged unmarried sisters did not want for proper shelter, or the other necessities of life. And during the one-half century of his absence, this obligation, from the evidence, was faithfully carried out. He sent money when called upon, without restriction as to its application.

The court below charged the law applicable to the facts fully and carefully. The jury has found the main issues in favor of the defendants. We can see no reason to disturb the verdict or judgment rendered thereon.

No error.

ADDIE O. WHITE, ADMINISTRATRIX OF THE ESTATE OF CARL J. WHITE, v. SOUTHERN RAILWAY COMPANY.

(Filed 10 April, 1940.)

APPEAL by plaintiff from *Bobbitt, J.*, at October Term, 1939, of CLEVELAND. Affirmed.

Civil action to recover damages for wrongful death.

On 9 August, 1937, deceased was in an intoxicated condition to the extent that he would stagger when he walked. He left Lilly Mill about 6:15 p.m. and went to and along the railroad track toward the railroad trestle. About thirty or forty minutes later his body was found at the foot of the railroad embankment near the trestle. His body was bloody and muddy; his jugular vein was bursted; he had chest injuries and six or eight ribs were broken, one of which punctured his heart, and his clothing was torn.

At the conclusion of all the evidence, on motion of the defendant, the action was dismissed by judgment of nonsuit. Plaintiff excepted and appealed.

Gerald B. Goforth, Joseph M. Wright, and Horace Kennedy for plaintiff, appellant.

W. T. Joyner, D. Z. Newton, and R. C. Howison, Jr., for defendant, appellee.

PER CURIAM. The plaintiff has failed to bring her case within the decisions in *Henderson v. R. R.*, 159 N. C., 581, and *George v. R. R.*, 215 N. C., 773, 3 S. E. (2d), 286. *Harrison v. R. R.*, 204 N. C., 718, 169 S. E., 637, and cases there cited, and *Cummings v. R. R., ante*, 127, are controlling.

The judgment below is

Affirmed.

FRYE CHEVROLET COMPANY, INC., v. O. J. HOLDER, COLINE S. EDMISTEN AND J. C. EDMISTEN.

(Filed 10 April, 1940.)

APPEAL by plaintiff from *Cowper, Special Judge,* at January Term, 1940, of CALDWELL. No error.

From judgment on verdict in favor of defendant J. C. Edmisten, plaintiff appealed.

Pritchett & Strickland for plaintiff, appellant.
Max C. Wilson for defendant, appellee.

PER CURIAM. Plaintiff instituted action on a note which it was alleged defendant J. C. Edmisten had endorsed. This defendant denied that he had endorsed the note, or authorized anyone to sign his name thereto. The jury accepted the defendant's version of the transaction and rendered verdict in his favor. On the record, we find no ruling of the court below which would justify setting aside the verdict and judgment. The plaintiff's assignments of error cannot be sustained.

No error.

C. E. HILL v. HUGH WINSLOW.

(Filed 10 April, 1940.)

APPEAL by plaintiff from *Cowper, Special Judge,* at November Term, 1939, of PITT.

J. C. Lanier for plaintiff, appellant.
Albion Dunn for defendant, appellee.

PER CURIAM. The plaintiff alleges that he was riding in a trailer attached to the automobile of the defendant and that the negligence of the defendant, which was the proximate cause of his injury, consisted of said automobile "being operated in a careless, reckless and unlawful manner, and in reckless disregard of the rights and safety of this plaintiff, in that the car was being operated on a narrow and bumpy dirt road at an excessive rate of speed with respect to the condition of the road."

We have examined the evidence offered by the plaintiff and concur in his Honor's ruling that it fails to sustain the allegations of the complaint. The judgment as in case of nonsuit entered at the close of the plaintiff's evidence is, therefore,

Affirmed.

J. L. THOMPSON v. DR. PEPPER BOTTLERS CORPORATION.

(Filed 17 April, 1940.)

APPEAL by plaintiff from *Gwyn, J.*, at November Term, 1939, of IREDELL.

Civil action to recover for alleged actionable negligence.

The pleading and evidence disclose that defendant is a corporation engaged in the business of bottling a soft drink known as "Dr. Pepper," in Charlotte, North Carolina; that it distributes the "Dr. Pepper" in bottles to retail dealers in Mooresville, Iredell County, North Carolina, and elsewhere to be sold for human consumption, for which purpose defendant advertises it as a refreshing and health-giving beverage; that defendant directly or through its agents and employees at the times hereinafter mentioned "sold or left for sale" bottled "Dr. Pepper" with the Tuxedo Billiard Parlor in Mooresville, North Carolina.

Plaintiff further alleges and defendant for lack of information denies that on night of 4 July, 1938, plaintiff, after buying a bottle of "Dr. Pepper" in said Tuxedo Billiard Parlor, drank a part of it and discovered therein a foreign substance and was made sick thereby.

Plaintiff offers evidence tending not only to support the further allegation but tending to show that some time in July, 1938, within five or six days from the time plaintiff purchased the bottle as aforesaid, Floyd Beaver and Corbitt Moore found in a bottle of "Dr. Pepper," bought in the Shell Filling Station at the corner of Main and Moore, something like a piece of meat "as big as the end of your thumb, green looking on one side and black looking on the other," with manufacture and sale of which there is no evidence to connect defendant.

Plaintiff appeals to Supreme Court from judgment as of nonsuit entered at close of his evidence, and assigns error.

Zeb V. Turlington for plaintiff, appellant.

Land & Sowers for defendant, appellee.

PER CURIAM. No new question of law is raised in this case on appeal. Hence, in accordance with well settled applicable principles of law as enunciated in *Enloe v. Bottling Co.*, 208 N. C., 305, 180 S. E., 582, and numerous decisions subsequently rendered, the evidence appearing here, taken in the light most favorable to plaintiff as is required in considering demurrer to evidence, C. S., 567, is insufficient to take the case to the jury.

The judgment below is

Affirmed.

SERVICE INSURANCE & REALTY COMPANY v. J. A. GILES ET AL.

(Filed 8 June, 1940.)

APPEAL by defendants from *Carr, J.*, at October Term, 1939, of ORANGE.

Civil action to recover commissions for procuring purchaser of real estate to whom conveyance was afterwards made.

Upon denial of liability and issues joined, the case resulted in verdict and judgment for plaintiff, from which the defendants appeal, assigning errors.

L. J. Phipps for plaintiff, appellee.

C. P. Hinshaw for defendants, appellants.

PER CURIAM. The case was tried upon the principles announced in *McCoy v. Trust Co.*, 204 N. C., 721, 169 S. E., 644; *Trust Co. v. Goode*, 164 N. C., 19, 80 S. E., 62; and *Trust Co. v. Adams*, 145 N. C., 161, 58 S. E., 1008. The controverted issues of fact were resolved by the jury in favor of the plaintiff. The record is free from reversible error.

No error.

AMERICAN DISCOUNT CORPORATION v. MENESE WILLIARD.

(Filed 8 June, 1940.)

APPEAL by defendant from *Clement, J.*, at October Term, 1939, of GUILFORD.

Thomas Turner, Jr., for plaintiff, appellee.

Walser & Wright for defendant, appellant.

PER CURIAM. This is an action to recover the possession of an automobile instituted in the municipal court of the city of High Point, wherein from an adverse judgment the defendant appealed to the Superior Court of Guilford County. In the Superior Court judgment was entered overruling the assignments of error of the appellant and affirming the judgment of the municipal court. From this judgment the defendant appealed to the Supreme Court, making the single assignment of error "the judgment as signed affirming the judgment of the municipal court."

We have examined the judgment of the Superior Court and find therein No error.

DANIEL MASON v. R. M. BRAWLEY, JR.

(Filed 8 June, 1940.)

APPEAL by plaintiff from *Olive, Special Judge,* at November Term, 1939, of GUILFORD. Affirmed.

James E. Coltrane and W. Henry Hunter for plaintiff.
Zeb V. Turlington and John W. Caffey for defendant.

PER CURIAM. At the conclusion of plaintiff's evidence, motion for judgment of nonsuit was allowed. An examination of the evidence offered by the plaintiff leads us to the conclusion that the plaintiff has failed to offer any substantial evidence of actionable negligence upon the part of the defendant. Plaintiff was struck while he was attempting to cross the highway in front of defendant's motor vehicle. The judgment of nonsuit is

Affirmed.

E. C. HIGHSMITH v. A. H. EWING.

(Filed 19 June, 1940.)

APPEAL by defendant from *Stevens, J.,* at October-November Term, 1939, of PENDER.

Civil action to recover for lumber sold and delivered.

The defendant, a general contractor of Richmond, Va., was under contract to build a house in Wilmington, N. C. On competitive bidding, the Charles R. Barnes Lumber Company, of Raleigh, N. C., was awarded

the contract to furnish the lumber according to specifications. The lumber company in turn placed a part of the order with the plaintiff, a sawmill operator of Rocky Point, N. C., to be filled. It is in evidence that the plaintiff declined to fill the order from the lumber company and so notified the defendant. Whereupon the defendant notified the lumber company that he would purchase the needed lumber on the open market. The lumber was thereafter purchased from the plaintiff by defendant's foreman.

Plaintiff billed the defendant for the lumber on 13 September, 1937, which amounted to $381.44. Payment was declined on 18 September, 1937, on the ground that the lumber was furnished under a contract with the Barnes Lumber Company, to whom plaintiff was informed he should look for payment. The defendant paid the Barnes Lumber Company for the lumber in question on 20 October, 1937.

Upon denial of liability and issue joined, the jury responded in favor of the plaintiff, and from judgment thereon, the defendant appeals, assigning errors.

Clifton L. Moore, C. E. McCullen, Jr., and I. C. Wright for plaintiff, appellee.

Rountree & Rountree for defendant, appellant.

PER CURIAM. The legal questions involved are not altogether free from difficulty, albeit the Charles R. Barnes Lumber Company, who has received payment for the lumber in question, is not a party to the action. Plaintiff omits to explain why he declined to fill the order for the Barnes Lumber Company when he had the needed lumber on hand. Nevertheless, all disputed matters were submitted to the jury and resolved in favor of the plaintiff. It would seem that the verdict might well have been otherwise. However, the issue was for the jury. No doubt the defendant's failure to protect himself by refusing to pay the lumber company after notice of plaintiff's claim had much to do with the result. The exceptive assignments of error are apparently insufficient to warrant a new trial. The verdict and judgment will be upheld.

No error.

WORD AND PHRASE INDEX.

(References are to the Analytical Index, which begins on page 833, and to the case.)

ANALYTICAL INDEX.

ABATEMENT AND REVIVAL.

§ 11. Survival of Actions for Negligent Injury Causing Death.

While a father has no right of action for negligent injury of his child which immediately results in its death, the right of action for wrongful death existing only under C. S., 160, in favor of the administrator or executor, where negligent injury to the child does not immediately result in death, the father may maintain an action for loss of services and expenses of treatment, at least, during the period between the infliction of injury and the child's death, although the right of action for prospective earnings of the child during minority abates. *White v. Comrs. of Johnston*, 329.

ADOPTION.

§ 3. Consent of Natural Parents.

The consent of the living parent is necessary to the adoption of a minor, and judgment of the juvenile court, entered upon its finding that the child is a neglected child, that the child be committed to an asylum, and that the asylum should have the power to place the child in a home for adoption, does not show abandonment of the child or consent of the mother to its adoption notwithstanding she was present in court, the provision that the asylum should have the power to place the child in a home for adoption being void as beyond the jurisdiction of the juvenile court. *Ward v. Howard*, 201.

§ 4. Jurisdiction and Proceeding for Adoption in General.

Consent of the living natural parent must be made to appear to the court as a jurisdictional matter unless the child has been abandoned. *Ward v. Howard*, 201.

The Juvenile Court Act is in no respect an amendment to the Adoption Law, and does not affect the procedure therein prescribed for the adoption of minors. *Ibid.*

Ch. 171, Public Laws of 1927, cannot be held to validate an order of adoption theretofore entered by the court when such order is void because of want of consent of the living parent of the child or proof of abandonment, since even if the curative act be construed as retroactive, the defect is one of jurisdiction. Whether the General Assembly could provide for the adoption of children without notice to their parents or proof of abandonment, Constitution of North Carolina, Art. I, sec. 17, *quære*. *Ibid.*

ADVERSE POSSESSION.

§ 3. Actual, Hostile and Exclusive Possession in General.

Adverse possession is actual possession in the character of owner, evidenced by making the ordinary uses and taking the usual profits of which the property is susceptible in its present state, to the exclusion of all others, including the true owner. *Carswell v. Creswell*, 40.

§ 4b. Adverse Possession Against Trustees and Charitable and Religious Trusts.

Title by adverse possession may be acquired against religious, charitable or educational corporations or trusts. *Carswell v. Creswell*, 40.

ANIMALS—*Continued.*

are at large with his knowledge and consent or at his will or their escape is due to negligence on his part. *Gardner v. Black*, 573.

The person having charge of domestic animals is guilty of negligence in permitting them to escape only if he fails to exercise ordinary care and the foresight of a prudent person in keeping them in restraint, the ordinary rules of negligence being applicable. *Ibid.*

The provision of C. S., 1849, that any person who permits his livestock to run at large in territory in which the stock law is applicable shall be guilty of a misdemeanor, implies knowledge, consent or willingness on the part of the owner that the animals be at large, or negligence equivalent thereto, and the mere fact that animals are at large does not raise the presumption that the owner permits them to run at large, nor does the doctrine of *res ipsa loquitur* apply upon the establishment of the fact that the animals are found at large. *Ibid.*

Evidence *held* insufficient to show that the escape of defendant's mule was due to negligence, or that it was at large with defendant's knowledge and consent or at his will. *Ibid.*

§ 3. Recovery of Damages Inflicted by Domestic Animals.

Father *held* entitled to *mandamus* to compel county commissioners to appoint freeholders to ascertain his damages resulting from fatal injury to child by dog, the injury not resulting in immediate death of child. *White v. Comrs. of Johnston*, 329.

APPEAL AND ERROR.

I. Nature and Grounds of Appellate Jurisdiction
- 1. In General. Cox v. Kinston, 391.
- 2. Judgments Appealable: Premature Appeals. Hyman v. Edwards, 342; Panel Co. v. Ipock, 375; Knight v. Little, 681.
- 4. Academic Questions and Advisory Opinions. Efird v. Comrs. of Forsyth, 691.

II. Preservation and Presentation of Grounds of Review
- 6b. Form and Sufficiency of Exceptions. Holding v. Daniel, 473.
- 6e. Objections and Exceptions to Evidence and Motions to Strike. Edgerton v. Johnson, 314.
- 6g. Parties Entitled to Complain and Take Exception. Vaughn v. Booker, 479.
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XI. Review
- 37. Matters Reviewable.
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  - e. Findings of Fact other than in Injunctive Proceedings. Crabtree v. Sales Co., 587; Rose v. Bank, 600.
- 38. Presumptions and Burden of Showing Error. R. R. v. Thrower, 77; Tolley v. Creamery Co., 255; McCune v. Mfg. Co., 351.
- 39. Harmless and Prejudicial Error.
  - a. In General. R. R. v. Thrower, 77; Tolley v. Creamery Co., 255; Barnes v. Wilson, 190.
  - b. Error Cured by Verdict. McClamroch v. Ice Co., 106.
  - d. Harmless and Prejudicial Error in Admission of Exclusion of Evidence. McClamroch v. Ice Co., 106; Tolley v. Creamery Co., 255; Brown v. Montgomery Ward & Co., 368; Edgerton v. Johnson, 314.
  - e. Harmless and Prejudicial Error in Instructions. Oakley v. Casualty Co., 150; Templeton v. Kelley, 164; Barnes v. Wilson, 190; Saleed v. Abeyounis, 644.
- 40. Review of Particular Exceptions, Findings, Orders and Judgments.
  - a. Review of Judgments on Findings of Fact. McCormick v. Parker, 23; Rosser v. Matthews, 132; Smith v. Mineral Co., 346; McCune v. Mfg. Co., 351; Wood v. Woodbury & Pace, 356; Rose v. Bank, 600.

APPEAL AND ERROR—*Continued.*

§ 1. Nature and Grounds of Appellate Jurisdiction in General.

There is no inherent or inalienable right of appeal, the right of appeal being a privilege granted by statute. *Cox v. Kinston*, 391.

§ 2. Judgments Appealable: Premature Appeals.

Since a tenant in common has the right to actual partition unless it is made to appear by satisfactory proof that actual partition cannot be made without injury to some or all of the parties interested, C. S., 3233, an order for sale for partition affects a substantial right, and an appeal will lie to the Supreme Court from such order entered by the judge on appeal from the clerk. *Hyman v. Edwards*, 342.

An appeal from an order of the judge on appeal from the clerk directing actual partition is premature and will be dismissed, all orders being interlocutory until decree of confirmation. *Ibid.*

The appeal of the surety on a replevin bond from final judgment entered against him and his principal prior to the determination of the surety's motion that his name be stricken from the bond on the ground that in fact he did not sign same, *is held* not premature, since the final judgment would preclude the surety from thereafter litigating the question. *Panel Co. v. Ipock*, 375.

Even though an appeal from an order granting plaintiffs' motion for an examination of the adverse party is premature, the Supreme Court may nevertheless in its discretion consider the matter upon its merits. *Knight v. Little*, 681.

§ 4. Academic Questions and Advisory Opinions.

When act sought to be enjoined has been committed pending appeal, there is nothing for Court to enjoin and appeal will be dismissed. *Efird v. Comrs. of Forsyth*, 691.

§ 6b. Form and Sufficiency of Exceptions.

A general exception to the judgment does not present for review errors in the trial of the cause, and the Supreme Court, upon such exception, cannot grant a new trial upon appellant's contention that the court, notwithstanding that it did not submit to the jury any issue relating to defendant's counterclaim, rendered judgment in defendant's favor upon his counterclaim. *Holding v. Daniel*, 473.

§ 6e. Objections and Exceptions to Evidence and Motions to Strike.

(Later admission of evidence without objection see Appeal and Error § 6e.)

Where a witness' answer is not responsive to the question or where he testifies to facts not necessary to answer the question, it is incumbent upon the adverse party to move to strike out the answer. *Edgerton v. Johnson*, 314.

APPEAL AND ERROR—*Continued.*

§ 6g. Parties Entitled to Complain and Take Exception.

Appellant may not maintain an exception to the charge on the ground that it contained an expression of opinion by the court in violation of C. S., 564, when the alleged error is in favor of appellant and is therefore harmless as to him. *Vaughn v. Booker*, 479.

§ 8. Theory of Trial.

An appeal will be determined in accordance with the theory of trial in the lower court. *Jones v. Waldroup*, 178.

§ 21. Matters Not Appearing of Record.

Where the evidence is not in the record it will be presumed that it was sufficient to support trial court's refusal to nonsuit. *Barker v. Palmer*, 519.

§ 22. Conclusiveness and Effect of Record.

Ordinarily, the record is controlling, and a municipality may not maintain that if its license from the Federal Government is void the license should be treated as a nullity and that it should not be enjoined from proceeding in the construction of its hydroelectric plant, when the record discloses that it proposed to proceed under the Federal license, and there is no disclaimer in the record of the obligations imposed thereby. *McGuinn v. High Point*, 449.

The rule that the appeal is controlled by the record does not preclude consideration of matters *dehors* the record which disclose that the question sought to be presented has become moot or academic. *Ibid.*

Where the contract sued on is not made a part of the complaint, the sufficiency of the complaint as against demurrer will be determined in accordance with the nature of the contract as disclosed by the facts alleged, and not by plaintiff's characterization of the contract, and plaintiff may not recover on a theory of liability not supported by the facts alleged. *Petty v. Lemons*, 492.

§ 25. Waiver of Exceptions by Failure to Assign Same as Error.

An exception which is not assigned as error is deemed abandoned. *Rose v. Bank*, 600.

§ 29. Abandonment of Exceptions by Failure to Discuss Same in Briefs.

Only exceptive assignments of error brought forward in appellant's brief will be considered. Rule of Practice in the Supreme Court, No. 28. *Barnes v. Wilson*, 190.

Exceptions not set out in appellant's brief or in support of which no authority is cited and no argument advanced are deemed abandoned. Rule of Practice in the Supreme Court, No. 28. *Rose v. Bank*, 600.

§ 37b. Discretionary Matters.

The plaintiff excepted to the refusal of the court to set aside the verdict upon his contention that it reflected a compromise in that immediately after requesting and receiving additional instructions, the jury returned a verdict awarding inadequate damages. *Held:* In the absence of error of law or legal inference, the direct supervision of verdicts is a matter resting in the sound discretion of the trial court and is not reviewable. *McClamroch v. Ice Co.*, 106.

The ruling of the trial court as a matter of law that it was without power to permit defendant to amend his answer because of defect in the notice of the motion to amend is reviewable. *Cody v. Hovey*, 407.

APPEAL AND ERROR—*Continued.*

§ 37c. Review in Injunction Proceedings.

On appeal in injunction proceedings the Supreme Court has the power to find and review the findings of fact. *Rosser v. Matthews*, 132.

Upon appeal from judgment continuing a temporary order to the final hearing, it will be presumed that the court found facts sufficient to support the judgment in the absence of a request for findings or challenge to any facts found. *Beam v. Rutledge*, 670.

Where the parties waive a jury trial and agree to submit the entire controversy to the court for final determination, the findings of the court have the force and effect of a verdict and are conclusive on appeal, and this rule applies to facts found by the court by agreement upon the final hearing in injunction proceedings, except in cases submitted upon written or documentary proofs, although facts found upon the preliminary hearing are reviewable, since they are made only for the purpose of the interlocutory order and are found by the court without waiver or consent of the parties. *McGuinn v. High Point*, 449; *Yadkin County v. High Point*, 462.

§ 37e. Review of Findings of Fact Other Than in Injunctive Proceedings.

The findings of fact by the trial court in respect to service of summons are conclusive on appeal when supported by evidence. *Crabtree v. Sales Co.*, 587.

An assignment of error to the refusal of the court to sustain exceptions to the findings of fact by the referee cannot be sustained when the findings are supported by evidence. *Rose v. Bank*, 600.

§ 38. Presumptions and Burden of Showing Error.

The burden is upon the appellant to show not only that error was committed but also that it was prejudicial. *R. R. v. Thrower*, 77; *Tolley v. Creamery Co.*, 255; *McCune v. Mfg. Co.*, 351.

§ 39a. Harmless and Prejudicial Error in General.

A new trial will not be awarded for mere error alone, but the appellant must show not only that error was committed, but also that the error was material and prejudicial, amounting to a denial of a substantial right. *R. R. v. Thrower*, 77; *Tolley v. Creamery Co.*, 255.

An error in favor of appellant cannot entitle him to a new trial. *Barnes v. Wilson*, 190.

§ 39b. Error Cured by Verdict.

In this action for wrongful death plaintiff objected to the admission in evidence of his testator's death certificate, which had not been certified in accordance with C. S., 7111, plaintiff contending that the admission of the certificate was prejudicial for that the contents supported an inference that testator's death did not result from the accident in suit. *Held:* The verdict of the jury in plaintiff's favor on the issue of negligence rendered the error, if any, in the admission of the certificate harmless. *McClamroch v. Ice Co.*, 106.

§ 39d. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

Ordinarily, an exception to the admission of evidence cannot be sustained when similar evidence is admitted without objection. *McClamroch v. Ice Co.*, 106; *Tolley v. Creamery Co.*, 255; *Brown v. Montgomery Ward & Co.*, 368.

An exception to the admission of evidence becomes immaterial when the excepting party himself introduces evidence of the same import. *Edgerton v. Johnson*, 314.

APPEAL AND ERROR—*Continued.*

A new trial will not be awarded for error in the admission of evidence which is merely cumulative or of slight probative force and could not have prejudiced the complaining party. *Tolley v. Creamery Co.*, 255.

§ 39e. Harmless and Prejudicial Error in Instructions.

Conflicting instructions on a material point entitles appellant to a new trial, since the jury cannot be presumed to know which of the conflicting statements is correct. *Oakley v. Casualty Co.*, 150; *Templeton v. Kelley*, 164.

Erroneous instruction is not cured by later correct instruction on the same point when later instruction does not refer to, correct or retract prior instruction. *Templeton v. Kelley*, 164.

An excerpt from the charge will not be held for reversible error when the charge construed contextually as a whole is not prejudicial to appellant. *Barnes v. Wilson*, 190; *Saieed v. Abeyounis*, 644.

§ 40a. Review of Judgments on Findings of Fact.

Ordinarily, when there are no findings of fact in the record it will be presumed that the court found facts supporting its judgment, but when the record discloses that the court refused to hear evidence and find facts on a material point, the presumption cannot be indulged. *McCormick v. Proctor*, 23.

When, in a trial of a cause by the court by consent, there is no request that the court find the facts, it will be presumed on appeal that the court found facts sufficient to support its judgment. *Rosser v. Matthews*, 132.

Where appellant's only exception is to the signing of the judgment and there is no request for findings of fact or exceptions to the facts found, it will be presumed that the court found all facts necessary to support the judgment. *Smith v. Mineral Co.*, 346; *McCune v. Mfg. Co.*, 351.

The Supreme Court will not review conflicting affidavits in order to find a fact necessary to support a judgment, but in the absence of a request by appellant for findings of fact in the trial court, will presume that the court found the facts necessary to support its judgment. *Wood v. Woodbury & Pace*, 356.

An assignment of error to the court's failure to sustain exceptions to the referee's conclusions of law cannot be sustained when the conclusions are supported by the findings of fact. *Rose v. Bank*, 600.

§ 40b. Review of Orders on Motions to Strike.

An order striking out portions of the complaint will not be disturbed on appeal when it does not prejudice plaintiff or embarrass it in the prosecution of its cause. *Lumber Co. v. Edwards*, 251.

§ 40c. Review of Judgments on Motions to Nonsuit.

Where incompetent evidence is admitted in support of plaintiff's cause of action, the fact that had such evidence been excluded plaintiff might have offered competent evidence upon the point, will be considered by the Supreme Court in passing upon defendant's exception to the refusal of its motions for judgment of nonsuit. *Brown v. Montgomery Ward & Co.*, 368.

The refusal of a motion to nonsuit will not be held for error when the evidence is not in the record, since in such case it will be presumed that the evidence was sufficient to be submitted to the jury. *Barker v. Palmer*, 519.

§ 40f. Review of Judgments Upon Demurrer.

In reviewing a judgment sustaining a demurrer, the facts alleged in the complaint will be taken as true for the purpose of determining the sufficiency of the complaint, and whether the plaintiff can establish them by proof is not presented. *White v. Comrs. of Johnston*, 329; *Parks v. Princeton*, 361.

APPEAL AND ERROR—*Continued.*

§ 40g. Review of Constitutional Questions.

The Supreme Court will not decide the constitutionality of an ordinance when the appeal may be determined on the ground of want of power in the municipality to establish the regulation, unless strong considerations of public necessity appear. *Rhodes, Inc., v. Raleigh*, 627.

§ 41. Questions Necessary to Be Determined.

Where it is determined that defendant's motion to nonsuit on the issue of negligence should have been granted, defendant's exception to the refusal of the court to submit an issue of contributory negligence becomes immaterial and need not be considered. *Gardner v. Black*, 573.

Where a new trial is awarded on one assignment of error, other assignments relating to matters which may not arise on the subsequent hearing need not be considered. *Bank v. Marshburn*, 688.

§ 43. Determination of Petitions to Rehear.

The petition to rehear on the ground that the Court was inadvertent to one of the grounds upon which plaintiff attacked the constitutionality of the statute involved in the case is allowed. *Best & Co. v. Maxwell*, 134.

Where the Supreme Court is evenly divided in opinion, one Justice not sitting, as to whether there was error in the opinion of the Court in the construction of the statute attacked by plaintiff in the action, plaintiff's petition to rehear on this ground will be denied. *Ibid.*

The petition to rehear is allowed in this case as to that part of the opinion holding that the trial court erroneously failed to charge on the question of proximate cause, it appearing that the instruction taken contextually as a whole did sufficiently charge on this aspect of the case, but the petition is denied as to the part of the opinion holding that the charge of the trial court contained prejudicial error on another aspect of the case. *Templeton v. Kelley*, 164.

§ 49a. Law of the Case.

Held: Opinion reversing judgment overruling demurrer merely indicated plaintiff might move to amend under C. S., 515, and did not entitle her to file amended complaint as a matter of right without notice to defendant. *Scott v. Harrison*, 319.

Decision of Supreme Court *held* not to confine defendant to the procedure prescribed by C. S., 515, in seeking to amend his answer. *Cody v. Hovey*, 407.

Where the evidence upon the subsequent trial is materially different from that on the former trial, the decision of the Supreme Court on the former appeal is not conclusive. *George v. R. R.*, 684; *Warren v. Ins. Co.*, 705.

APPEARANCE.

§ 1. Special Appearance.

A motion to dismiss for failure of plaintiff to file security for costs as required by C. S., 493, pertains to a procedural question apart from the merits of the action, and an appearance for the purpose of making this motion, and a motion to dismiss for want of jurisdiction, does not constitute a general appearance, C. S., 490. *Mintz v. Frink*, 101.

§ 2b. Effect of Appearance.

Upon the hearing of a motion for the joinder of an additional party defendant, whether the appearance of such party for the purpose of resisting the

APPEARANCE—*Continued.*

motion is a general or special appearance is immaterial when the court refuses the motion and thereby takes such party out of court. *Cavarnos-Wright Co. v. Blythe Bros. Co.*, 583.

ARBITRATION AND AWARD.

§ 6. Notice, Hearings and Appraisals.

A party to an arbitration agreement has the right to notice and an opportunity to present evidence as to all matters submitted. *Grimes v. Ins. Co.*, 259.

§ 9. Resubmission to Arbiters.

Where a party who is not bound by the award institutes action in the Superior Court, and defendant pleads to the merits, and issue is joined and the jury impaneled, the court is without authority to order resubmission to the arbiters over defendant's objection, and defendant's participation in the second hearing before the arbiters does not constitute a waiver of its exception. *Grimes v. Ins. Co.*, 259.

§ 12. Award as Bar to Action.

An award entered in the absence of notice and an opportunity to be heard is not binding and does not preclude institution of action in the Superior Court. *Grimes v. Ins. Co.*, 259.

ARREST.

§ 1b. Arrest by Officers Without Warrant.

An instruction to the effect that police officers had a right to enter a cafe without a warrant and make whatever investigation they deemed necessary *is held* without error, since the officers have a right to enter a public place as invitees unless forbidden to enter therein, and further, officers may enter public or private property upon hearing a disturbance therein and make an arrest without a warrant to prevent a breach of the peace. C. S., 4542, 2642. *S. v. Wray*, 167.

§ 3. Resisting Arrest and Interference With Officers Making Arrest.

Evidence *held* sufficient to be submitted to the jury as to each defendant on the charge of obstructing justice in interfering with police officers in the discharge of their duty in making an arrest. *S. v. Wray*, 167.

ASSAULT.

§ 11. Sufficiency of Evidence and Nonsuit.

Evidence *held* sufficient to be submitted to jury on charge of assault with deadly weapon. *S. v. Wray*, 167.

ASSIGNMENTS.

§ 1. Choses Assignable.

An equity arising to the owner of land by reason of his construction of a house, through innocent mistake, partly on the adjacent land, is assignable. *Lumber Co. v. Edwards*, 251.

An assignment by an employee of wages earned and due him by the employer is valid without acceptance by the employer, and the assignee may sue the employer thereon, C. S., 446. the provision of chapter 410, Public Laws of 1935, being applicable only to wages to be earned in the future. *Rickman v. Holshouser*, 377.

ASSISTANCE, WRIT OF.

§ 5. Restraining Execution of Writ of Assistance.

The proper remedy to restrain execution of a writ of assistance is by motion in the cause, since a writ of assistance is in the nature of an execution. *Davis v. Land Bank*, 145.

ATTORNEY AND CLIENT.

§ 4. Right to Be Represented by Attorney.

A litigant has the right, as a matter of law, to be represented by counsel, who must, within reasonable bounds, be permitted to cross-examine the witnesses of his adversary. *Roediger v. Sapos*, 95.

§ 7. Right of Attorney to Withdraw From the Case. (Withdrawal of attorney as constituting "surprise" see Judgments § 22e.)

When an attorney is retained generally to conduct a legal proceeding he enters into an entire contract to follow the proceeding to its termination, and he may withdraw from the case for good cause only by permission of the court after notice to the client, and the court should not permit him to withdraw in the absence of the client without showing that his client has been notified. *Roediger v. Sapos*, 95.

AUTOMOBILES.

II. Sale, Title and Warranties
- 6c. Warranties and Liabilities between Dealers. Aldridge Motors v. Alexander, 750.
- 6d. Liability of dealer for Negligence in Dangerous Defects. Jones v. Chevrolet Co., 693.

III. Operation and Law of the Road
- 8. Emergencies. Guthrie v. Gocking, 476.
- 12a. Speed in General. Clarke v. Martin, 440; Smart v. Rodgers, 560.
- 13. Stopping, Starting and Turning. Butner v. Spease, 82; Guthrie v. Gocking, 476.
- 14. Parking and Parking Lights. Clarke v. Martin, 440.
- 18. Actions to Recover for Negligent Operation.
  - a. Sufficiency of Evidence and Nonsuit on Issue of Negligence. Clarke v. Martin, 440.
  - c. Contributory Negligence. Clarke v. Martin, 440.
  - d. Concurring and Intervening Negligence. Butner v. Spease, 82; Guthrie v. Gocking, 476.
  - h. Instructions. Smart v. Rodgers, 560.

IV. Guests and Passengers
- 21. Parties Liable to Guests and Passengers. Butner v. Spease, 82; Cole v. Motor Co., 756.

V. Liability of Owner for Driver's Negligence
- 24b. Scope of Employment. Cole v. Motor Co., 756.
- 24d. Instructions on Issue of Respondeat Superior. Templeton v. Kelley, 164.
- 25. Family Car Doctrine. Vaughn v. Booker, 479.

§ 6c. Warranties and Liabilities Between Dealers.

In the sale of a car by one automobile dealer to another automobile dealer for resale to the ultimate purchaser, there is an implied warranty that the car is merchantable and salable and reasonably fit for the use for which it was sold, and this implied warranty between the dealers is not affected by the fact that the contract between the dealers is approved by the manufacturer. *Aldridge Motors, Inc., v. Alexander*, 750.

In an action between dealers upon an implied warranty, the defense that plaintiff dealer had knowledge of the defect resulting in the destruction of the car in the hands of the ultimate purchaser for some time prior to its destruction, and did not notify defendant dealer until after the ultimate purchaser had filed suit for damages, and that therefore plaintiff was estopped to maintain an action, cannot be taken by demurrer but must be raised by answer. *Ibid.*

§ 6d. Liability of Dealer for Negligence in Dangerous Defects.

Evidence tending to show that defendant, an automobile dealer, sold the car in question second-hand with representation that the brakes thereon were

good and reliable, while in fact the brakes were defective and in such condition that the operator would lose control over the car upon the application of the brakes in an emergency, and that plaintiff was injured while riding as a passenger in the car as a direct result of the defective brakes, *is held* to state a cause of action against the dealer in tort. *Jones v. Chevrolet Co.*, 693.

In an action by a passenger in a car to recover for alleged negligence of the dealer in selling the car second-hand with representations that the brakes were dependable, while in fact the brakes were defective, and resulted in injury to plaintiff passenger when they were applied by the driver, parol evidence that the dealer had represented the brakes as being good and dependable is erroneously excluded on the ground that such evidence was at variance with the written contract between the purchaser of the car and the finance company, since plaintiff is not a party to the contract, and the action is in tort and not upon the contract. *Ibid.*

In an action by a passenger in an automobile to recover for the negligence of the dealer in selling the car second-hand with representations that the brakes were good and dependable, while in fact the brakes were defective and would likely result in injury to the public, testimony of defendant's employee that brakes of the type used on the car had given trouble, that they had had to change a lot of them, but that the brakes on this car had not been changed, *is held* competent as a *post rem* statement of the agent tending to show knowledge of the principal. *Ibid.*

§ 8. Emergencies.

While a motorist under some circumstances, as when he sees a car approaching on the wrong side of the highway with the driver in an apparently helpless condition, may be required to drive off the hard surface on his right to avoid a collision, he owes no duty to the driver of the car in his rear to drive off the highway so that the driver in his rear may see the approaching car. *Guthrie v. Gocking*, 476.

§ 12a. Speed in General.

A motorist is required not to exceed speed at which he can stop car within distance he can see along highway. *Clarke v. Martin*, 440.

While ordinarily the violation of a safety statute constitutes negligence *per se* and is actionable when the proximate cause of injury, speed in excess of the limits prescribed by chapter 407, Public Laws of 1937, is made merely *prima facie* evidence that the speed is not reasonable or prudent. *Smart v. Rodgers*, 560.

§ 13. Stopping, Starting and Turning.

Evidence that driver of truck, intending to enter a side road, turned across the highway straight in front of the path of an automobile when the vehicles were only about fifty feet apart, establishes negligence on the part of the truck driver insulating the negligence of the driver of the car, even conceding he was negligent in driving at an excessive speed, and notwithstanding that truck driver gave hand signal for a left turn, since, even if the signal could have been seen, the driver of the car could not have anticipated that the truck would turn immediately in front of him, and since the signal could not have been seen because both cars had their lights burning and it was dark. *Butner v. Spease*, 82.

The duty of a motorist to give warning before materially decreasing his speed or turning to the right or left is for the benefit of drivers of vehicles which might be endangered by such action, and it is not incumbent upon a

AUTOMOBILES—*Continued.*

driver to give warning to the drivers of vehicles in his rear that a car is approaching from the opposite direction and his failure to give such warning cannot be held a proximate cause of a collision between the car in his rear and the car approaching from the opposite direction. *Guthrie v. Gocking*, 476.

§ 14. Parking and Parking Lights.

Evidence that defendant parked his truck before daylight on the right-hand side of the highway without proper signal lights in the rear thereof, and that plaintiff ran his automobile into the rear of the truck, resulting in injury to his person and damage to his car, *is held* sufficient to be submitted to the jury on the issue of negligence. *Clarke v. Martin*, 440.

§ 18a. Sufficiency of Evidence on Issue of Negligence.

Evidence that defendant parked truck on highway before daylight without proper signal lights in rear *held* sufficient for jury in motorist's action for damages sustained when he struck back of truck. *Clarke v. Martin*, 440.

§ 18c. Contributory Negligence.

Court should have granted requested instruction that if plaintiff was traveling at speed in excess of that at which he could stop car within distance he could see along highway, and if such speed was one of proximate causes of plaintiff's car hitting rear of defendant's truck parked on highway, plaintiff would be guilty of contributory negligence. *Clarke v. Martin*, 440.

§ 18d. Concurring and Intervening Negligence.

Negligence of driver of one vehicle *held* to insulate that of driver of other vehicle and to preclude recovery by guest in first vehicle against driver of the second. *Butner v. Spease*, 82.

Plaintiff was driving along the highway following defendant's car. A car approaching from the opposite direction side-swiped defendant's car and collided head-on with plaintiff's car. *Held:* Defendant driver's failure to signal that he was going to slacken speed or stop was not the proximate cause of the accident between plaintiff's car and the third automobile, and even conceding that defendant driver should have driven off of the hard surface portion of the highway to his right under the circumstances, the evidence discloses that the gross and palpable negligence of the driver of the third car constituted the efficient proximate cause of plaintiff's injuries and completely exculpates defendants. *Guthrie v. Gocking*, 476.

§ 18h. Instructions.

An instruction that speed in excess of the limits prescribed by the statute constitutes negligence *per se* is error which is not cured by a correct instruction upon the question of proximate cause. *Smart v. Rodgers*, 560.

§ 21. Parties Liable to Guests and Passengers.

Negligence of driver of one vehicle *held* to insulate that of driver of other vehicle and to preclude recovery by guest in first vehicle against driver of the second. *Butner v. Spease*, 82.

The owner of a car cannot be held liable by a person given a ride in the car by his employee against the employer's orders except for wanton or willful injury inflicted by the driver, since in such case the passenger is a trespasser; but when the driver is a salesman and has implied authority to pick up such person in the performance of his duty to demonstrate the car and contact prospects, the owner may be held liable for mere negligent injury. *Cole v. Motor Co.*, 756.

AUTOMOBILES—*Continued.*

§ 24b. Scope of Employment.

Whether salesman acted within scope of employment to properly demonstrate car and contact prospects in giving plaintiff ride *held* for jury in plaintiff's action to recover for injuries resulting from collision. *Cole v. Motor Co.*, 756.

§ 24d. Instructions on Issue of Respondeat Superior.

Instruction *held* for error in charging that jury should answer issue of negligence against alleged employer if they found the employee was negligent, without charging that the employer's liability depended on whether the individual defendant was an employee and engaged in the scope of his employment at the time, and error was not cured by later instruction on this point which did not refer to, correct or retract the prior instruction. *Templeton v. Kelley*, 164.

§ 25. Family Car Doctrine.

A father cannot be held liable for the negligent operation of his car by his son under the family purpose doctrine when the accident occurs in a locality in which the son is expressly forbidden to drive, there being no liability on the part of the father merely by reason of the relationship, his liability under the family car doctrine being the liability of a principal. *Vaughn v. Booker*, 479.

BAILMENT.

§ 1. Nature and Requisites.

A contract under which the purchaser's agent agrees to hold the chattels and to turn same over to the purchaser as they are paid for, and to return same only in the event they are not paid for, the title to remain in the seller until the purchase price is paid is a conditional sales contract and not a bailment. *Body Co. v. Corbitt Co.*, 264.

BANKS AND BANKING.

§ 7f. Joint Deposits.

Where money is deposited by husband in savings account in name of himself "or" wife, even though made with the proceeds of sale of realty held by the entireties, there is no right of survivorship, and upon husband's death the deposit belongs to his estate and the wife is not entitled to recover same from his administrator in the absence of a showing that she and husband had agreed that survivor should take. *Redmond v. Farthing*, 678.

BASTARDS.

§ 7. Limitations on Prosecutions for Failure to Support.

Where the defendant acknowledges paternity, a prosecution for his failure to support his illegitimate child must be instituted within three years from the date of an acknowledgment of paternity made within three years from date of the birth of such child. Chapter 217, Public Laws of 1939. *S. v. Killian*, 339; *S. v. Hodges*, 625.

BETTERMENTS.

§ 1. Nature and Requisites of Claim for Betterments.

The owner of a lot who, through innocent mistake, constructs a house partly on his lot and partly on the adjacent lot, acquires an equity, which equitable

BILLS AND NOTES—*Continued.*

The person taking note from maker's office was collecting agent for bank and also president of the corporate payee. *Held:* If in taking the note such person was acting as agent for the bank, the bank would be charged with notice and would not be holder in due course, but if such person was acting as agent for the payee the bank would be a holder in due course entitled to recover free from equities. *Bank v. Marshburn*, 688.

§ 10g. Issuing Worthless Checks.

The indictment charged that defendant issued a worthless check knowing at the time that he did not have sufficient funds or credit for its payment. The proof was that defendant issued a check of a corporation of which he was an executive officer, and that the corporation did not have sufficient funds or credit for its payment. *Held:* There is a fatal variance between allegation and proof, and defendant's motion to nonsuit should have been allowed. *S. v. Dowless*, 589.

§ 20. Discharge by Judgment and Rights of Parties to Note Inter Se.

One of defendants admitted that he was a principal on the note in question, and the verdict of the jury established that the other defendant was also a principal. Plaintiff was a surety on the note, and after judgment was obtained by the payee, plaintiff drew his check to one of the principals to be used in partial satisfaction of the judgment. *Held:* Although upon the rendition of the judgment the note merged therein and the judgment became the only legal evidence of the indebtedness, the relative liability of defendants as principals and plaintiff as surety, as between themselves, remained the same as on the note, and plaintiff, even in the absence of an assignment of the judgment to a trustee for his benefit, became the contract creditor of defendants to the extent of the money advanced by him. *Saieed v. Abcyounis*, 644.

§ 25. Presumptions and Burden of Proof.

In this action by an administrator against intestate's widow to recover a certain note as an asset of the estate, it appeared that the note was payable to intestate or the widow and that it was in the widow's possession. *Held:* In the absence of evidence of superior title, and instruction that if the jury believed the evidence to answer the issue of ownership of the note in favor of defendant widow is without error, since possession raises a presumption of title. *Jones v. Waldroup*, 178.

§ 29. Instructions.

Whether plaintiff bank was holder in due course depended upon whether the person stealing the note from the maker's office did so as agent for the bank or as agent of the payee. There was evidence that he was collecting agent for the bank and also president of the corporate payee. *Held:* An instruction merely that the bank could not recover if the note was taken by its agent *is held* for error. *Bank v. Marshburn*, 688.

BOUNDARIES.

§ 1. Questions of Law and Questions of Fact.

What constitutes the dividing line between the lands of the respective parties is a question of law for the court, but where this line is located is a question of fact for the jury, and where the jury locates the line upon conflicting evidence under correct instructions from the court, the finding of the jury is conclusive. *Clegg v. Canady*, 433.

CARRIERS.

§ 14. Rates and Tariffs.

Question of whether goods came under rate classification for "asphalt paving blocks or tiles" or for "asphalt composition facing or flooring tile" *held* for jury upon conflicting evidence. *R. R. v. Thrower*, 77.

Defendant consignee stopped payment on his check given in payment of freight charges on the shipment in question, contending that the charges were excessive for that they were based upon an inapposite rate classification. *Held:* It was competent for plaintiff carrier to introduce in evidence correspondence between the shipper and defendant tending to show that defendant stopped payment on the check at the instigation of the shipper. *Ibid.*

Where a consignee accepts and uses a shipment of goods and gives his check in payment of the freight charges, he may not thereafter repudiate the matter and contend that the charges were excessive in that they were based upon an inapposite rate classification. *Ibid.*

Defendant consignee stopped payment on his check given in payment of freight charges, contending that the charges were excessive in that they were based upon an inapposite rate classification. *Held:* In the carrier's action on the check, the burden was properly placed upon defendant consignee to show that the freight charges should have been based upon a lower rate classification as contended by him. *Ibid.*

§ 15. Relationship of Carrier and Passenger.

A passenger on a bus does not lose his rights as such in having the bus stop at a filling station on the route and leaving the bus temporarily to go to the toilet. *Wilson v. Bus Lines*, 586.

§ 21b. Liability of Carrier for Injury to Passenger in Transitu.

Plaintiff, while a passenger of defendant bus company, was assaulted and injured by an unidentified person as plaintiff was nearing the bus to board same. *Held:* Conflicting evidence as to whether defendant's employees could have come to plaintiff's rescue, and negligently failed to do so, after discovering his peril, was properly submitted to the jury. *Wilson v. Bus Lines*, 586.

CHARITIES.

§ 1. Definitions and Distinctions. (Exemption of property from taxation see Taxation § 20.)

An organization empowered by its charter to hold real and personal property for commercial purposes provided the profits therefrom, if any, are used for the benefit of widows and orphans of deceased members or for such charitable and benevolent purposes as it may deem necessary or expedient, with further provision that its funds, property and income should not be divided in any manner among its members *is held* to hold the *corpus* of its property for business or commercial purposes. *Odd Fellows v. Swain*, 632.

§ 4. Liability for Torts.

A person injured while enjoying the benefits provided by a charitable institution may not hold the institution liable for the negligence of its agents or employees if the institution has exercised reasonable care in their selection and retention. *Herndon v. Massey*, 610.

The fact that a charitable institution procures insurance indemnifying it for liability does not enlarge its liability for negligence of its agents or employees, and allegations that it had procured such insurance are properly stricken in action for negligence. *Ibid.*

CHATTEL MORTGAGES AND CONDITIONAL SALES.

§ 1a. Nature and Requisites in General.

A contract under which the purchaser's agent agrees to hold the chattels and to turn them over to the purchaser as they are paid for, and to return same only in the event they are not paid for, the title to remain in the seller until the purchase price is paid, is a conditional sales contract and not a bailment. *Body Co. v. Corbitt Co.*, 264.

§ 9a. Notice, Lien and Priorities Under Registered Instruments.

Proper registration of a lien upon real or personal property is notice to all the world of the existence of the lien created by the instrument, but due cancellation of record may be relied upon with equal security. *Mfg. Co. v. Malloy*, 666.

§ 11. Rights and Remedies of Mortgagee.

Where mortgagee has no knowledge that chattels were used by mortgagor in operation of nuisance, and chattels are not worth mortgage debt, he is entitled to recover the chattels under his conditional sales contract from the sheriff before they are sold under C. S., 3184. *Habit v. Stephenson*, 447.

In such case only equity of mortgagor may be sold. *Sinclair v. Croom*, 526.

§ 12a. Title and Rights of Purchaser Under Registered Instruments.

Where it appears on face of chattel mortgage that it was given as additional security to deed of trust on lands, cancellation of deed of trust cancels the chattel mortgage, and purchaser of chattels acquires title free from claim of chattel mortgagee, notwithstanding alleged agreement between debtor and creditor that chattel mortgage should remain in force as security for other debts. *Mfg. Co. v. Malloy*, 666.

§ 12b. Title and Rights of Parties Under Unregistered Conditional Sales Contract.

Held: Under the General Code of Ohio, section 8568, if defendant is a purchaser in good faith and for value, it obtains title unaffected by the unrecorded conditional sales contract, and the conflicting evidence as to whether defendant is a purchaser in good faith and for value should have been submitted to the jury, and an instruction that the contract constituted a bailment and that as a matter of law plaintiff is the owner of the cabs, is error. *Body Co. v. Corbitt Co.*, 264.

§ 14. Satisfaction and Cancellation.

A lien is incident to the debt secured and the discharge of the debt discharges the lien itself, and therefore when it appears upon the face of a chattel mortgage that it was given as additional security to a deed of trust, cancellation of record of the deed of trust discharges the chattel mortgage, even though the chattel mortgage is not canceled of record. *Mfg. Co. v. Malloy*, 666.

CLAIM AND DELIVERY.

§ 16. Liabilities on Defendant's Undertaking.

A surety on a replevin bond, within the limits of his obligation, is a party to the action and, if the bond is properly executed by him, is bound by the judgment against the principal and may not deny liability on the merits of the original controversy and therefore, except in case of fraud, the proper procedure to challenge his liability on the ground that he did not in fact sign the bond is by motion in the cause. *Panel Co. v. Ipock*, 375.

CLAIM AND DELIVERY—*Continued.*

Held: It was error for the trial court to sign final judgment against surety prior to determination of surety's motion in the cause to be relieved of liability on ground that he did not in fact sign bond. *Ibid.*

CLERKS OF COURT.

§ 7. Jurisdiction as Juvenile Court.

The Juvenile Court Act is in no respect an amendment to the Adoption Law, and does not affect the procedure therein prescribed for the adoption of minors. *Ward v. Howard*, 201.

The juvenile court has no power to place a child anywhere for adoption, Michie's Code, 5044, and when it orders a child committed to an asylum upon its finding that the child is a neglected child, Michie's Code, 5039, the further provision of the order that the asylum should have power to place the child in a home for adoption is void. Michie's Code, 5044. *Ibid.*

CONSTITUTIONAL LAW.

§ 2b. Effective Date of Amendment.

Regardless of whether the effective date of the amendment changing the terms of office of sheriffs from two to four years is the date of the election at which the amendment was approved or the date of its certification, it was in effect on the first Monday in December when the terms of sheriffs elected in that election began, and therefore it applies to the sheriffs elected at that election. *Freeman v. Board of Elections*, 63.

§ 2c. Construction of Amendments.

The General Assembly, in authorizing the submission of a constitutional amendment to the qualified voters of the State, and the voters, in voting thereon, are presumed to act in the right of existing constitutional and statutory provision. *Freeman v. Board of Elections*, 63.

§ 3½. Separation of Governmental Powers.

The creation by the Legislature of a board or municipal corporation and the conferring upon such board or municipal corporation *quasi*-judicial and administrative functions does not violate the constitutional provision that the legislative and the supreme judicial powers of the Government shall be separate and distinct, Constitution of North Carolina, Art. I, sec. 8. *Cox v. Kinston*, 391.

CONSTITUTIONAL LAW—*Continued.*

A Housing Authority created under chapter 456, Public Laws of 1935, is not invested with legislative and supreme judicial powers, and therefore its creation does not violate the constitutional provision that these powers be and remain separate and distinct. *Ibid.*

§ 4a. Determination of Public Policy.

Public policy is the exclusive province of the Legislature and its determination is not subject to review by the courts. *Cox v. Kinston*, 391.

§ 4c. Delegation of Power by Legislature.

The fact that an administrative board or municipal corporation is authorized to investigate and determine the existence or nonexistence of facts upon which depend the application of the law it is charged with administering, is not a delegation of legislative functions. Constitution of North Carolina, Art. II, sec. 1. *Cox v. Kinston*, 391.

The provision of chapter 456, Public Laws of 1935, investing municipal corporations with the power to determine each for itself the existence or nonexistence of facts necessary for the creation of a housing authority to perform a proper municipal governmental function within its limits is not an unconstitutional delegation of legislative authority. Constitution of North Carolina, Art. II, sec. 1. *Ibid.*

§ 4d. Legislative Power in Regard to Counties, Cities and Public Officers.

The General Assembly has power to prescribe the time when sheriffs-elect shall qualify and be inducted into office, and it has provided that the term of office of sheriffs-elect shall begin on the first Monday in December next ensuing the general election in November at which they are elected. Public Laws of 1868, ch. 20, sec. 8 (32), as amended by Public Laws of 1876-77, ch. 275, secs. 1 and 77. C. S., 1297 (12). *Freeman v. Board of Elections*, 63.

The constitutional provision for the election of registers of deeds for a term of two years, Art. VII, sec. 1, is subject to modification by statute, Art. VII, sec. 14, and therefore the Legislature has the power to make the office appointive rather than elective, to extend the term, or to abolish it altogether, and even to dispossess the incumbent, since public office is not a property right. *Penny v. Board of Elections*, 276.

§ 6a. Judicial Power in General.

A court has only that jurisdiction granted it by the Constitution and by statute, and it cannot acquire jurisdiction by waiver or consent, and objection to the jurisdiction may be taken at any time during the progress of the action. C. S., 518. *McCune v. Mfg. Co.*, 351.

§ 7. Scope of State Police Power in General.

A zoning ordinance limiting the uses of property solely on the basis of race is beyond the scope of police power, since the reserved police power of a state must stop when it encroaches on the protection afforded the citizen by the Federal Constitution. *Clinard v. Winston-Salem*, 119.

§ 8. Regulation of Trades and Professions.

A statute passed in the exercise of the police power of the State should be strictly construed so as to give it the least interference with personal liberty. *S. v. Mitchell*, 244.

§ 10. Morals and Public Welfare.

The State, in the exercise of its police power, may abate a nuisance against public morals. *Barker v. Palmer*, 519.

CONSTITUTIONAL LAW—*Continued.*

§ 11. Racial Discrimination.

Municipality may not provide exclusive residential districts respectively for white and Negro races. *Clinard v. Winston-Salem*, 119.

§ 12. Monopolies and Exclusive Emoluments.

When the Legislature appoints persons to public offices for a specified term, and fails to provide for the election of successors, and fails to appoint successors at the end of the term, its appointees continue in office, and this fact does not violate the constitutional provision against exclusive emoluments, since the Legislature has the power to terminate, change or continue the appointments. *Freeman v. Comrs. of Madison*, 209.

§ 14a. Searches and Seizures.

The search warrant in question was issued upon the sworn affidavit of a police officer which stated that the basis of the oath was "information." *Held:* The affidavit does not negative the assumption that the police officer was examined as to the particulars of his information and it is not required that the affidavit give in detail the source and extent of the information, and evidence procured in a search under the warrant is competent, ch. 339, sec. 1½, Public Laws of 1937. *S. v. Elder*, 111.

§ 17. Right to Jury Trial.

The interest of a mortgagee may not be forfeited without a determination by a jury that he had actual or constructive notice that the property was used by the mortgagor in the operation of a nuisance against public morals. *Sinclair v. Croom*, 526.

§ 19. Remedies and Procedure.

The Legislature may limit the time for the assertion of a property right provided it affords those vested with the right a reasonable time to assert same after the enactment of the statute, since there is no vested right in procedure. Constitution of North Carolina, Art. I, sec. 17; 14th Amendment to the Federal Constitution. *Sheets v. Walsh*, 32.

CONTRACTS.

§ 1. Nature, Essentials and Validity in General.

The freedom to contract will not be lightly abridged, and public policy favors the enforcement of contracts intended to protect legitimate interest. *Beam v. Rutledge*, 670.

§ 4. Acceptance of Offer.

Ordinarily, the offeree may accept or reject an offer by mail when the offer is transmitted by mail, and upon valid acceptance the contract is mutually binding. *Board of Education v. Board of Education*, 90.

§ 7a. Contracts in Restraint of Trade.

A contract not to engage in similar business or same profession is not void as being contrary to public policy if the restrictions, both in regard to time and territory, are reasonably necessary to protect the legitimate interests of covenantor, and the restraints are no greater than are reasonably necessary for this purpose. *Comfort Spring Corp. v. Burroughs*, 658; *Beam v. Rutledge*, 670.

§ 8. General Rules of Construction.

Public laws in force at the time of the execution of a contract become a part thereof. *McGuinn v. High Point*, 449; *Barker v. Palmer*, 519.

CONTRACTS—*Continued.*

§ 19. Parties.

A third party may maintain an action on a contract made for his benefit. *Boone v. Boone*, 722.

§ 21. Pleadings.

Complaint alleging contract of employment providing that plaintiff should be paid a salary plus ten per cent of the net profits earned in the construction of the buildings, that contract was later extended orally to other buildings, that plaintiff fully performed the services agreed upon, and that defendant refused to pay the agreed percentage of the profits earned in the construction of the other buildings, *is held* to allege a contract, breach by defendant, and damages, and defendant's demurrer thereto was properly overruled. *Brown v. Clement Co.*, 47.

Where the contract sued on is not made a part of the complaint, the sufficiency of the complaint as against demurrer will be determined in accordance with the nature of the contract as disclosed by the facts alleged, and not by plaintiff's characterization of the contract, and plaintiff may not recover on a theory of liability not supported by the facts alleged. *Petty v. Lemons*, 492.

CORPORATIONS.

§ 13a. Sale of Stock and Transfer of Ownership Between Individuals.

(Joint tenancy and survivorship therein see Estates § 13.)

An assignment of stock is good as between the parties without registration on the books of the corporation, and the legal title may be perfected in the assignee by registry and the delivery of the certificates. *Jones v. Waldroup*, 178.

Where the holder and owner of stock surrenders the certificates to the corporation and directs the corporation to transfer same on its books, the transferee acquires title which is perfected by the surrender or delivery of the new certificate to him. C. S., 1164. *Ibid.*

§ 50. Title, Rights and Liabilities of Corporation Purchasing Property of Another.

The mere fact that a corporation purchases the entire assets of another corporation is not sufficient to establish responsibility on the purchasing corporation for the liabilities of the selling corporation. *Coltrain v. Ins. Co.*, 262.

COUNTIES.

§ 1. Control and Supervision of General Assembly.

Counties are political subdivisions of the State, and the General Assembly has control and supervision over them, limited only by restrictions prescribed by the State Constitution and the powers granted to the Federal Government in the Constitution of the United States. *Freeman v. Comrs. of Madison*, 209.

The General Assembly has the power to create county highway commissions. *Ibid.*

The General Assembly has the power to create county sinking fund commissions. *Ibid.*

The General Assembly has the power to appoint a tax collector or manager for a county. *Ibid.*

Ch. 322, Public Laws of 1931, creating Madison County Board of Health, *held* void as special act relating to health. *Sams v. Comrs. of Madison*, 284.

COUNTIES—*Continued.*

The constitutional provision for the election of registers of deeds for a term of two years, Art. VII, sec. 1, is subject to modification by statute, Art. VII, sec. 14, and therefore the Legislature has the power to make the office appointive rather than elective, to extend the term, or to abolish it altogether, and even to dispossess the incumbent, since public office is not a property right. *Penny v. Board of Elections*, 276.

Legislature has power to prescribe time when sheriffs-elect shall qualify and be inducted into office. *Freeman v. Board of Elections*, 63.

§ 5. County Commissioners.

The General Assembly has power to appoint a tax collector or manager for a county of the State, the fiscal powers granted the county commissioners by Art. VIII, sec. 2, being subject to modification or abrogation by statute by express provision of Art. VII, sec. 14. *Freeman v. Comrs. of Madison*, 209.

County commissions may not be held liable by sureties on clerk's bond for alleged negligent failure to have proper audit of clerk's books, since there is no causal connection between alleged breach of duty by commissioners and loss sustained by sureties. *Ellis v. Brown*, 787.

§ 7. County Auditors, Accountants and Tax Collectors.

The appointment of a tax manager or collector for Madison County by the chairmen of the highway and sinking fund commissions and the chairmen of the board of county commissioners and the board of education in accordance with ch. 341, Public-Local Laws (the statutes creating the jury and tax commission and the board of health of the county being unconstitutional, *is held* to preclude the board of county commissioners from taking over the office of county tax collector, and taxpayers of the county may enjoin the commissioners from paying to the person appointed to this office by them public funds of the county. *Freeman v. Comrs. of Madison*, 209.

There being no provision in ch. 341, Public-Local Laws of 1931, for the election of a delinquent tax collector for Madison County, the board of county commissioners of the county has authority to appoint a delinquent tax collector for the county to collect delinquent taxes and those taxes uncollected by the tax manager appointed under provision of the public-local act, and taxpayers of the county are not entitled to enjoin the county commissioners from paying the salary of the delinquent tax collector appointed by them. *Ibid.*

County auditor may not be held liable by sureties on clerk's bond for alleged failure to make proper audit of clerk's books. *Ellis v. Brown*, 787.

§ 8b. County Physicians.

Madison County Board of Health, created by ch. 322, Public-Local Laws of 1931, *held* without power to appoint county physician, the act creating the board being void. *Sams v. Comrs. of Madison*, 284.

§ 17. Parties Who May Maintain Action Against County.

Taxpayers of a county may maintain an action to restrain the board of county commissioners from making illegal disbursements of public funds by the payment of salaries to unauthorized persons, but taxpayers may maintain action to try title to county office. *Freeman v. Comrs. of Madison*, 209.

COURTS.

§ 1a. Exclusive Original Jurisdiction of Superior Court.

The complaint alleged in substance that plaintiff purchased a mare from defendant, that the defendant warranted the mare to be sound, that in fact the mare had defective eyesight, which was known to defendant, that plaintiff relied upon the representation that the mare was sound, and that plaintiff

COURTS—*Continued.*

was damaged in the sum of $125.00, and, as a second cause of action, alleged that as a result of the said wrongful act of defendant, plaintiff had been obliged to feed a worthless mare to his damage in the sum of $100.00. *Held:* The complaint fails to state a cause of action for fraud in that it fails to allege *scienter*, but states a cause of action for breach of warranty in the sum of $125.00, which is within the exclusive original jurisdiction of a justice of the peace, C. S., 1473, the sum claimed for feeding the mare not being within the rule for the determination of the jurisdictional amount, and therefore defendant's demurrer to the action instituted in the Superior Court was properly sustained. *Hill v. Snider*, 437.

A nonresident plaintiff may sue a nonresident defendant upon a transitory cause of action in the courts of this State. *Alberts v. Alberts*, 443.

§ 2c. Appeals to Superior Court from Clerk.

Where issue of title is raised in a processioning proceeding, and the clerk, instead of transferring the cause to the civil issue docket, determines the issue, the Superior Court nevertheless acquires full jurisdiction upon appeal. *Hill v. Young*, 114.

§ 3. Jurisdiction After Orders or Judgments of Another Superior Court Judge.

One Superior Court judge may not review the judgment of another Superior Court judge or restrain him from proceeding in a cause in which he has full jurisdiction. *Davis v. Land Bank*, 145.

Since in partition proceedings all orders are interlocutory, one judge may enter an order upon appeal setting aside the clerk's order although another judge had theretofore affirmed the clerk's order of sale for partition. *Hyman v. Edwards*, 342.

§ 10. Applicability of Federal Decisions in Actions Instituted in State Court.

The validity of a municipal ordinance imposing restrictions upon the occupancy of property solely upon the basis of racial status involves a Federal constitutional question, and in the absence of a direct holding on the subject by the Supreme Court of the United States, the question must be determined by the implications of its decisions. *Clinard v. Winston-Salem*, 119.

CRIMINAL LAW.

VII. Evidence
- 28a. Presumptions and Burden of Proof. S. v. Wray, 167.
- 30. Evidence and Record at Former Trial or Proceedings. S. v. Wilson, 123; S. v. Kiziah, 399.
- 34e. Admissions of Counsel. S. v. Redman, 483.
- 41b. Cross-Examination.
- 41d. Evidence Competent to Impeach or Corroborate Defendant. S. v. Wilson, 123.
- 41e. Evidence Competent to Corroborate or Impeach Witness. S. v. Kiziah, 399.
- 43. Evidence Obtained by Unlawful Means. S. v. Elder, 111.

VIII. Trial
- 51. Argument and Conduct of Counsel. S. v. Templeton, 698.
- 53c. Instructions on Burden of Proof and Presumptions. S. v. Wray, 167.
- 53f. Requests for Instructions. S. v. Kiziah, 399.
- 53g. Objections and Exceptions to Charge. S. v. Redman, 483.
- 58. Motions for New Trial for Newly Discovered Evidence. S. v. Rodgers, 622.

XII. Appeal in Criminal Cases
- 68c. Judgments and Orders Appealable. S. v. Rodgers, 622.
- 69. Certiorari. S. v. Flynn, 345.
- 71. Pauper Appeals. S. v. Hopkins, 324.
- 77c. Matters Not Appearing in Record Presumed without Error. S. v. Elder, 111.
- 77d. Conclusiveness and Effect of Record. S. v. Redman, 483.
- 78. Presentation and Preservation of Ground of Review.
  - d. Motions to Nonsuit. S. v. Kiziah, 399.
- 79. Briefs. S. v. Cox, 177.
- 80. Prosecution and Dismissal of Appeal. S. v. Page, 288; S. v. Hopkins, 324; S. v. Flynn, 345; S. v. Gibson, 563.
- 81c. Harmless and Prejudicial Error. S. v. Elder, 111; S. v. Wray, 167; S. v. Cox, 177; S. v. Redman, 483; S. v. Smith, 591.
- 81d. Questions Necessary to Determination of Appeal. S. v. Wilson, 123.

CRIMINAL LAW—*Continued.*

§ 28a. Presumptions and Burden of Proof.

A charge to the effect that, in the absence of an admission or evidence establishing a presumption of guilt sufficient to overcome the presumption of innocence, the most that can be required of a defendant in a criminal prosecution is explanation but not exculpation, *is held* without error. *S. v. Wray*, 167.

§ 30. Evidence and Record at Former Trial or Proceedings.

It is error to permit the solicitor, while cross-examining defendant in a criminal prosecution, to read certain allegations of fact in a complaint in a civil action relating to the same subject matter and to ask defendant if he had not failed to deny them by answer. C. S., 533. *S. v. Wilson*, 123.

Where transcript at preliminary hearing is offered to impeach witness, defendants should offer only relevant portions of transcript and disclose purpose for which it is offered, and when this is not done, the exclusion of the transcript will not be held for error. *S. v. Kiziah*, 399.

§ 34e. Admission of Counsel.

An admission of counsel during the argument when the defendant has no opportunity to protest or deny the admission is not binding upon defendant. *S. v. Redman*, 483.

§ 41b. Cross-Examination.

While in a prosecution for embezzlement the solicitor may cross-examine defendant about the administration of other estates of which defendant was guardian and question him in regard to independent indictments then pending against him in connection therewith, for the purpose of impeaching defendant, the State may not introduce affirmative evidence of such collateral matters without showing that they were so connected with the offense charged as to be competent for the purpose of showing intent. *S. v. Wilson*, 123.

The extent of the cross-examination of a witness beyond the scope of the examination-in-chief for the purpose of showing bias rests in the sound discretion of the trial court, and the action of the court in sustaining an objection to a question asked for the purpose of showing that the witness was biased cannot be held prejudicial and does not disclose abuse of discretion when it appears that the witness had theretofore answered another question having the same import. *S. v. Wray*, 167.

§ 41d. Evidence Competent for Purpose of Impeaching or Corroborating Defendant.

While in a prosecution for embezzlement the solicitor may cross-examine defendant about the administration of other estates of which defendant was guardian and in regard to independent indictments then pending against him in connection therewith, for the purpose of impeaching defendant, the State may not introduce affirmative evidence of such collateral matters without showing that they were so connected with the offense charged as to be competent for the purpose of showing intent. *S. v. Wilson*, 123.

§ 41e. Corroborating and Impeaching Witnesses.

Character evidence of a witness is testimony as to the witness' general reputation or standing in the community and not as to any particular acts, based upon what the character witness has heard or learned as a matter of hearsay. *S. v. Kiziah*, 399.

After a character witness is once qualified, he or she may be cross-examined as to the source of his or her knowledge but the answers go to the credibility of the witness rather than to the competency. *Ibid.*

CRIMINAL LAW—*Continued.*

Where transcript in former hearing is offered to impeach testimony of witness at trial, defendant should disclose purpose for which it is offered. *Ibid.*

§ 43. Evidence Obtained by Unlawful Means.

The search warrant in question was issued upon the sworn affidavit of a police officer which stated that the basis of the oath was "information." *Held:* The affidavit does not negative the assumption that the police officer was examined as to the particulars of his information and it is not required that the affidavit give in detail the source and extent of the information, and evidence procured in a search under the warrant is competent, ch. 339, sec. 1½, Public Laws of 1937. *S. v. Elder*, 111.

§ 51. Argument and Conduct of Counsel.

In the prosecution of a cafe proprietor for killing a customer in the cafe, the failure of the court to adequately protect defendant from extraneous and irrelevant argument of counsel, made over defendant's objection, to the effect that the establishment maintained by defendant amounted to a nuisance against public morals and was corrupting the morals of young people *is held* to entitle defendant to a new trial. *S. v. Thompson*, 698.

§ 53c. Instructions on Burden of Proof and Presumptions. (In homicide cases see Homicide § 27b.)

A charge to the effect that, in the absence of an admission or evidence establishing a presumption of guilt sufficient to overcome the presumption of innocence, the most that can be required of a defendant in a criminal prosecution is explanation but not exculpation, *is held* without error. *S. v. Wray*, 167.

§ 53f. Requests for Instructions.

If defendants desire a more definite charge on subordinate features of the case they must aptly tender proper prayers for instruction. *S. v. Kiziah*, 399.

§ 53g. Objections and Exceptions to Charge.

Failure of defendant to bring to the trial court's attention an error in the statement of defendant's admissions does not waive defendant's objection thereto when the misconception of defendant's testimony results in an error in the instructions on the burden of proof. *S. v. Redman*, 483.

§ 58. Motions for New Trial for Newly Discovered Evidence.

A motion for a new trial for newly discovered evidence, made in the trial court after decision of the Supreme Court affirming the judgment of conviction, is addressed to the discretion of the trial court, and its refusal of the motion is not appealable. *S. v. Rodgers*, 622.

§ 68c. Judgments and Orders Appealable.

Appeal will not lie from denial of motion for new trial for newly discovered evidence. *S. v. Rodgers*, 622.

§ 69. Certiorari.

Defendant's petition for *certiorari* denied for want of merit. *S. v. Flynn*, 345.

§ 71. Pauper Appeals.

The affidavit and order for appeal *in forma pauperis held* not in strict accord with the statute. *S. v. Smith*, 152 N. C., 842. *S. v. Hopkins*, 324.

§ 77c. Matters Not Appearing in Record Presumed Without Error.

Where the charge is not in the record it will be presumed without error. *S. v. Elder*, 111.

CRIMINAL LAW—*Continued.*

§ 77d. Conclusiveness and Effect of Record.

The statement of the court in regard to the argument of counsel and the admissions made by them therein is conclusive, since it is for the court to say what occurred during the trial. *S. v. Redman*, 483.

§ 78d. Motions to Nonsuit.

Defendants must make proper motions for judgment as of nonsuit during the course of the trial in order to present upon appeal the question of the sufficiency of the evidence. C. S., 4643. *S. v. Kiziah*, 399.

§ 79. Briefs. (Dismissal for failure to file see Criminal Law § 80.)

An exception not brought forward and referred to in appellant's brief is deemed abandoned, Rule 28. *S. v. Cox*, 177.

§ 80. Prosecution and Dismissal of Appeal.

Defendant was convicted of a capital felony and was allowed to appeal *in forma pauperis*. Upon certificate of the clerk that nothing has been done towards perfecting the appeal and that the time for filing it has expired, and his statement in the certificate that he is informed by counsel that they do not intend to prosecute the appeal, the appeal is dismissed upon motion of the Attorney-General, there being no apparent error on the face of the record proper. Rule of Practice in the Supreme Court, No. 17. *S. v. Page*, 288.

Where defendant files in the office of the Clerk of the Supreme Court a certified copy of the record proper and defendant's case on appeal, which had been served on the solicitor, but fails to file nine typewritten copies of the record and case on appeal and fails to file a brief, the motion of the Attorney-General to docket and dismiss will be allowed, Rules of Practice in the Supreme Court, Nos. 22 and 28, but when defendant has been convicted of a capital felony the motion to docket and dismiss will be allowed only after an inspection of the record proper and defendant's case on appeal shows no apparent error. *S. v. Hopkins*, 324.

Where defendant, convicted of a capital felony, fails to file his case on appeal within the time allowed, the motion of the Attorney-General to docket and dismiss will be allowed when an examination of the record proper fails to disclose error. Rule of Practice in the Supreme Court, No. 17. *S. v. Flynn*, 345; *S. v. Gibson*, 563.

§ 81c. Harmless and Prejudicial Error.

The exclusion of testimony cannot be held for prejudicial error when testimony of the same import is thereafter admitted. *S. v. Elder*, 111.

The exclusion of evidence cannot be held prejudicial when the record fails to show the purpose for which the testimony was offered or what the witness' answer would have been. *Ibid.*

Error must be prejudicial in order to entitle defendant to a new trial. *S. v. Wray*, 167.

Where a general verdict of guilty is returned against a defendant prosecuted upon an indictment containing two counts of equal gravity, any error in the judge's charge upon one of the counts is harmless, there being no exceptions to the instructions on the other count. *S. v. Cox*, 177.

Error in the instructions on the burden of proof is prejudicial, and is not waived by defendant's failure to bring to the court's attention in apt time the misconception of defendant's admissions causing the error. *S. v. Redman*, 483.

Excerpts from the charge will not be held for reversible error when the charge, construed as a whole, is not prejudicial to defendant. *S. v. Smith*, 591.

CRIMINAL LAW—*Continued.*

§ 81d. Questions Necessary to Determination of Appeal.

Where a new trial is awarded on certain exceptions, other exceptions relating to matters which may not arise upon the subsequent hearing need not be considered. *S. v. Wilson*, 123.

DAMAGES.

§ 13. Instructions on Issue of Damages.

Plaintiff alleged a cause of action in contract and in tort to recover for personal injuries alleged to have been caused by an insecticide manufactured by defendant. The charge of the court on the issue of damages *is held* to contain prejudicial error in being susceptible to the construction that the damages sustained might be found separately under the issue of negligence and under the issue of breach of warranty, and added together, thereby permitting two recoveries for one injury. *Simpson v. Oil Co.*, 542.

DEATH.

§ 8. Expectancy of Life and Damages.

Charge of the court on the issue of damages in this action for wrongful death *held* without error, C. S., 1790, 161. *McClamroch v. Ice Co.*, 106.

In this action for wrongful death, the charge on the issue of damages *is held* not to contain prejudicial error because of the use by the court of the words "gross income" in stating the rule for the ascertainment of the present cash value of the net pecuniary worth of intestate, since, construing the charge as a whole, it is apparent that the court was not referring to the total amount intestate would have earned during his life expectancy, but to such sum less his living expenses. An instruction to the effect that interest for the period of intestate's life expectancy should be deducted from his net pecuniary worth to ascertain the present cash value of his net pecuniary worth, disapproved, since intestate's earnings would not be postponed until the end of his life expectancy. *Barnes v. Wilson*, 190.

DECLARATORY JUDGMENT ACT.

§ 1. Nature and Scope in General.

The purpose of the Declaratory Judgment Act is to provide a speedy remedy for the determination of questions of law, and although questions of fact necessary to the adjudication of the legal questions involved may be determined, the remedy is not available to present for determination issues of fact alone. Chapter 102, Pubic Laws of 1931. *Ins. Co. v. Unemployment Compensation Com.*, 495.

An action to determine whether salaries paid certain employees should be included in computing the contributions to be paid by an employer under the Unemployment Compensation Act involves solely an issue of fact and does not involve any right, status or legal relation, and the employer may not maintain proceedings under the Declaratory Judgment Act to determine the question. *Ibid.*

In an action instituted under the Declaratory Judgment Act the court has no authority to instruct a litigant whether to take advantage of the provisions of C. S., 1795 upon the hearing of the cause upon its merits, since such instructions upon a question of procedure do not fall within the purview of the act. *Redmond v. Farthing*, 678.

DEDICATION.

§ 5. Revocation of Dedication.

The owner of lands subdivided and sold same with reference to a plat showing certain streets. Plaintiffs are the successors in title from the dedicator of lots embracing certain of the streets so dedicated, which streets had never been opened or used by the public. *Held:* Plaintiffs claim under the dedicator and are authorized by statute to file and have recorded a declaration withdrawing the streets embraced within their lands from dedication. Michie's Code, 3846 (rr), (ss), (tt); chapter 174, Public Laws of 1921, as amended by chapter 406, Public Laws of 1939. *Sheets v. Walsh*, 32.

Withdrawal of dedication in conformity with statute by person claiming under dedicator terminates easement of public and of purchasers of lots, and person thus revoking dedication acquires fee free from easements in all streets shown by plat within his land. *Ibid.*

Statute providing for revocation of dedication affords reasonable time to purchasers for assertion of rights, and is constitutional. *Ibid.*

DEEDS.

§ 2a. Mental Capacity of Grantor.

Failure to submit issue of mental incapacity *held* not error upon the evidence in absence of tender of issue. *Greene v. Greene*, 649.

§ 2c. Undue Influence.

Undue influence which will vitiate a deed or a clause thereof is a fraudulent influence, and therefore an instruction that the burden is upon the party asserting undue influence to show that the clause attacked was inserted in the deed as a result of fraudulent acts and that the jury should answer the issue in the affirmative if they found by the greater weight of the evidence that the grantor was motivated by undue influence, and to answer the issue in the negative if the jury should not be so satisfied, *is held* without error when construed as a whole. *Greene v. Greene*, 649.

The owner of lands deeded to each of his children a certain part thereof reserving the timber rights, with provision that after his death the timber be sold and the proceeds of sale be divided equally among his children in order to make an equal division of his property. Defendant attacked the timber reservation on the ground of undue influence. *Held:* The value of the timber was some evidence upon the issue, the probative force being for the jury. *Ibid.*

§ 11. General Rules of Construction.

In construing a deed, the position of the different clauses is not controlling, but the courts will look at the whole instrument, without reference to formal divisions, in order to ascertain the intention of the parties. *Sheets v. Walsh*, 32.

When the language of a deed is doubtful it must be construed most favorably to the grantee. *Ibid.*

§ 12. Property Conveyed. (Boundaries of property conveyed see Boundaries.)

Held: Construing the instrument as a whole to effectuate the intent of the parties, and construing doubtful language in favor of the grantee, the deed *is held* to convey the grantor's title and interest in the streets and alleys and not to except or reserve them therefrom. *Sheets v. Walsh*, 32.

§ 13a. Estates and Interest Created by Construction of Instrument.

The provisions of C. S., 991, that a conveyance will be construed to be in fee whether the word "heir" is used or not, applies by the express language

DEEDS—*Continued.*

of the statute only when the deed fails to disclose a clear intention to convey an estate of less dignity. *Hines v. Hines*, 325.

Instrument providing that grantor did "give, grant, bargain, sell and convey, lease and let" premises to give grantee home until grantor should sell or reposes, and providing that grantee should pay one-half taxes and insurance as rent, and that grantee should give up possession upon 30 days notice, *held* to disclose intent to convey less than fee, and instrument was a lease and not a deed. *Ibid.*

§ 17d. Agreements to Support Grantor.

Under facts of this case, agreement in deed to support grantor *held* not a charge on the land as against purchasers for value. *Bailey v. Land Bank*, 512.

DESCENT AND DISTRIBUTION.

§ 6. Right of Adopted Children to Inherit.

The right of an adopted child to inherit from its adopting parents is in derogation of succession by heritable blood, and the adoption proceedings must be in strict conformity with the statutory procedure in order to confer the right of inheritance upon the adopted child. *Ward v. Howard*, 201.

The right of an adopted child to inherit from its adopting parents is based upon the creation of the relationship of parent and child established by the adoption, and when the adoption proceedings are void, no right of inheritance can be predicated thereon. *Ibid.*

DIVORCE.

§ 14. Enforcing Payment of Alimony.

Wife may have amount of alimony due under prior orders determined by the court upon motion in the cause, and judgment rendered for amount thereof. *Barber v. Barber*, 422.

§ 15. Review and Change of Award.

An order for the payment of alimony is *res judicata* between the parties, but is not a final judgment, since the court has the power, upon application of either party, to modify the orders for changed conditions of the parties. *Barber v. Barber*, 422.

DOWER.

§ 2c. Dower in Mortgaged Lands.

Where widow does not protect her rights and encumbered land is sold without bringing surplus, widow's claim of value of dower against husband's estate has no priority. *Brown v. McLean*, 555.

DRAINAGE DISTRICTS.

§ 1. Nature and Establishment of Drainage Districts.

Drainage districts are political subdivisions of the State, created for a public purpose. *Wilkinson v. Boomer*, 217.

§ 12. Nature of Drainage Liens.

The lien of a drainage assessment is *in rem* and attaches to the land in the same manner as a lien for taxes, and creates no personal liability on the part of owners of land in the district. *Wilkinson v. Boomer*, 217.

DRAINAGE DISTRICTS—*Continued.*

§ 15. Collection and Enforcing Payment of Liens.

Since drainage districts are political subdivisions of the State, all statutory remedies and provisions for, or securing payment of the bonds issued by a district under authority of law, which are in effect when the bonds are issued, become a part of the contract between the drainage district and the bondholders. *Wilkinson v. Boomer*, 217.

Procedure for collection of drainage assessments by the public authorities. *Ibid.*

Holder of drainage bonds may not foreclose drainage liens on lands within the district. *Ibid.*

EJECTMENT.

§ 5. Parties and Pleadings in Summary Ejectment.

The affidavit of plaintiff made in support of the summons in this proceeding in summary ejectment *is held* sufficient to state a cause of action, and defendant's motion to set aside the verdict rendered in the Superior Court upon appeal, on the ground that plaintiff failed to state a cause of action, was properly denied. *Roediger v. Sapos*, 95.

§ 9. Nature and Essentials of Right of Action in Ejectment to Try Title.

Plaintiff in ejectment may not rely upon weakness of adversary's title, but must show title good against the world, or good against defendant by estoppel. *Keen v. Parker*, 378; *Clegg v. Canady*, 433.

Plaintiff in ejectment may connect defendant with a common source of title and show in himself a better title from that source. *Keen v. Parker*, 378.

§ 11. Complaint in Ejectment.

Complaint *held* to state cause of action in ejectment, and demurrer was properly overruled. *Lumber Co. v. Edwards*, 251.

§ 12. Answer.

Matters in nature of estoppel *in pais* must be pleaded. *Keen v. Parker*, 378.

§ 13. Competency and Relevancy of Evidence.

In an action in ejectment, matters in the nature of an estoppel *in pais*, whether relied upon affirmatively or by way of defense, must be pleaded, and in the absence of a specific plea, evidence of estoppel by conduct is incompetent. *Keen v. Parker*, 378.

In an action in ejectment evidence impeaching an alleged title deed is competent under a general denial. *Ibid.*

Where the deed to plaintiff contains an agreement under which plaintiff assumed a prior mortgage on the land, defendant, claiming under *mesne* conveyances from the purchaser at the foreclosure sale of the mortgage, may rely upon the debt assumption agreement to estop plaintiff from denying the validity of the mortgage, even though the estoppel is not specifically pleaded, since the evidence is in derogation of the title asserted by plaintiff. *Ibid.*

§ 14. Sufficiency of Evidence and Nonsuit.

Defendants' evidence that plaintiffs had entered into a consent judgment in partition proceedings stipulating that defendants' predecessor in title owned the fee, and that one of plaintiffs had assumed a mortgage under which defendants claimed by *mesne* conveyances from the purchaser at the foreclosure sale, *held* to entitle defendants to judgment as of nonsuit. *Keen v. Parker*, 378.

EJECTMENT—*Continued.*

§ 15. Burden of Proof.

In ejectment plaintiff may not rely upon the weakness of defendant's title, but has the burden of pleading and proving title good against the world, or good against the defendant by estoppel. *Keen v. Parker*, 378.

In an action in ejectment the burden of proof is upon plaintiff to establish his title and he may not rely upon the weakness of the title of defendant, and therefore where the parties agree that the controversy depends upon the location of the dividing line between their respective properties, an instruction that the burden is on plaintiff to establish the line as contended for by him is without error. *Clegg v. Canady*, 433.

ELECTION OF REMEDIES.

§ 1. Procedure: Putting Plaintiff to Election.

If defendant deems that plaintiff is attempting to recover on two inconsistent theories of liability, defendant must move that plaintiff be required to make his election. *Simpson v. Oil Co.*, 542.

EMBEZZLEMENT.

§ 6. Competency and Relevancy of Evidence.

Upon an indictment of a public guardian for embezzlement of the funds of a specified ward, the only question at issue is whether defendant embezzled funds of the named ward, and previous orders of the court removing defendant as public guardian, and records of the court containing statements of the court and the foreman of the grand jury, raising inference that they believed defendant had mismanaged guardianship funds, are improperly admitted in evidence, and while the solicitor may cross-examine him as to indictments pending charging embezzlement of funds of other wards for the purpose of impeaching defendant, the State may not introduce affirmative evidence thereof without showing they were so connected with the offense charged as to be competent to show intent. *S. v. Wilson*, 123.

EMINENT DOMAIN.

§ 1a. Nature and Extent of Power in General.

The power of a municipal corporation to purchase or condemn land for a public purpose is not affected by the fact that its acquisition of the property for such public purpose has the effect of retiring the property from the tax books. *Cox v. Kinston*, 391.

§ 1b. Condemnation of Land Already in Use for Public Purpose.

Ordinarily, the power of eminent domain extends only to the right to condemn private property for public use, and property already in use for a public purpose cannot be condemned for another public purpose in the absence of legislative authority, express or necessarily implied, and a general authorization to exercise the power of eminent domain will not suffice, especially when the property in use for a public purpose is owned by an instrumentality of the State, but the general rule is subject to possible exception when the property sought to be condemned is not in actual public use or is not vital to such purpose, or where the additional easement would not seriously interfere with the first use. *Yadkin County v. High Point*, 462.

Municipality *held* without authority to condemn for public purpose part of lands used for County Home site. *Ibid.*

EMINENT DOMAIN—*Continued.*

Municipality *held* without authority to condemn for public purpose portions of county highways. *Ibid.*

ESTATES.

§ 16. Joint Estates and Survivorship in Personalty.

The owners of personalty may create by gift or bilateral agreement a tenancy in common therein with right of survivorship, since C. S., 1735, abolished survivorship in personalty, with an exception relating to partnerships, only when it followed as a legal incident to joint tenancy, and since survivorship in personalty is not against public policy. *Jones v. Waldroup*, 178.

When the owner of stock has same transferred on the books of the corporation and re-issued to himself "or" wife, the word "or" may be construed "and" when necessary to effect the apparent intent of the parties to create a joint tenancy in the personalty with right of survivorship. *Ibid.*

Assignment and issue of stock by direction of owner to himself or wife *held* to create tenancy in common with right of survivorship. *Ibid.*

This action was instituted by a widow against her husband's administrator to recover funds which had been deposited in a bank in his name "or" her name. Defendant, while admitting that the funds represented proceeds of sale of lands held by her and her husband by entirety, denied that she had made the deposit and denied that she and her husband had agreed that the survivor was to take the balance. *Held:* Plaintiff's motion for judgment on the pleading was properly denied, since the account cannot constitute a gift *inter vivos* for the reason that the husband did not lose dominion over the property, and since, in the absence of rebutting evidence, the person making a deposit is deemed the owner thereof, and therefore upon the facts admitted the wife had authority to withdraw the funds only as an agent, which agency and authority terminated upon his death. *Redmond v. Farthing*, 678.

ESTOPPEL.

§ 1. Creation and Operation of Estoppel by Deed.

Where a grantee in a deed assumes the payment of a debt secured by mortgage or deed of trust on the land conveyed, he thereby becomes the principal debtor and is estopped to deny that the mortgage or deed of trust is valid. *Keen v. Parker*, 378.

Warranty deed conveying present interest and contingent remainder *held* to estop grantor and those claiming under him. *Thames v. Goode*, 639.

Deed with covenant to defend the title against lawful claims of all persons claiming under grantor *held* to estop grantor's heirs. *Ibid.*

§ 11a. Pleadings.

Matters constituting an estoppel *in pais* must be pleaded. *Keen v. Parker*, 378; *Aldridge Motors v. Alexander*, 750.

EVIDENCE.

§ 5. Judicial Notice of Matters Within Common Knowledge.

It is a matter of common knowledge that a pistol is discharged by pulling the trigger, and that ordinarily it is not discharged by a blow. *Warren v. Ins. Co.*, 705.

EVIDENCE—*Continued.*

§ 7. Burden of Establishing Cause of Action.

The burden of proof remains on plaintiff throughout the trial to establish his cause of action. *Jones v. Waldroup*, 178.

§ 8. Burden of Establishing Defenses.

The burden is on defendant to establish affirmative defenses relied on by him to defeat the right of recovery. *Jones v. Waldroup*, 178.

§ 16. Credibility of Interested Witnesses.

The charge of the court upon the credibility to be given testimony of interested witnesses *held* without error. *McClamroch v. Ice Co.*, 106.

§ 18. Evidence Competent to Corroborate Witness.

Where widow testifies and contends that certain stock and notes belonged to her rather than to husband's estate, testimony of witnesses that husband had stated to them that wife owned certain business and was entitled to income therefrom and that he was making investments for her *is held* competent for purpose of corroboration. *Jones v. Waldroup*, 178.

§ 32. Transactions or Communications With Decedent.

In this action by an administrator against intestate's widow to recover certain stock and a note as assets of the estate, testimony by the widow that she had had possession of the note since it was issued and that she had had possession of the stock for some time prior to intestate's death, *is held* competent as being testimony of an independent fact, notwithstanding the legal implications from such possession, the note being payable to both intestate and defendant and the stock being issued or assigned to both, and further, the complaint having alleged possession of the choses in action by the widow, the question is academic in this case. C. S., 1795. *Jones v. Waldroup*, 178.

§ 34. Public Documents and Records.

Where the record in a former action is in existence and is before the court upon the plea of *res judicata* and discloses the identity of the actions within the rule of estoppel by judgment, the granting of defendant's plea of estoppel without findings of fact is not error, the record in the former action being the only evidence admissible to prove its contents. *Bruton v. Light Co.*, 1.

The contents of a public record may be proven in any court by the original record itself. *McClamroch v. Ice Co.*, 106.

§ 39. Parol or Extrinsic Evidence Affecting Writings.

Rule that written contract between the parties as to warranties and representation cannot be varied by oral testimony does not apply when article is totally worthless for purpose for which sold. *Edgerton v. Johnson*, 314.

Where action is in tort and not upon contract, parol evidence at variance with contract is not incompetent. *Jones v. Chevrolet Co.*, 693.

While parol evidence is inadmissible to vary, contradict or add to a written instrument, where part of the agreement is written and part oral, parol evidence is competent to establish the oral part unless it is required by law to be in writing. *Boone v. Boone*, 722.

§ 42d. Admissions by Agents.

Plaintiff was injured when he slipped and fell on oil or grease on the floor near a washing machine on display as he was going towards his wife who was inspecting rugs in another part of the store. Plaintiff testified that after he fell, the rug salesman made a declaration to the effect that the oil was from the washing machine which was "leaking again." *Held:* The declaration was

EVIDENCE—*Continued.*

not a part of the *res gestæ* and the testimony should have been excluded as hearsay. *Brown v. Montgomery Ward & Co.*, 368.

Post rem statement of agent is competent to show principal's knowledge of the transaction. *Jones v. Chevrolet Co.*, 793.

§ 42f. Admissions in Pleadings.

Whether an allegation in a pleading constitutes an admission is a question of law for the court. *Cummings v. R. R.*, 127.

In order for a paragraph in a pleading to contain an admission it must make an admission by an independent statement of fact. *Ibid.*

§ 45c. Technical Basis for Expert Testimony.

Testimony of an expert witness as to the position of deceased's body when struck by defendant's train is properly stricken out when the witness testifies that his opinion is not based upon the wounds on the body but upon the fact that intestate was wearing white shoes and white marks were found on the inside of one of the rails and the "opinion of the entire crowd." *George v. R. R.*, 684.

§ 51. Qualification and Competency of Experts.

The exclusion of opinion testimony based upon hypothetical questions cannot be held for error when the court does not find as a fact that the witness was an expert. *O'Neil v. Braswell*, 561.

EXECUTION.

§ 11. Procedure to Restrain Execution.

Remedy of defendant to prevent sale of certain articles on ground that they were not used in operation of nuisance against public morals is by motion in the cause and not by independent action to restrain sheriff. *Humphrey v. Churchill*, 530.

Complaint in independent action to restrain execution cannot be treated as a motion in the cause when plaintiff in former action is not a party. *Ibid.*

§ 12. Title and Rights of Third Persons.

Where movable personal property sold under a conditional sales contract is used by the mortgagor in the operation of a nuisance and is seized by the sheriff and held for sale under the provision of C. S., 3184, the innocent mortgagee is entitled to recover same from the sheriff when the value of the property is less than the debt and there is no equity above the mortgage, since C. S., 3184, provides that the property should be sold in the same manner as is provided for sales of chattels under execution and C. S., 677, provides only for the sale of the equity of redemption of the judgment debtor in pledged or mortgaged property. *Habit v. Stephenson*, 447.

In such case only equity of mortgagor may be sold. *Sinclair v. Croom*, 526.

§ 20. Title and Rights of Purchaser at Execution Sale.

In an action in ejectment instituted by the purchaser of the land at execution sale, the burden is upon the judgment debtor attacking the title on the ground that his homestead had not been allotted in the land to show that his homestead had not been allotted and that he was entitled to homestead therein, and the mere statement of the purchaser on cross-examination to the effect that as far as he knew homestead had not been allotted in the land is insufficient to justify judgment as of nonsuit, plaintiff purchaser having established *prima facie* title under the execution sale. *Johnson v. Sink*, 702.

EXECUTORS AND ADMINISTRATORS.

§ 10. Actions to Collect Assets.

In this action by an administrator against decedent's widow to collect notes and stocks allegedly belonging to the estate, the widow claimed that the choses in action belonged to her because purchased with her own money. *Held:* Testimony of witnesses that the husband had stated the wife owned a certain business and was entitled to the income therefrom is competent to corroborate her testimony, but *held further*, it was error for the court to fail to charge, upon the theory upon which the case was tried, that the burden was upon the wife to prove her affirmative defense as to the stocks, although the notes, being in her possession, raised a presumption of ownership, and justified an instruction to find that she was the owner of the notes in the absence of evidence of a superior title. *Jones v. Waldroup*, 178.

§ 12b. Power to Sell Assets at Private Sale.

Ordinarily, administrator *c. t. a.* may exercise all powers of sale granted the executor by the will. *Trust Co. v. Drug Co.*, 502.

It will be presumed that a will is executed in contemplation of the statutes providing that an administrator *c. t. a.* succeeds to all the rights, powers and duties of the executor, C. S., 90, 4170. *Ibid.*

Held: Under facts of this case, the administrator *c. t. a.* has the authority to exercise the power of sale granted in the will. *Ibid.*

Where a will provides for the sale of lands by the personal representative for distribution of the estate among the ultimate beneficiaries, mortgages and assignments executed by such beneficiaries prior to the settlement of the estate cannot defeat the power of sale, and the personal representative may convey the lands free of such liens. The right of the lienors in the proceeds of sale is not presented for determination. *Ibid.*

§ 15j. Offset of Amount Due Estate by Debt Owed by Decedent.

When judgment upon a money demand is rendered in favor of the administrator of an estate against the parents of decedent, and at the same term of court judgment is rendered against the administrator upon obligations of decedent which were outstanding at the date of his death in favor of his parents, the failure of the parents to demand at that time the right of offset precludes them from thereafter asserting the right to offset as against the general creditors of the estate, the assets of the estate being insufficient to pay general creditors in full. Whether a person is entitled to offset a debt due by him to the estate by his claim against the estate, *quære*. *In re Miller*, 136.

§ 16. Priorities.

Where widow does not protect rights and encumbered land is sold without bringing surplus, widow's claim of value of dower against her husband's estate has no priority. *Brown v. McLean*, 555.

§ 24. Distribution of Estate by Agreement.

While a court of equity has the power to terminate a trust created by will prior to the time contemplated by testator upon agreement of all the interested parties or when necessary or even expedient, it is error to do so in an action instituted to obtain the advice and instructions of the court in administering the estate and for the construction of the will, when only the beneficiaries filing pleadings consent thereto and no necessity or expediency is shown. *Trust Co. v. Laws*, 171.

EXECUTORS AND ADMINISTRATORS—*Continued.*

§ 28. Charges and Credits.

Bank administrator depositing funds of estate in its commercial department is required to pay the estate interest on such funds at the highest legal rate. *Rose v. Bank*, 600.

§ 29. Costs and Commissions.

Administrator filing reports required by law, audited by clerk, and who acts in good faith with due diligence, exercises sound business judgment, and accounts for all funds received by it, is entitled to commissions allowed by law and approved by clerk, notwithstanding that it may have asserted commissions on funds to which it is not entitled. *Rose v. Bank*, 600.

Administrator is not entitled to commissions on stocks and bonds received by it which it turns over unchanged to heir. *Ibid.*

FORFEITURES.

§ 3. Claims of Third Persons.

An innocent mortgagee without knowledge that the property was being used by the mortgagor in operating a nuisance contrary to law and in violation of provisions in the conditional sales contract, may institute action to recover the property after it has been seized by the sheriff but before it has been sold under the provision of C. S., 3184, and when there is no equity in the property above the debt, is entitled to recover the specific chattels. *Habit v. Stephenson*, 447.

Only equity of mortgagor may be sold. *Sinclair v. Croom*, 526.

FORGERY.

§ 6. Sufficiency of Evidence and Nonsuit.

Evidence *held* insufficient to prove that defendant had forged any one of the checks specified in the indictments. *S. v. Shelnutt*, 274.

FRAUD.

§ 1. Definition of Fraud.

The elements of actionable fraud are a misrepresentation of material fact, made with knowledge of its falsity or in culpable ignorance of its truth, with intent that it should be relied upon, and which is relied upon by the other party to his damage. *Hill v. Snider*, 437.

§ 8. Pleadings.

A complaint which fails to allege that the misrepresentation was made with the intent to deceive plaintiff is insufficient to state a cause of action for fraud. *Hill v. Snider*, 437.

FRAUDS, STATUTE OF.

§ 9. Contracts Required to Be in Writing in General.

While provisions of a deed of separation relating to realty are required to be in writing, an agreement between the parties that the husband would not maintain an action for divorce upon certain specified grounds and would not institute any action tending to injure her character and reputation, need not be in writing. *Boone v. Boone*, 722.

FRAUDULENT CONVEYANCES.

§ 3. Consideration.

Evidence that deed from husband to wife in satisfaction of notes for money borrowed by him from her to make improvements on the land *held* to take question of valuable consideration for the deed to the jury. *Sills v. Morgan*, 662.

§ 4. Knowledge and Intent of Grantee.

Where it is established that the deed in question was executed for a valuable consideration and that it was not executed with intent to delay, hinder and defraud creditors, the question of the knowledge and intent of the grantee is immaterial. *Sills v. Morgan*, 662.

§ 5. Insolvency and Intent of Grantor.

Fraudulent intent may not ordinarily be inferred as a matter of law, and evidence in this case *held* for jury on question of fraudulent intent in execution of deed by husband to wife in satisfaction of notes for money borrowed by him to make improvements on the land. *Sills v. Morgan*, 662.

§ 9. Pleadings.

In an action to set aside a deed as being fraudulent to plaintiff creditor, plaintiff is not entitled to judgment on the pleadings, even though it is admitted that the deed recited a consideration of $10.00 and that at the time of its execution the grantor was indebted to plaintiff and did not retain property sufficient and available to pay his then existing creditors, when defendants deny the want of valuable consideration for the deed and deny actual intent on the part of the grantor with knowledge of the grantee, to defraud his creditors, and allege facts relied upon as showing the existence of valuable consideration for the deed, and as indicating the absence of fraudulent intent. *Sills v. Morgan*, 662.

GAMING.

§ 2b. Slot Machines.

Sheriffs, constables and police officers are authorized by statute, Michie's Code, 4435, to seize and destroy all slot machines not expressly permitted by section 130, chapter 158, Public Laws of 1939, and may hold such machines as evidence for criminal prosecutions under the statute. *McCormick v. Proctor*, 23.

Held: Court should have found whether slot machines were illegal in determining plaintiff's right to enjoin officers from interfering with his business. *Ibid.*

GUARDIAN AND WARD.

§ 13. Investment and Management of Property.

A bank guardian breaches its trust by depositing guardianship funds in its commercial department, and must pay interest on such funds at the highest legal rate. *Rose v. Bank*, 600.

§ 21. Accounting.

Where a guardian is permitted to get in evidence the fact that it had paid interest on guardianship funds which it had used in its own business, and the referee finds as a fact that the interest claimed had been paid, the exclusion of the reason why the guardian had made the payment is not prejudicial, evidence of the reason for the payment being immaterial. *Rose v. Bank*, 600.

GUARDIAN AND WARD—*Continued.*

§ 22. Commissions of Guardian.

Where an administrator or guardian files the reports required by law, which are audited by the clerk, acts in good faith and with due diligence, exercises sound business judgment, and accounts for all funds received by it in its fiduciary capacity, it is entitled to commissions allowed by law and approved by the clerk within the limits prescribed by statute, C. S., 157, 2190. *Rose v. Bank*, 600.

Where a bank, acting as administrator and as guardian for one of the distributees, pays over to itself as guardian the distributive share of its ward, such amount is cash received by it as guardian, and it is entitled by law to commissions thereon. C. S., 157, 2190. *Ibid.*

A guardian is entitled to commissions on the amount obtained by it for the ward's estate from its sale of the ward's inherited interest in lands. *Ibid.*

Where a bank, acting as administrator and as guardian for one of the distributees, makes an advancement to its ward from the intestate's estate and uses the funds so advanced in making investments for the ward's estate and charges such funds against the distributive share of the ward, the bank is entitled to commissions on sums thus advanced, since such money is cash received by it as guardian and is subject to commissions allowed by the clerk within the limitations prescribed by statute. *Ibid.*

Where a guardian uses funds of its ward's estate in its own business and pays to the ward's estate interest on the funds so used, it is entitled to commissions on the amount of interest so paid. *Ibid.*

A guardian is entitled to commissions on the sum received by it from the sale of stock belonging to its ward's estate. *Ibid.*

Where a bank, acting as administrator and as guardian of one of the beneficiaries, comes into possession of certain stocks and bonds as administrator, subsequently delivers to itself as guardian the same stocks and bonds and upon settlement with its ward delivers the same stocks and bonds to her upon her majority, the bank is not entitled to retain commissions on the stocks and bonds either as administrator or as guardian. *Ibid.*

Where facts are not in dispute, whether guardian is entitled to commissions is question of law for the court and not issue of fact for jury. *Ibid.*

§ 23. Liabilities of, and Charges Against Guardian.

A guardian is not liable for penalties paid for failure to list the ward's personalty for taxes when no taxes were paid on the personalty for the years prior to five years before the property was listed and the penalties amount to less than the taxes would have been for those years had the property been properly listed, since in such instance the ward's estate suffers no damage. *Rose v. Bank*, 600.

Where it is found that the rents collected by the guardian amount to the reasonable rental value of the realty of the estate for the time it was rented, and there is no finding that there was any contract for any specific amount of rent to be paid subsequent to the date the rent was paid in full, the guardian cannot be held liable for failure to collect rents in excess of that accounted for. *Ibid.*

When a guardian or administrator uses funds of the estate in its own business it must pay to the estate interest on such funds at the highest legal rate, and the fact that the fiduciary is a bank and deposits the funds from its trust department in its commercial department does not relieve it of the duty to pay interest on such funds, the bank being but a single entity and the use of the funds by one department being for the benefit of the bank as a whole. *Ibid.*

GUARDIAN AND WARD—*Continued.*

Where facts are not in dispute, whether guardian is liable for interest on guardianship funds used by it in its own business is a question of law for the court, and not issue of fact for jury. *Ibid.*

HOMESTEAD.

§ 8. Assertion, Waiver and Abandonment.

In an action in ejectment instituted by the purchaser of the land at execution sale, the burden is upon the judgment debtor attacking the title on the ground that his homestead had not been allotted in the land to show that his homestead had not been allotted and that he was entitled to homestead therein, and the mere statement of the purchaser on cross-examination to the effect that homestead had not been allotted in the land is insufficient to justify judgment as of nonsuit, plaintiff purchaser having established *prima facie* title under the execution sale. *Johnson v. Sink*, 702.

HOMICIDE.

§ 4c. Premeditation and Deliberation.

In absence of previous fixed design, drunkenness to point defendant is incapable of premeditation and deliberation is defense to capital charge. *S. v. McManus*, 445.

§ 16. Presumptions and Burden of Proof.

Where defendant enters a plea of not guilty and does not withdraw or modify this plea or make formal plea of self-defense, defendant's testimony that he shot deceased and testimony by the State that he had made similar statements prior to the trial, do not amount to an admission that he killed deceased, since it does not necessarily follow from the admission that he inflicted a fatal wound, and the burden remains upon the State throughout the trial to prove that the wound inflicted by defendant was fatal. *S. v. Redman*, 483.

§ 27b. Instructions on Burden of Proof.

Defendant admitted he shot deceased, but the admission did not constitute an admission that defendant inflicted a fatal wound. *Held:* The court's charge that defendant admitted killing deceased with a deadly weapon, constituting murder in the second degree, nothing else appearing, without charging that the burden was on the State to prove that deceased died as the proximate result of the pistol shot wound inflicted by defendant, is error, and such error is not waived by defendant's failure to call the court's attention to the misstatement of the evidence. *S. v. Redman*, 483.

§ 27c. Instructions on Murder in First Degree.

Court's refusal to give requested instruction that if defendant had formed no prior fixed design, drunkenness to point precluding premeditation and deliberation would be defense to capital crime, supported by evidence, *held* error. *S. v. McManus*, 445.

§ 30. Appeal and Review.

Error in the instructions on the question of premeditation and deliberation cannot be held harmless on the ground that the homicide was committed in the perpetration of a robbery, rendering the question of premeditation and deliberation immaterial, when, even conceding there was evidence of robbery, there is no evidence that the homicide was committed in the perpetration or attempt to perpetrate the robbery. *S. v. McManus*, 445.

HUSBAND AND WIFE.

§ 4b. Conveyances by Wife to Husband.

A conveyance of land by a wife to her husband is void when the acknowledgment fails to comply with C. S., 2515, and the acknowledgment is fatally defective if the probating officer fails to certify that, at the time of its execution and the wife's privy examination, the deed is not unreasonable and injurious to her. *Fisher v. Fisher*, 70.

A deed by husband and wife conveying lands held by them by entireties to a trustee for the use and benefit of the husband is a conveyance of the land by a wife to her husband within the meaning of C.S., 2515. *Ibid.*

Defective acknowledgment of deed conveying wife's interest in land to her husband *held* not cured by prior deed of separation properly executed. *Ibid.*

Improper acknowledgment in deed *held* not cured by wife's subsequent quitclaim deed to trustee or trustee's deed to husband. *Ibid.*

It would seem that C. S., 2529, applies to conveyances by the wife to third persons and not to conveyances by her to her husband, C. S., 2515. *Ibid.*

§ 6. Right to Sue for Negligent Injury.

In this jurisdiction a wife has the right to bring an action for actionable negligence against her husband. *Alberts v. Alberts*, 443.

§ 18a. Right of Wife to Convey as Free Trader.

The right of a wife to convey her real estate as a free trader without consent of her husband attaches upon the registration of the deed of separation, and a deed of separation cannot affect the wife's conveyance of her land prior to the date the deed of separation is filed for registration, C. S., 2529. *Fisher v. Fisher*, 70.

§ 19. Requisites and Validity of Deeds of Separation.

While provisions of a deed of separation relating to realty are required to be in writing, an agreement between the parties that the husband would not maintain an action for divorce upon certain specified grounds and would not institute any action tending to injure her character and reputation, need not be in writing. *Boone v. Boone*, 722.

INDICTMENT AND WARRANT.

§ 20. Variance Between Charge and Proof.

The indictment charged that defendant issued a worthless check knowing at the time that he did not have sufficient funds or credit for its payment. The proof was that defendant issued a check of a corporation of which he was an executive officer, and that the corporation did not have sufficient funds or credit for its payment. *Held:* There is a fatal variance between allegation and proof, and defendant's motion to nonsuit should have been allowed. *S. v. Dowless*, 589.

§ 22. Sufficiency of Indictment to Support Conviction of Less Degree of the Crime.

Indictment charging rape will support conviction of assault on a female. *S. v. Kiziah*, 399.

INJUNCTIONS.

§ 1. Nature and Grounds of Injunctive Relief in General.

Injunction will not lie to control the exercise of the discretionary powers vested in a board or municipal corporation, and its finding of facts upon which

it determines that the law it is charged with administering is applicable is not subject to review by injunction, the scope of the inquiry being limited to the constitutionality of the act and the right of the board or municipality to proceed upon the facts found. *Cox v. Kinston*, 391.

§ 5. Enjoining Institution or Prosecution of Civil Actions.

When a party makes a valid agreement not to institute a civil action, and to permit him to maintain the action would result in irreparable injury to the adverse party, equity will enjoin him from instituting the action not to protect against oppressive or vexatious litigation but to specifically enforce the contract, the order being directed to the party and not to the court, since equity has the power to prevent actions at law when resort to legal proceedings would result in unjust injury wholly irremedial in that tribunal. *Boone v. Boone*, 722.

Order restraining husband from instituting action for alienation of affections in violation of verbal agreement in deed of separation *held* properly continued to the hearing. *Ibid.*

§ 7. Enjoining Enforcement of Criminal Laws.

The general rule is that courts of equity will not interfere with the enforcement of the criminal laws of the State, but will remit the person charged to setting up his defense or attacking the constitutionality of the statute in a prosecution thereunder. *McCormick v. Proctor*, 23.

As an exception to a general rule, equity will interfere with the enforcement of a criminal law when injunction is necessary to protect effectually property rights and to prevent irremedial injuries to the rights of persons. *Ibid.*

Held: Court should have found whether slot machines were illegal in determining plaintiff's right to enjoin officers from interfering with his business. *Ibid.*

§ 8. Contracts Not to Engage in Similar Business or Same Profession.

A contract by an employee not to engage in a similar business within a specified territory for a certain time is valid and enforceable only if the restraint imposed is reasonably necessary to protect the business or good will of the employer and imposes no greater restraint upon the employee than is reasonably necessary for this purpose, provided its enforcement would not be detrimental to the public interest in depriving it of the services and skill of the employee or in incurring the danger of the employee becoming a public charge. *Comfort Spring Corp. v. Burroughs*, 658.

A covenant by an employee not to engage in a similar business in the entire United States as an employee of a named competitor is unreasonable and oppressive upon the employee and unnecessary for the protection of the employer, and is void as being in restraint of trade, and the employer may not enforce such contract in the absence of allegation and evidence circumscribing and limiting the territory by showing the extent of the territory over which its business extends. *Ibid.*

A stipulation of a partnership agreement between professional men that upon dissolution of the partnership the junior member would not practice the profession within the same town or within one hundred miles thereof for a period of five years *is held* reasonable and enforceable. *Beam v. Rutledge*, 670.

The test to determine the validity of a covenant prohibiting a person from engaging in a similar business or practicing his profession in a specified area is the existence of legitimate interests of the covenantee which are sought to

INJUNCTIONS—*Continued.*

be protected by the covenant, and whether the restrictions in regard to time and territory are reasonably necessary to afford fair protection for that interest and are not injurious to the interest of the public. *Ibid.*

A covenant in a partnership agreement between professional men that upon dissolution of the partnership the junior partner should not practice the profession within a restricted area for a specified time stands upon a different footing from like agreements between employer and employee, since a professional man is deemed capable of guarding his own interest and is not under like compulsion in making the agreement, but the line of demarcation between freedom to contract on one hand and public policy on the other must be determined upon the circumstances of each particular case. *Ibid.*

§ 11. Continuance, Modification and Dissolution.

Held: Court should not have dissolved the temporary order restraining defendant officers from interfering with plaintiff's business without finding that slot machines operated by plaintiff were illegal. *McCormick v. Proctor*, 23.

In a suit for perpetual injunction in which questions of fact are raised for the determination of the court, and in which no issues of fact to be tried by a jury are involved, the court may dismiss the action if it appears that in no aspect of the case would plaintiff be entitled to the relief, but in such case the action must be dismissed at term-time and not at chambers. *Cox v. Kinston*, 391.

In a suit for a permanent injunction to prevent irreparable injury, the court, upon the hearing of the order to show cause, may ascertain the probable effect of a continuance or dissolution of the temporary order, and should continue the order to the final hearing if there is probable cause for supposing that plaintiff will be able to maintain the primary equity alleged and there is reasonable apprehension of irreparable injury should the temporary order be dissolved, or if a continuance appears necessary to protect plaintiff's right until the controversy can be determined. *Boone v. Boone*, 722.

Held: Temporary order restraining institution of action for alienation of affections was properly continued to the hearing. *Ibid.*

§ 12. Burden of Proof.

The party seeking injunctive relief has the burden of proof. *Comfort Spring Corp. v. Burroughs*, 658.

INSANE PERSONS.

§ 19. Effect of Adjudication of Sanity.

Adjudication of sanity is evidence of sanity but is rebuttable in independent action. *Johnson v. Ins. Co.*, 139.

INSURANCE.

§ 14. Assignment.

The assignment of an insurance policy is governed by rules pertaining to other assignments as to requisites, validity, operation, and effect. *Land Bank v. Foster*, 415.

§ 21. Loss Payable Clauses.

The rights of the parties under a loss-payable clause in a policy of fire insurance will be determined in accordance with the terms and provisions of the contract, which derive no extra validity by reason of the fact that the form is prescribed by law, Michie's Code, 6437. *Land Bank v. Foster*, 415.

INTOXICATING LIQUOR.

§ 2. Construction and Operation of Control Statutes.

A. B. C. Act does not permit person to possess gallon of tax-paid liquor for purpose of sale. Whether the act permits possession of gallon of tax-paid liquor in home in dry county for personal use *held* not necessary to be decided. *S. v. Elder*, 111.

§ 9c. Relevancy and Competency of Evidence.

Evidence obtained by search *held* competent, the search warrant sworn to by officer upon "information" being sufficient. *S. v. Elder*, 111.

Where circumstantial evidence tends to show that defendant frequently and continuously bought a gallon of tax-paid liquor at the time and carried it to his apartment for the purpose of sale, evidence that defendant had theretofore been stopped on the highway with a gallon of tax-paid liquor *is held* a competent circumstance to be considered by the jury with the other facts and circumstances. *Ibid.*

§ 9d. Sufficiency of Evidence and Nonsuit.

Circumstantial evidence of defendant's possession of gallon of tax-paid liquor for purpose of sale *held* sufficient to be submitted to jury in prosecution under Turlington Act. *S. v. Elder*, 111.

JUDGMENTS.

§ 1. Nature and Essentials of Consent Judgments.

A consent judgment is the contract of the parties entered upon the records with the approval and sanction of a court of competent jurisdiction, and its provisions cannot be modified or set aside without consent of the parties except for fraud or mistake. *Keen v. Parker*, 378.

Where a judgment recites that it is entered by consent of all the parties, but is signed only by the attorneys for the respective parties, naming them, it will be presumed, nothing else appearing, that the attorneys had authority to sign same, and the judgment is binding upon the parties and those standing in privity to them. *Ibid.*

§ 2. Jurisdiction to Enter Consent Judgment.

It is not required that the provision of a consent judgment be predicated upon issues raised by the pleadings, it being sufficient if the court has general jurisdiction of the subject matter of the agreement of the parties. C. S., 593, as amended by chapter 92, Public Laws, Extra Session, 1921. *Keen v. Parker*, 378.

Clerk *held* to have jurisdiction to enter consent judgment in partition proceedings adjudicating title. *Ibid.*

§ 4. Attack of Consent Judgments.

Held: The findings support the court's holding that the wife consented to or ratified the consent judgment, and sustains its order refusing to set aside the judgment. *Smith v. Mineral Co.*, 346.

Procedure to set aside consent judgment for fraud or mistake is by independent action. *Keen v. Parker*, 378.

§ 22b. Direct and Collateral Attack of Judgments.

The procedure to attack judgments of foreclosure of lands for nonpayment of taxes on the ground of want of sufficient notice of such judgments is by motion in the cause and not by independent action against the commissioner to restrain him from selling the lands as directed by the judgment. *Rosser v. Matthews*, 132.

JUDICIAL SALES.

(Execution sales see Execution.)

§ 6. Validity and Attack.

The presumption is in favor of the regularity of a judicial sale. *Johnson v. Smith*, 702.

JUSTICES OF PEACE.

§ 4. Pleadings and Trial.

Pleadings in a magistrate's court are oral and will not be held insufficient for mere informality. *Roediger v. Sapos*, 95.

LANDLORD AND TENANT.

(Agricultural tenancies see Agriculture.)

§ 26. Recovery of Rents Prepaid.

Complaint in action to recover proportionate rents prepaid upon destruction of premises by fire *held* as against demurrer. *Oil Co. v. Bass*, 489.

LIBEL AND SLANDER.

§ 2. Words Actionable Per Se.

Article identifying plaintiff as the person who had been arrested for violations of Mann Act *held* libelous *per se*, raising presumption of actual damage. *Roth v. News Co.*, 13.

§ 6. Notice and Retraction.

Under C. S., 2430, the publication of an apology and retraction is not in itself sufficient, but it must be made to appear also that the libelous article was published in good faith, that its falsity was due to an honest mistake of fact, and that there were reasonable grounds for believing the statements in the article were true. *Roth v. News Co.*, 13.

Mere statement that defendant had come in possession of information *contra* to prior libelous article *held* insufficient retraction, and fact that defendant sent plaintiff a copy of second article with the request that plaintiff advise defendant if it were not satisfactory, make it incumbent upon plaintiff to approve or disapprove it. *Ibid.*

§ 12. Relevancy and Competency of Evidence.

Evidence of the financial worth of defendant is competent upon the issue of punitive damages. *Roth v. News Co.*, 13.

§ 13. Sufficiency of Evidence and Nonsuit.

Evidence *held* sufficient to be submitted to jury on question of whether words libelous *per se* were spoken of and concerning plaintiff. *Roth v. News Co.*, 13.

§ 16. Damages.

Punitive damages may be awarded in an action for libel and slander only upon a showing that the publication was prompted by actual malice as distinguished from malice implied from the intentional doing of an act which would have a natural tendency to injure, but oppression, gross or willful wrong, or a wanton, reckless or criminal disregard or indifference to plaintiff's rights will support an issue of punitive damages. *Roth v. News Co.*, 13.

Evidence *held* sufficient to sustain submission of issue of punitive damages. *Ibid.*

LIBEL AND SLANDER—*Continued.*

The law presumes that general damages actually, proximately and necessarily result from an unauthorized publication which is libelous *per se* and therefore has the immediate tendency to injure plaintiff's reputation, and such damages arise by inference of law even in the absence of actual pecuniary loss, and therefore need not be proved by plaintiff. *Ibid.*

The fact that the law presumes that general damages result from the publication of a libel *per se* does not preclude the plaintiff from offering evidence of damages both general and special. *Ibid.*

Evidence of the unauthorized publication of words libelous *per se*, raising the presumption of general damages, with testimony by plaintiff to the effect that he had suffered mental anguish, humiliation and embarrassment as a result thereof, entitles plaintiff to the award of some damages, the amount thereof being for the determination of the jury. *Ibid.*

LIMITATION OF ACTIONS.

§ 7. Insanity as Disability Preventing Running of Statute.

An adjudication of sanity is not binding on those not parties to the proceeding, and while evidence of sanity, it is rebuttable and does not entitle defendant to judgment of nonsuit on the ground of the bar of the statute of limitations when plaintiff introduces evidence that he was mentally incompetent until within the statutory period. *Johnson v. Ins. Co.*, 139.

The failure of the guardian to institute actions which he has the authority and duty to bring on behalf of his ward is the failure of the ward, entailing the same legal consequences with respect to the bar of the statutes of limitation. *Ibid.*

Evidence *held* not to show that guardian knew or should have known of fraud and his failure to institute suit does not bar ward. *Ibid.*

§ 11b. Institution of Action Within One Year After Nonsuit.

In order to be entitled to institute an action within one year after nonsuit in an action instituted prior to the bar of the statute of limitaions, plaintiffs must show that the costs in the prior action have been paid or that it was brought *in forma pauperis*, C. S., 415. *Osborne v. R. R.*, 263.

§ 12a. Partial Payment as Affecting Principals.

Partial payment by one principal starts the statute running anew as to both principals. *Saieed v. Abeyounis*, 644.

§ 16. Burden of Proof.

While the burden is on plaintiff to show that his cause of action is not barred by the statute of limitations, and in an action for fraud must show that the cause was instituted within three years from the discovery of the fraud or the time it should have been discovered in the exercise of due diligence, proof of mental incapacity until within the statutory period is sufficient. *Johnson v. Ins. Co.*, 139.

The charge of the court construed contextually as a whole *is held* to properly place the burden upon plaintiff to prove by the greater weight of the evidence that his claim was not barred by the statute of limitations pleaded by defendants. *Saieed v. Abeyounis*, 644.

MANDAMUS.

§ 1. Nature and Grounds of Writ in General.

Mandamus confers no new authority, but lies only to compel the performance of a duty imposed by law on the person sought to be coerced at the

MANDAMUS—*Continued.*

instance of a party having a clear legal right to demand its performance. *White v. Comrs. of Johnston*, 329.

§ 2a. Legal or Ministerial Duty.

Since county commissioners are under legal duty to appoint freeholders to ascertain damages done by dog upon application of person entitled to recover upon satisfactory proof of damages, *mandamus* will lie to compel performance of this duty upon proper application. *White v. Comrs. of Johnston*, 329.

§ 3. Parties Entitled to Remedy.

A person having a separate and peculiar right to the performance of a legal duty by an officer or board, so that he is the party beneficially interested, may maintain suit for *mandamus* to compel the performance of the legal duty. *White v. Comrs. of Johnston*, 329.

MARRIAGE.

§ 1. Nature and Essentials of the Status.

While marriage is essentially a civil contract, the status resulting therefrom is of profound importance to society and the State, and public policy is concerned therewith for the preservation of the purity and virility of the race. *Winders v. Powers*, 580.

MASTER AND SERVANT.

I. The Relation
1. Creation and Existance of the Relationship. Pafford v. Construction Co., 730.

II. Compensation of Employee. (Upon quantum meruit see Quasi-Contracts)
9. Actions against Employer for Wages or Remuneration. Brown v. Clement Co., 47.

IV. Liability for Injury to Third Persons. (In driving see Automobiles)
21b. Course of Employment. D'Armour v. Hardware Co., 568.

V. Federal Employers' Liability Act
27. Negligence of Railroad Employer. Brittain v. R. R., 737.

VII. Workmen's Compensation Act
36. Validity of Compensation Act. McCune v. Mfg. Co., 351.
37. Nature and Construction of Compensation Act in General. Blassingame v. Asbestos Co., 223; Morris v. Chevrolet Co., 428.
39b. Independent Contractors. Farmer v. Lumber Co., 158; Cook v. Lumber Co., 161.
40. Injuries Compensable.
b. Diseases. Blassingame v. Asbestos Co., 223; MacRae v. Unemployment Compensation Com., 769.
c. Hernia. Smith v. Creamery Co., 468.
d. Whether Injury Results from an "Accident." Buchanan v. Highway Com., 172; Smith v. Creamery Co., 468.
f. Whether Accident "Arises in the Course of the Employment." Stallcup v. Wood Turning Co., 302; Mion v. Marble & Tile Co., 743.
41a. Amount of Compensation. Mion v. Marble & Tile Co., 743.
44. Rights of Employer, Employee, and Insurer against Third Person Tort Feasor. Mack v. Marshall Field & Co., 55; Sayles v. Loftis, 674.
45b. Employees and Risks Covered by Policy. Mion v. Marble & Tile Co., 743.
47. Notice and Filing of Claim. Blassingame v. Asbestos Co., 223.
49. Original Jurisdiction of Commission and Exclusiveness of Remedy. McCune v. Mfg. Co., 351.
52b. Hearings and Evidence before Commission. Blassingame v. Asbestos Co., 223; MacRae v. Unemployment Compensation Com., 769.
52c. Findings of Fact and Conclusions of Law by Commission. Farmer v. Lumber Co., 158; Cook v. Lumber Co., 161; MacRae v. Unemployment Compensation Com., 769.
55. Appeal and Review of Award.
d. Matters Reviewable. Buchanan v. Highway Co., 173; Blassingame v. Asbestos Co., 223; MacRae v. Unemployment Compensation Com., 769; Stallcup v. Wood Turning Co., 302.
g. Determination and Disposition of Appeal. Farmer v. Lumber Co., 158; Cook v. Lumber Co., 161.

VIII. Unemployment Compensation Act
56. Validity, Nature and Construction of the Act in General. Ins. Co. v. Unemployment Com., 495.
59. Taxes. Ins. Co. v. Unemployment Compensation Com., 495.

§ 1. Creation and Existence of the Relationship.

Plaintiff was a salesman for a wholesale building material house. In order to sell certain goods to a retailer he agreed to obtain a purchaser for the

retailer, and pursuant thereto procured a subcontractor to buy the goods from the retailer upon the condition that plaintiff inspect the material at the first opportunity as it was being used in construction work. It further agreed that the retailer was required to reimburse the subcontractor for any defective material and that the wholesaler collected from the retailer subject to any credit allowed the retailer for defective material. *Held:* In inspecting the material on the construction job, plaintiff was not an employee of the contractor or the subcontractor, and may not invoke the rules governing the liability of the contractor to the employees of the subcontractor in his action to recover for injuries received in a fall down an open elevator shaft while on the premises. *Pafford v. Construction Co.*, 730.

§ 9. Actions Against Employer for Wages or Remuneration.

Complaint alleging agreement by defendant to pay plaintiff salary plus ten per cent of net profit earned in construction of building, later extended to other buildings by parol, that plaintiff fully performed work, and that defendant had refused to pay the agreed percentage of the net profit earned in the construction of the other buildings *held* good as against demurrer. *Brown v. Clement Co.*, 47.

§ 21b. Course of Employment.

A master or principal is liable for a tort of his servant or agent committed in the course of the employment or scope of the authority and in the furtherance of the superior's business. *D'Armour v. Hardware Co.*, 568.

§ 27. Negligence of Railroad Employer.

Plaintiff was injured when the motorcar upon which he and other employees of defendant railroad company were being transported to work collided on the tracks with a motorcar of defendant telegraph company. *Held:* The motion of the defendant telegraph company for judgment as of nonsuit should have been allowed, there being no evidence in the record upon which it might be held for negligence, but the evidence was properly submitted to the jury upon the issue of the negligence of defendant railroad company. *Brittain v. R. R.*, 737.

§ 36. Validity of Compensation Act.

The contention that the Workmen's Compensation Act is unconstitutional for that it destroys the right of trial by jury is untenable. *McCune v. Mfg. Co.*, 351.

§ 37. Nature and Construction of Compensation Act in General.

Chapter 123, Public Laws of 1935, expressly repealing all laws and clauses of laws in conflict therewith, is an amendment to chapter 120, Public Laws of 1929, and must be construed *in para materia* therewith, and the amendment should be construed to repress the evil arising under the old act and to advance the remedy provided in the new. *Blassingame v. Asbestos Co.*, 223.

The Compensation Act must be liberally construed to effectuate its intent and compensation will not be denied by a strict, strained or technical construction. *Ibid.*

The Workmen's Compensation Act will be construed as a whole to effectuate the intent of the General Assembly. *Morris v. Chevrolet Co.*, 428.

§ 39b. Independent Contractors.

Cause remanded for findings necessary to determination, as question of law, whether plaintiff was employed by independent contractor. *Farmer v. Lumber Co.*, 158; *Cook v. Lumber Co.*, 161.

MASTER AND SERVANT—*Continued.*

§ 40b. Diseases.

Expert opinion evidence in this case *held* sufficient to sustain the findings of the Industrial Commission that the deceased employee suffered from asbestosis which resulted in pneumonia causing his death. *Blassingame v. Asbestos Co.*, 223.

Chapter 123, section 50½ (a), Public Laws of 1935, providing that only the occupational diseases therein specified should be compensable, relates only to occupational diseases, which are those resulting from long and continued exposure to risks and conditions inherent and usual in the nature of the employment, and this section does not preclude compensation for a disease not inherent in or incident to the nature of the employment when it results from an accident arising out of and in the course of the employment, Michie's Code, 8081 (i), subsec. (f). *MacRae v. Unemployment Compensation Com.*, 769.

Evidence *held* to sustain finding that contraction of tuberculosis resulted from accident within meaning of Compensation Act. *Ibid.*

§ 40c. Hernia.

Evidence *held* sufficient to sustain finding that hernia resulted from accident. *Smith v. Creamery Co.*, 468.

§ 40d. Whether Injury Results From an "Accident." (Whether disease results from "accident" see Master and Servant § 40b.)

The Industrial Commission found, upon supporting evidence, that claimant became temporarily sick and blind while performing usual manual labor in the usual manner, that his condition improved and he went back to work and that shortly thereafter he again suffered a similar disability. *Held:* The findings support the conclusion that the injury did not result from an accident arising out of and in the course of claimant's employment within the purview of the Workmen's Compensation Act. *Buchanan v. Highway Com.*, 172.

An "accident" within the contemplation of the Workmen's Compensation Act is an unusual and unexpected or fortuitous occurrence, there being no indication that the Legislature intended to put upon the usual definition of this term any further refinements. *Smith v. Creamery Co.*, 468.

An injury, in order to be compensable under the Workmen's Compensation Act, must result from an accident, and injuries which are not the result of any fortuitous occurrence but are the natural and probable result of the employment are not compensable. *Ibid.*

§ 40f. Whether Accident "Arises in the Course of the Employment."

Evidence that night watchman was injured in fall as he was getting up from reclining position after rest to make inspection rounds, his son being engaged in discharge of employee's duties in boiler room, *held* not to disclose as a matter of law that at time of injury he had not deviated from employment, and denial of compensation must be upheld. *Stallcup v. Wood Turning Co.*, 302.

Injury sustained while employee was returning from project to office to check out *held* within course of employment. *Mion v. Marble & Tile Co.*, 743.

§ 41a. Amount of Recovery.

Medical and hospital expenses should not be included in computing the maximum compensation recoverable for any one injury. *Morris v. Chevrolet Co.*, 428.

The employee in question was employed practically continuously for thirty-three weeks prior to the injury resulting in death, but during that period his wages were twice increased. *Held:* In the absence of a finding supported by

evidence that the average weekly wage for the entire period of employment would be unfair, compensation should have been based thereon, and the computation of the average weekly wage on the basis of the wage during the period after the last increase in pay is not supported by the evidence. Chapter 120, Public Laws of 1929, sec. 2 (e). *Mion v. Marble & Tile Co.*, 743.

§ 44. Rights of Employee, Employer and Insurer Against Third Person Tort-Feasor.

Administrator of deceased employee may maintain action for wrongful death against third person tort-feasors. *Mack v. Marshall Field & Co.*, 55; *Sayles v. Loftis*, 674.

§ 45b. Employees and Risks Covered by Policy.

Defendant employer was engaged in business in both North and South Carolina, but its one office is situate in a city in North Carolina. The employee in question resided in that city and the contract of employment was executed in this State. On the day in question the employee, after reporting to defendant's office, was transported by the employer to a job in South Carolina, and was fatally injured in an accident occurring in North Carolina while he was returning to the employer's office to check out in the course of his employment. *Held:* The risk was covered by policy embracing liability under the North Carolina Compensation Act. *Mion v. Marble & Tile Co.*, 743.

§ 47. Notice and Filing of Claim.

When an employee dies as a result of an occupational disease, but had no knowledge that he had contracted or was suffering from the disease, he has no "distinct manifestation" of the disease within the purview of sec. 50½ (o), ch. 123, Public Laws of 1935, and his failure to give notice thereof to his employer does not bar his dependents from recovering compensation for his death. *Blassingame v. Asbestos Co.*, 223.

When a widow does not know that her husband had an occupational disease resulting in death until after the autopsy reports, almost two months after his death, notice and claim filed with the employer by her within 90 days after the report is sufficient, since under the circumstances it would be humanly impossible for her to have given notice and filed claim within 90 days of her husband's death. *Ibid.*

The provision of sec. 50½ (o), ch. 123, Public Laws of 1935, does not provide that notice to the employer should be a condition precedent to recovery of compensation, the provision that the claim "shall be forever barred" applying only to the requirement that claim for disability or death should be made within one year after the disablement or death, and not to the requirement of notice to the employer within 90 days from the date of death. *Ibid.*

§ 49. Original Jurisdiction of Commission and Exclusiveness of Remedy.

Remedies under Compensation Act excludes the recovery of both actual and punitive damages at common law. *McCune v. Mfg. Co.*, 351.

In this action by an employee against the employer and the employer's foreman to recover for alleged malicious and willful assault on plaintiff by the foreman in the course of the employment, judgment sustaining the demurrer of the corporate defendant to the jurisdiction of the Superior Court on the ground that the Industrial Commission has exclusive jurisdiction is upheld, it being presumed that the court found facts sufficient to support its judgment in the absence of findings or request therefor. *Ibid.*

In an action by an employee against the employer and the employer's foreman for alleged joint tort, the action is properly dismissed as to the corporate

MASTER AND SERVANT—*Continued.*

defendant when it appears that the Industrial Commission has exclusive jurisdiction of its liability, and is properly retained as to the individual defendant, the right of action against the individual defendant remaining at common law in the Superior Court. *Ibid.*

§ 52b. Hearings and Evidence.

In this hearing before the Industrial Commission, the hypothetical questions asked witnesses assumed only facts established by the evidence either directly or by fair and necessary implication, and were competent. *Blassingame v. Asbestos Co.*, 223; *MacRae v. Unemployment Compensation Com.*, 769.

§ 52c. Findings of Fact and Conclusions of Law by Commission.

The Industrial Commission should make specific and separate findings of fact and conclusions of law upon those facts even though the matter presented be a mixed question of law and of fact. *Farmer v. Lumber Co.*, 158; *Cook v. Lumber Co.*, 161.

Findings of fact by the Industrial Commission may be based on circumstantial as well as direct evidence. *MacRae v. Unemployment Compensation Com.*, 769.

§ 55d. Review.

The Industrial Commission has the exclusive duty and authority to find the facts relative to controverted claims, and its findings of fact, with exception of jurisdictional findings, are conclusive on the courts when supported by any competent evidence. *Buchanan v. Highway Com.*, 173.

The findings of fact of the Industrial Commission are conclusive on the courts when supported by competent evidence, notwithstanding that some of the evidence sustaining the findings may be objectionable under technical rules of evidence appertaining to courts of general jurisdiction. *Blassingame v. Asbestos Co.*, 223; *MacRae v. Unemployment Compensation Com.*, 769.

Findings of fact of the Industrial Commission are conclusive on the courts when supported by any competent evidence. *Stallcup v. Wood Turning Co.*, 302.

§ 55g. Determination and Disposition of Appeal.

When the findings of the Industrial Commission are insufficient for a proper determination of the questions involved, the proceeding will be remanded to the Industrial Commission for additional findings. *Farmer v. Lumber Co.*, 158; *Cook v. Lumber Co.*, 161.

§ 56. Validity, Nature and Construction of Unemployment Compensation Act.

Unemployment Compensation Commission is a State agency. *Ins. Co. v. Unemployment Compensation Com.*, 495.

§ 59. Taxes.

Contributions imposed on employers within the purview of the Unemployment Compensation Act are compulsory and therefore constitute a tax, and they are not rendered any less a tax by reason of the provision that they should be segregated in a special fund for distribution in furtherance of the purpose of the act. *Ins. Co. v. Unemployment Compensation Com.*, 495.

An action to determine whether salaries paid certain employees should be included in computing the contributions to be paid by an employer under the Unemployment Compensation Act involves solely an issue of fact and does not involve any right, status or legal relation, and the employer may not maintain proceedings under the Declaratory Judgment Act to determine the question. *Ibid.*

MUNICIPAL CORPORATIONS.

§ 1. Nature and Essentials and Definition of Municipal Corporation.

A Housing Authority created under the provision of chapter 456, Public Laws of 1935, Michie's Code, 6243, is a municipal corporation created for a public governmental purpose, and such Authority is invested with a governmental function. *Cox v. Kinston*, 391.

§ 2. Creation of Municipal Corporations.

The existence or nonexistence of facts within its corporate limits justifying the creation of a Housing Authority is for the determination of the municipal corporation, chapter 456 (4), Public Laws of 1935, Michie's Code, 6243 (4), which duty is political and not judicial, and in proceedings to enjoin the activities of a Housing Authority created under the act the court does not have authority to hear evidence in regard to the existence of the facts upon which the creation of the Housing Authority is predicated. Whether an appeal will lie from the municipal corporation to review such findings, *quære*. *Cox v. Kinston*, 391.

§ 8. Private Powers.

In absence of legislative authority a municipality may not agree to submit to control and regulation of Federal Power Commission in development of hydroelectric generating system. *McGuinn v. High Point*, 449.

Certificate of convenience from Utilities Commissioner *held* necessary to construction of municipal electric generating plant. *Ibid.*

§ 12. Exercise of Governmental and Corporate Powers in General.

In the absence of statute subjecting it to liability, a municipality is not liable for torts committed by its officers and agents while performing a governmental function of the municipality or a duty imposed upon it solely for the public benefit, but it may be held liable for tortious acts of its officers or agents committed by them in the performance of their duties relating to an activity carried on by the municipality in its corporate character or in the exercise of powers for its own advantage. *Parks v. Princeton*, 361.

In arresting and imprisoning a person, a municipal corporation is performing duties imposed upon it solely for the public benefit, and therefore it cannot be held liable for alleged negligence of its agents in imprisoning a person or in failing to search other prisoners for objects which might result in injury to the prisoner. *Ibid.*

Art. XI, section 6, of the Constitution of North Carolina imposes liability on a municipality only for such injuries to prisoners as result from its failure to properly construct and furnish the prison to afford prisoners reasonable comfort and protection from suffering an injury to health. *Ibid.*

MUNICIPAL CORPORATIONS—*Continued.*

§ 14. Defects or Obstructions in Streets or Sidewalks.

While a municipality is not an insurer of the safety of its streets, it is under duty to make reasonable inspection and to repair dangerous defects and conditions of which it has notice, either actual or implied, regardless of whether the defects are caused by it or by others, and, in the exercise of such reasonable diligence, to keep its streets in a reasonably safe condition for travel by all vehicles having the right to use the streets, whether automobiles, motorcycles, bicycles or wagons. *Barnes v. Wilson*, 190.

Evidence that motorcyclist was fatally injured when he struck manhole in dirt street which had been recently scraped, leaving manhole in depression about five inches deep, *held* sufficient for jury on issue of negligence. *Ibid.*

Nonsuit on the ground of contributory negligence on the part of plaintiff's intestate, killed in an accident occurring when the motorcycle he was riding hit a manhole cover in a depression in a street, *held* properly denied. *Ibid.*

§ 16. Injuries to Lands by Sewerage Systems.

Judgment *held* to embrace permanent damages resulting from operation of municipal sewage disposal plant, including dye water from manufacturing plant emptied through city's system, entitling city to permanent easement for continued operation of plant in same manner. *Clinard v. Kernersville*, 686.

§ 17c. Jails.

Held: Facts alleged failed to show causal connection between the construction and equipment of prison and injury to prisoner. *Parks v. Princeton*, 361.

§ 23. Purchase of Land by Municipality.

The fact that the purchase of land for a governmental purpose by a municipality would result in the retirement of the land from the tax books, does not affect the power to purchase. *Cox v. Kinston*, 391.

§ 36. Nature and Extent of Municipal Police Power in General.

A municipality has only that police power given it by statute, and since such statutes involve matters of common right, they must be strictly construed. *Rhodes, Inc., v. Raleigh*, 627.

§ 37. Zoning Ordinances and Building Permits.

The municipal ordinance in question provided reciprocal inhibitions of occupancy of residential districts by members of the white and Negro races, fairly apportioned, the provision being inserted in a general zoning ordinance adopted under authority of chapter 250, Public Laws of 1923. *Held:* Restrictions upon occupancy necessarily involved restrictions upon the purchase and sale of property, or the *jus disponendi*, which is an inherent right in property, and the denial of such right solely upon the basis of race is unconstitutional. *Clinard v. Winston-Salem*, 119.

§ 39. Regulation of Use of Streets.

A municipality may enact ordinances providing reasonable regulations for the use of its streets for the parking of motor vehicles, but the restrictions imposed must have some reasonable relation to the conditions sought to be remedied. *Rhodes, Inc., v. Raleigh*, 627.

There is no reasonable relationship between the imposition of a meter charge for use of parking spaces within the time limits allowed by ordinance and the prevention of the use of a parking space by the same car for an unreasonable time to the detriment of the rights of others. *Ibid.*

MUNICIPAL CORPORATIONS—*Continued.*

A meter charge for the use of parking space cannot be upheld on the ground that the charge is an inspection fee, since the object of the charge is solely to prevent the violation of parking ordinances or to detect and prove such violations, and bears no relation to fees imposed to defray the expense of inspecting a business or merchandise, the inspection of which is necessary to the public health, safety and welfare. *Ibid.*

A meter charge imposed by a municipality for the parking of motor vehicles is in effect a revenue measure imposing an excise tax for the privilege of using parking space, and the municipality is without authority to impose such tax, municipalities being limited by the Motor Vehicle Act, chapter 2, section 29, Public Laws of 1921; Michie's Code, 2612 (a), to the imposition of a $1.00 license fee upon each local vehicle. *Ibid.*

§ 40. Attack, Violation and Enforcement of Ordinances.

Injunction will lie to restrain the enforcement of a municipal ordinance at the instance of a citizen who is thereby deprived of a constitutional right. *Clinard v. Winston-Salem*, 119.

The municipal ordinance imposing a license tax on plaintiff's being invalid, the enforcement of the ordinance was properly restrained at their suit. *Kenny Co. v. Brevard*, 269.

§ 42. Power to Tax.

A municipal corporation is empowered to tax trades or professions carried on or enjoyed within the city, unless otherwise provided by law, Constitution of North Carolina, Article V, sec. 3; C. S., 2677, but its classification of trades and professions for taxation must be based upon reasonable distinctions and all persons similarly situated must be treated alike. *Kenny Co. v. Brevard*, 269.

The powers of a municipality relating to taxation are strictly construed. *Ibid.*

Municipalities are prohibited by section 61, chapter 407, Public Laws of 1937, from levying a license or privilege tax for use of its streets by motor trucks. *Ibid.*

A municipality may not levy a tax on a business or trade which is not carried on within its limits. *Ibid.*

Municipal license tax on merchants delivering goods by truck from outside of city *held* void as being discriminatory and as imposing tax on business not carried on within its limits. *Ibid.*

NEGLIGENCE.

I. Acts and Omission Constituting Negligence
- 1. In General. Sayles v. Loftis, 674.
- 3. Dangerous Substances, Machinery and Instrumentalities. Hubbel v. Furniture Co., 518; Ashkenazi v. Bottling Co., 552; O'Neil v. Braswell, 561; Daniels v. Montgomery Ward & Co., 768.
- 4. Condition and Use of Lands and Building.
  - a. In General. Furtick v. Cotton Mills, 516, 517; Wellons v. Sherrin, 534.
  - b. Distinction between "Licensee" and "Invitee." Pafford v. Construction Co., 730.
  - c. Duty and Liability to Licensees. Pafford v. Construction Co., 730.
  - d. Duty and Liability to Invitees. Brown v. Montgomery Ward & Co., 368; Schwingle v. Kellenberger, 577.

II. Proximate Cause
- 7. *Intervening Negligence.* Butner v. Spease, 82.
- 9. Anticipation of Injury; Foreseeability. O'Neil v. Braswell, 561.

IV. Actions
- 16. Pleadings. Daniels v. Montgomery Ward & Co., 768.
- 19. Sufficiency of evidence and nonsuit.
  - a. On issue of Negligence. Ashkenazi v. Bottling Co., 552; O'Neil v. Braswell, 561; Brittain v. R. R., 737.
  - d. Nonsuit on ground of intervening negligence. Butner v. Spease, 82.
- 20. Instructions. Brown v. Montgomery Ward & Co., 368.

NEGLIGENCE—*Continued.*

§ 1. Acts and Omissions Constituting Negligence in General.

Allegations that defendant felled a tree in close proximity to plaintiff's intestate without warning intestate so as to enable him to escape to a place of safety and that the tree struck and killed intestate, *is held* to state cause of action. *Sayles v. Loftis*, 674.

§ 3. Dangerous Substances, Machinery and Instrumentalities.

Allegations and evidence to the effect that defendant's salesman, in demonstrating a washing machine, started it working without warning while plaintiff's hand was known by him to be in close proximity to the machine, and that plaintiff's hand was caught therein, resulting in injury, *held* sufficient to overrule defendant's motion to nonsuit. *Hubbel v. Furniture Co.*, 518.

Evidence that bottle containing soft drink prepared by defendant manufacturer exploded in plaintiff customer's hand, and that other bottles prepared by defendant about same time had exploded in retailer's stores, *held* to take case to jury on issue of negligence. *Ashkenazi v. Bottling Co.*, 552.

Evidence that fireworks was supposed to ascend to height before exploding, and that it exploded near ground, causing injury to member of committee putting on display, fails to disclose negligent act committed by defendant club from which it could foresee that injury was likely to occur. *O'Neil v. Braswell*, 561.

Seller of kerosene and gasoline stove *held* not liable to neighbor of purchaser for damages from fire caused by explosion of stove in absence of allegation of specific defect in stove causing explosion. *Daniels v. Montgomery Ward & Co.*, 768.

§ 4a. Condition and Use of Lands and Buildings as Constituting Negligence.

Allegations that defendant maintained a pond in connection with its manufacturing business, that intestate, seventeen years of age, drowned therein when he stepped into a deep hole while wading to recover some ducks, and that defendant was negligent in failing to warn of the unevenness of the bottom of the pond and in increasing the danger by discharging hot water containing oil or grease in the pond, without allegation or contention that the pond constituted an attractive nuisance, *held* insufficient to state a cause of actionable negligence proximately causing intestate's death. *Furtick v. Cotton Mills*, 516, 517.

Allegations that lessor of filling station, upon ascertaining that the septic tank thereon was inadequate, paid part the cost of constructing an open pit on the adjacent vacant lot belonging to one of lessees, the pit being connected with the septic tank to take care of the overflow, that the pit was allowed to become concealed by weeds, etc., and that plaintiff's intestate, a boy five years old, who lived on adjoining premises, fell into the pit and was drowned, there having been no warning of the danger given his parents, *held* to state cause of action against lessor as well as lessees. *Wellons v. Sherrin*, 534.

§ 4b. Distinction Between "Licensee" and "Invitee."

The distinction between a licensee and an invitee does not depend upon whether there is an "invitation" to come on the premises, but is determined by the nature of the business bringing him to the premises, an invitee being a person who goes upon the premises for the mutual benefit of himself and the person in possession, whose visit is of interest or advantage to the invitor, while a licensee is one who goes upon the premises for his own interest, con-

venience or gratification with the consent of the person in possession, and is neither a customer nor a servant nor a trespasser. *Pafford v. Construction Co.*, 730.

Plaintiff was a salesman for a wholesale building material house. In order to sell certain goods to a retailer he agreed to obtain a purchaser for the retailer, and pursuant thereto procured a subcontractor to buy the goods from the retailer upon the condition that plaintiff inspect the material at the first opportunity as it was being used in construction work. In performing the work the subcontractor was an independent contractor. *Held:* Plaintiff, in making the inspection of the materials as they were being used in the construction of a building was at most a mere licensee of the main contractor in possession of the premises. *Ibid.*

§ 4c. Duty and Liability to Licensees.

The owner or the person in possession of the premises is not under duty to a licensee to maintain the premises in a safe or suitable condition or to warn him of hidden dangers or perils of which the owner has actual or implied knowledge, his duty to the licensee being merely to refrain from doing the licensee willful injury and from wantonly and recklessly exposing him to danger. *Pafford v. Construction Co.*, 730.

Evidence *held* insufficient to be submitted to jury in this action by licensee to recover for injury sustained in fall down elevator shaft, since, even conceding there is evidence of breach of duty owed to licensee, the evidence discloses contributory negligence barring recovery as matter of law. *Ibid.*

§ 4d. Duty and Liability to Invitees.

The proprietor of a store is not an insurer of the safety of its patrons but is under duty to exercise due care to keep the premises in a reasonably safe condition and to give warning of any hidden peril. *Brown v. Montgomery Ward & Co.*, 368.

In order to hold a proprietor responsible for injury to a patron caused by some article or substance on the floor at a place where customers may be expected to walk, the customer must show that the proprietor either placed or permitted the substance to be there, or knew or by the exercise of due care should have known of its presence in time to have removed the danger or given warning of its presence. *Brown v. Montgomery Ward & Co.*, 368; *Schwingle v. Kellenberger*, 577.

Evidence *held* insufficient to be submitted to the jury on the issue of defendant proprietor's negligence in maintaining stairs. *Schwingle v. Kellenberger*, 577.

§ 7. Intervening Negligence.

Whether intervening active negligence on the part of another or others is such as to insulate the primary negligence is basically a question of proximate cause, and the primary negligence is not actionable if it would have produced no injury except for such intervening negligence and if the intervening negligence is not reasonably foreseeable, but if the intervening acts or omissions are reasonably foreseeable, the primary negligence will be held to act through such intervening causes and to be the proximate, or one of the proximate causes of the injury. *Butner v. Spease*, 82.

§ 9. Anticipation of Injury; Foreseeability.

Evidence *held* not to show any negligent act committed by defendant club from which it might foresee that plaintiff would be injured by premature explosion of fireworks. *O'Neil v. Braswell*, 561.

NEGLIGENCE—*Continued.*

§ 16. Pleadings.

Allegations that defendant sold a defective gasoline and kerosene stove to a customer who advised defendant that he was familiar with the mechanism of the stove and thought he could repair same so that it might be safe for use, that some time thereafter the stove exploded in the customer's apartment causing fire which spread to plaintiff's apartment, without allegation of any specific defect in the stove proximately causing the damage alleged, *is held* insufficient to state a cause of action. *Daniels v. Montgomery Ward & Co.*, 768.

§ 19a. Sufficiency of Evidence and Nonsuit on Issue of Negligence.

Evidence that bottle containing soft drink prepared by defendant manufacturer exploded in customer's hand, and that other bottles prepared by defendant at about same time exploded in retailers' stores, *held* to take case to jury. *Ashkenazi v. Bottling Co.*, 552.

Defendant club attempted to put on a fireworks display. Plaintiff, a member of the club, while acting as a member of the committee in charge of the display, was injured when a bomb, which was supposed to ascend 600 feet in the air before exploding, failed to ascend properly and exploded on the ground. *Held:* There is no sufficient evidence of any negligent act committed by defendant from which it could foresee that injury was likely to occur, and defendant's motion to nonsuit was properly granted. *O'Neil v. Braswell*, 561.

Plaintiff was injured when the motorcar upon which he and other employees of defendant railroad company were being transported to work collided on the tracks with a motorcar of defendant telegraph company. *Held:* The motion of the defendant telegraph company for judgment as of nonsuit should have been allowed, there being no evidence in the record upon which it might be held for negligence, but the evidence was properly submitted to the jury upon the issue of the negligence of defendant railroad company. *Brittain v. R. R.*, 737.

§ 19d. Nonsuit on Ground of Intervening Negligence.

Whether the intervening active negligence of a person is such as to insulate, as a matter of law, the primary negligence of another is a difficult question, but the principle of insulating negligence is a wholesome one and must be applied in proper instances, and nonsuit on ground of intervening negligence was properly granted in this case. *Butner v. Spease*, 82.

§ 20. Instructions.

An instruction on the issue of contributory negligence to the effect that plaintiff would not be entitled to recovery if his negligence was the proximate cause of the injury *held* for error in failing to charge on the question of concurring negligence that recovery would also be barred if plaintiff's negligence was one of the proximate causes of the injury. *Brown v. Montgomery Ward & Co.*, 368.

NUISANCES.

§ 4. Actions to Abate and for Damages.

In this action for damages resulting from the pollution of a stream running through plaintiff's land, the court held that plaintiff was not entitled to permanent damage, but instructed the jury that the measure of damage was the difference in the value of plaintiff's land immediately before and after the pollution of the stream plus resulting inconvenience and annoyance suffered by plaintiff from the date of the pollution of the stream to the date of trial.

NUISANCES—*Continued.*

Held: Defendant appellant is entitled to a new trial for the inadvertent error of the court in including in the charge on the issue of damages the rule for the admeasurement of permanent damage. *Oates v. Mfg. Co.*, 488.

§ 5. Actions for Damages for Maintenance of Permanent Nuisance.

Where, in an action for damages to plaintiff's land resulting from a permanent nuisance which is protected by the power of eminent domain or because of the exigent public interest may not be abated, award of permanent damages is made upon demand of plaintiff, defendant acquires a permanent easement entitling him to continue to maintain the nuisance in the same manner. *Bruton v. Light Co.*, 1.

§ 10. Padlocking Premises Used in Operation of Nuisance Against Public Morals.

In an action to abate a nuisance against public morals under the provisions of Michie's Code, 3180, *et seq.*, lessors of the property are entitled to the submission of an issue as to whether they knew the lessee was operating a public nuisance thereon before personal judgment is rendered against lessors taxing them with the cost and padlocking the premises, such personal judgment against them being justified only if they knew or, by the exercise of due diligence, should have known of the maintenance of the nuisance. *Barker v. Palmer*, 519.

A lease contract will be held to have been made in contemplation of the statute in effect at the time of the execution of the lease providing for the abatement of nuisances against public morals, and the lessor is subject to the rights of the State to padlock the premises in accordance with the statute if they are used in operating a nuisance as defined by the act. Michie's Code, 3180, *et seq. Ibid.*

§ 11. Sale of Property Used in Operation of Public Nuisance.

Where mortgagor's equity is *nil*, mortgagee without knowledge that property was used in operation of nuisance, is entitled to recover same. *Habit v. Stephenson*, 447.

Intervener sold a cash register under a conditional sales contract and same, together with other chattels of the purchaser, was seized for sale upon the determination that the purchaser was using same in the maintenance of a nuisance against public morals. Upon the facts agreed intervener had no actual or constructive knowledge that the cash register was used in the maintenance of a nuisance. *Held:* Only the equity of the purchaser could be condemned for sale under the statute and the intervener may be charged with no part of the cost. *Sinclair v. Croom*, 526.

Remedy of defendant to prevent sale of certain personalty on ground that it was not used in operation of nuisance is by motion in the cause and not by independent action to restrain sheriff from selling the property. *Humphrey v. Churchill*, 530.

PARENT AND CHILD.

§ 8. Parent's Right of Action for Negligent Injury to Child.

A father is under duty to care for and maintain his child and, if the child should die during minority, to pay the funeral expenses, and as between himself and its mother, nothing else appearing, is entitled to the services and earnings of his child during minority, and therefore the father has a right of action against person negligently injuring his child to recover for loss of services of the child and pecuniary damages sustained by him in consequence

PARENT AND CHILD—*Continued.*

of the injury to the child, including expenses of treatment. *White v. Comrs. of Johnston*, 329.

Father may maintain action for injury to child resulting in death when death does not immediately follow injury. *Ibid.*

PARTIES.

§ 9. Time of Objection and Waiver.

In an action to compel a grantee to sell certain timber for distribution among the grantor's children in accordance with reservations and directions in the deed, the fact that all the children are not parties will not preclude recovery by the children instituting the action when defendant does not request the joinder of the others and raises no objection until after verdict. *Greene v. Greene*, 649.

§ 10. Joinder of Additional Parties.

The court has the power to order additional parties made, even after judgment. *Johnston County v. Stewart*, 334.

PARTITION.

§ 1. Right to Partition.

A tenant in common has a right to actual partition unless it is made to appear by satisfactory proof that actual partition cannot be made without injury to some or all of the parties interested. *Hyman v. Edwards*, 342.

§ 4. Nature of Remedy and Proceedings.

In a proceeding for partition in which actual partition is ordered, all orders are interlocutory until the decree of confirmation, and upon the hearing on the report of the commissioners, the clerk may confirm the report or set the same aside and order a sale, and the judge, on appeal, may reverse, modify or confirm the clerk's judgment or set aside the report and order a sale, even though another Superior Court judge had theretofore affirmed the clerk's order for actual partition, since the former order, being interlocutory, is not *res judicata* and is subject to be set aside or modified. *Hyman v. Edwards*, 342.

Appeal will lie from order of sale for partition, but no appeal will lie from order for actual partition. *Ibid.*

Since clerk has jurisdiction over actual partition, he has jurisdiction to enter consent judgment that one of parties is owner of the land subject to lien for money due other parties, since such judgment amounts to private sale for partition. *Keen v. Parker*, 378.

PLEADINGS.

I. Complaint

3a. Statement of cause of action. Petty v. Lemons, 492.

II. Answer

10. Counterclaims, Set-Offs and Cross-Complaint. Montgomery v. Blades, 654.

IV. Demurrer

14. For want of Jurisdiction. McCune v. Mfg. Co., 351.
15. For Failure of Complaint to State Cause. Lumber Co. v. Edwards, 251.
16. For misjoinder of Parties and Causes. Burleson v. Burleson, 336; Ellis v. Brown, 787.
18. Defects Appearing on Face of Pleading and "Speaking Demurrers." Mack v. Marshall Field & Co., 55; Aldridge Motors v. Alexander, 750.
19. Time of Demurring and Waiver of Right to Demur. Aldridge Motors v. Alexander, 750.
20. Office and Effect of Demurrer. Mack v. Marshall Field & Co., 55; White v. Comrs. of Johnston, 329; Parks v. Princeton, 361.

V. Amendment of Pleadings

23. After decision sustaining Demurrer. Harris v. Board of Education, 281; Scott v. Harrison, 319; Johnston County v. Stewart, 334; Cody v. Hovey, 407.

VII. Motions Relating to Pleadings

28. Motions for Judgment on Pleadings. Sills v. Morgan, 662; Redmond v. Farthing, 678.
29. Motions to strike. Whitlow v. R. R., 558; Herndon v. Massey, 610; Sayles v. Loftis, 674; Aldridge Motors v. Alexander, 750.

PLEADINGS—*Continued.*

§ 3a. Statement of Cause of Action.

Plaintiff may not seek to recover on a theory of liability not supported by allegations of the complaint. *Petty v. Lemons*, 492.

§ 10. Counterclaims, Set-Offs and Cross Complaint.

A defendant may file a cross action against a codefendant only if such cross action is founded upon or is necessarily connected with the subject matter and purpose of plaintiff's action, and while C. S., 602, permits the determination of questions of primary and secondary liability and the right to contribution as between joint tort-feasors, it does not permit cross actions between defendants which are independent of the cause alleged by plaintiff. *Montgomery v. Blades*, 654.

In passenger's action for negligent injury, driver's administratrix may not set up cause for wrongful death against codefendant. *Ibid.*

§ 14. Demurrer for Want of Jurisdiction.

Demurrer *ore tenus* to the jurisdiction was made by the corporate defendant immediately after the jury was impaneled. The court reserved ruling thereon until after the close of all the evidence, when it sustained the demurrer. *Held:* Demurrer to the jurisdiction can be made at any time during the course of the trial, and the court correctly dismisses an action whenever it perceives that it has no jurisdiction thereof. *McCune v. Mfg. Co.*, 351.

§ 15. Demurrer for Failure of Complaint to State Cause.

A demurrer for failure of the complaint to state a cause of action is properly overruled if the complaint in any aspect states facts entitling plaintiff to relief, even though the complaint fails to specifically pray for the particular relief to which the facts alleged entitle plaintiff. *Lumber Co. v. Edwards*, 251.

§ 16. Demurrer for Misjoinder of Parties and Causes.

Demurrer for misjoinder of parties and causes should have been sustained, all of defendants not being necessary parties to each of the several causes alleged. *Burleson v. Burleson*, 336.

Where there is a misjoinder of parties and causes of action a severance is not permissible and the action must be dismissed upon demurrer without prejudice to plaintiffs' rights to prosecute their several claims in separate actions against the various defendants, grouped according to their interest in the property. *Ibid.*

Causes alleged *held* not to affect all parties, and cause in tort was joined with causes on contract, and demurrer was properly sustained. *Ellis v. Brown*, 787.

§ 18. Defects Appearing on Face of Pleadings and "Speaking" Demurrers.

Only defects appearing upon the face of the complaint can be taken advantage of by demurrer. *Mack v. Marshall Field & Co.*, 55.

Waiver of breach of warranty in sale by failure to bring defect to seller's attention in apt time cannot be raised by demurrer, but must be pleaded by way of answer. *Aldridge Motors v. Alexander*, 750.

§ 19. Time of Demurring and Waiver of Right to Demur.

Defendant may demur *ore tenus* at any time on the ground that the complaint fails to state a cause of action. *Aldridge Motors v. Alexander*, 750.

§ 20. Office and Effect of Demurrer.

A demurrer tests the sufficiency of a pleading, admitting for the purpose facts properly alleged and relevant inferences of fact deducible therefrom, but

PLEADINGS—*Continued.*

does not admit inferences or conclusions of law. *Mack v. Marshall Field & Co.*, 55.

In passing upon a demurrer the facts alleged in the complaint, and relevant inferences of fact necessarily deducible therefrom, will be taken as true. *White v. Comrs. of Johnston*, 329; *Parks v. Princeton*, 361.

§ 23. Amendment After Decision Sustaining Demurrer.

After decision of the Supreme Court sustaining a demurrer to the complaint, but not dismissing the action, plaintiff moved during term to be allowed to file amended complaint. Defendant objected thereto on the ground that it was entitled to three days written notice of the motion, C. S., 515, 914. *Held:* The objection is untenable, since parties are fixed with notice of all motions or orders made in pending causes during term, and the statutory provisions are not applicable in such instances. *Harris v. Board of Education*, 281.

When the Supreme Court reverses the judgment of the lower court overruling defendant's demurrer, plaintiff upon three days notice to defendant may move in the Superior Court within ten days after the opinion of the Supreme Court is received by the clerk, to be allowed to amend. C. S., 515. *Scott v. Harrison*, 319.

Where the Supreme Court holds that the demurrer to the complaint should have been sustained, the plaintiff may move for leave to amend in accordance with C. S., 515. *Johnston County v. Stewart*, 334.

Where plaintiff, after notice of defendant's intention to move to be allowed to amend his answer, requests and obtains a continuance of the motion he thereby waives his right to object that notice of the motion was not given him within the ten-day period prescribed by C. S., 515, even conceding that the provisions of that statute are applicable, the purpose of the requirement of notice being merely to call the matter to the attention of the adverse party and to give him reasonable time for preparation. *Cody v. Hovey*, 407.

The provisions of C. S., 515, that plaintiff, after judgment sustaining a demurrer to the complaint must move to be allowed to amend within ten days after the return of the judgment or within ten days after receipt of the certificate from the Supreme Court, applies solely to amendment of the complaint after demurrer thereto is sustained, and the ten-day period prescribed by statute does not apply to an amendment of an answer after judgment sustaining a demurrer to an affirmative defense set up therein. *Ibid.*

In determining the right of a party to be allowed to amend his pleading, the sufficiency of the matter intended to be pleaded is not germane. *Ibid.*

§ 28. Motion for Judgment on Pleadings.

Plaintiff is not entitled to judgment on pleadings when essential facts are denied. *Sills v. Morgan*, 662; *Redmond v. Farthing*, 678.

§ 29. Motions to Strike.

In action based on negligence in carelessly pointing and firing pistol at plaintiff, allegation that individual defendant possessed irritable disposition and violent and ungovernable temper, and knew it was against the law to point pistol at another, *held* properly stricken on motion, since they do not constitute contributing factors to negligence; but allegation that defendant was of nervous disposition was improperly stricken. *Whitlow v. R. R.*, 558.

Allegations in plaintiff's reply to new matter set up in the answer are properly stricken out upon motion when evidence in support of such allegations would not be competent upon the hearing, C. S., 537, and a motion to have irrelevant matter stricken from a pleading is a matter of right and does not rest in the trial court's discretion. *Herndon v. Massey*, 610.

PLEADINGS—*Continued.*

Fact that charitable institution had obtained indemnity insurance *held* irrelevant upon contention that activity in suit was not charitable enterprise, and also irrelevant upon question of its liability in tort, and were properly stricken. *Ibid.*

The test upon a motion to strike is whether the alleged matter is competent to be shown upon the trial. *Sayles v. Loftis*, 674; *Whitlow v. R. R.*, 558.

In reply to plaintiff's allegation that intestate was struck and killed by a tree felled by defendant, defendant admitted that as the tree accidentally fell in an unforeseeable manner it accidentally struck and killed intestate, without fault on the part of defendant. *Held:* The refusal of the court to grant plaintiff's motion to strike the paragraph of the reply, or the parts thereof inartificially setting up a defense, is not held for reversible error, plaintiff's more appropriate remedy being a motion to make defendant's pleading more definite and certain. C. S., 537, 535, 522, 519. *Sayles v. Loftis*, 674.

In action for wrongful death, motion to strike allegations upon which were predicated defense that Industrial Commission had exclusive jurisdiction should have been granted. *Ibid.*

Motion to strike *held* properly denied, the allegations being germane to plaintiff's cause of action. *Aldridge Motors v. Alexander*, 750.

PLUMBING AND HEATING CONTRACTORS.

§ 2. Licensing and Regulation.

Statute providing for licensing of plumbing and heating contractors *held* not to apply to journeymen plumbers. *S. v. Mitchell*, 244.

PRINCIPAL AND AGENT.

§ 7. Evidence and Proof of Agency.

Neither the fact of agency nor its scope can be proven by acts and declarations of the alleged agent, and ordinarily such acts and declarations are not admissible until evidence of agency *aliunde* has been offered, but the order of proof rests largely in the discretion of the trial court. *D'Armour v. Hardware Co.*, 568.

The fact of agency and its scope may be proven by the direct testimony of the agent. *Ibid.*

Testimony of declarations of alleged agent relating to fact and scope of agency *held* competent to contradict agent's testimony. *Ibid.*

§ 10a. Liability of Principal for Wrongful Acts of Agent. (In driving automobile see Automobiles.)

A master or principal is liable for a tort of his servant or agent committed in the course of the employment or scope of the authority and in furtherance of the superior's business. *D'Armour v. Hardware Co.*, 568.

In this action for malicious prosecution, the evidence, considered in the light most favorable to the plaintiff, *is held* sufficient to be submitted to the jury upon the question of whether the acts of defendant's agent in procuring the warrant and prosecuting plaintiff were done in the course of his employment and within the scope of his authority as agent of defendant. *Ibid.*

The charge of the court on the question of liability of a principal for the tortious act of his agent *held in* accord with the principles enunciated in *Dickerson v. Refining Co.*, 201 N. C., 90, and without error. *Ibid.*

PRINCIPAL AND SURETY.

§ 5a. Bonds of Public Officers.

Under the provisions of C. S., 354, the sheriff and the surety on his official bond are liable for the wrongful death of a prisoner resulting from the negligence of the jailer in locking the prisoner, in a weakened condition, in a cell with a person whom the sheriff and the jailer knew to be violently insane, and who assaulted the prisoner during the night, inflicting the fatal injury. *Dunn v. Swanson*, 279.

The surety on a bond of a delinquent tax collector is not liable for an arrest made by the collector in order to force the payment of a delinquent tax, since such act of the tax collector is not done under color of his office and does not come within the condition of the bond that he should "well and truly perform all the duties of his said office." *Henry v. Wall*, 365.

The liability of the principal and surety on an official bond is to be determined by the language of the contract and cannot be enlarged beyond the scope of its definite terms, and the provision that the principal should "well and truly perform all the duties of his office" includes only acts done under *colore officii* and does not impose the obligation that the principal will commit no wrong nor do anything not authorized by law. *Ibid.*

§ 7. Bonds for Public Construction.

Codefendant of contractor is not entitled to joinder of surety on contractor's bond for public construction in action by third person to recover for alleged negligent injury. *Cavarnos-Wright Co. v. Blythe Bros. Co.*, 583; *Broadhurst v. Blythe Bros. Co.*, 585.

§ 12. Discharge of Surety by Extension of Time to, or Giving of Additional Security by, Principal.

Ordinarily, a compensated surety is not relieved of liability by an extension of time given the principal unless it is prejudiced thereby, the rule that a surety is the favorite of the law applying only to gratuitous and not to corporate sureties. *Maxwell v. Ins. Co.*, 762.

Corporate surety on bond for gasoline taxes *held* not discharge under facts of this case by extension of time given to principal or by additional security given by principal. *Ibid.*

§ 15. Rights and Remedies of Sureties Against Third Persons.

Plaintiffs, sureties on the bond of the clerk of the Superior Court, sought to recover in this action against the county accountant for alleged negligence in failing to properly audit the books of the clerk, against the members of the board of county commissioners for alleged negligence in employing incompetent accountants and in failing to employ competent ones after discovering the neglect of both the county accountant and the clerk, and against the members of the board of county commissioners as statutory bondsmen, C. S., 335, in approving the bond of the county accountant in a penal sum less than that required by statute. *Held:* Defendants' demurrers were properly sustained, on the ground of misjoinder of parties and causes, and on the ground that the complaint fails to state a cause of action, there being no causal connection between the alleged breaches of duty and the loss sustained by plaintiffs. *Ellis v. Brown*, 787.

PROCESS.

§ 2. Issuance and Time of Service.

Summons in a civil action served on Sunday is invalid and does not bind defendant, C. S., 3958, and the status of the process is the same as if service had not been made. *Mintz v. Frink*, 101.

PROCESS—*Continued.*

§ 8. Service on Nonresident Automobile Owners.

A nonresident wife living with her husband in another state may serve summons on him by service on the Commissioner of Revenue under the provision of Michie's Code, 491 (a) (b), in her action instituted in a county in this State, Michie's Code, 469, to recover for injuries sustained in an automobile accident which occurred in this State and which resulted from his alleged negligence. *Alberts v. Alberts*, 443.

Evidence *held* to support finding that auto was under control, express or implied, of nonresident corporate defendant. *Crabtree v. Sales Co.*, 587.

§ 12. Alias and Pluries Summons and Discontinuance.

When the original summons is invalid, plaintiff is entitled to have *alias* summons issued within 90 days next after the date of original summons, C. S., 480, but in order to prevent a discontinuance *alias* and *pluries* summonses must be successively and properly issued. *Mintz v. Frink*, 101.

Summons original in form is not constituted an *alias* summons by endorsement of word "*alias*" at its top. *Ibid.*

Service of the original summons in this action was void because made on a Sunday and an "*alias*" summons thereafter issued was ineffective because not in the form prescribed by statute. *Held:* Upon the expiration of 90 days from the date of the original summons there was a discontinuance, and the court was without authority thereafter to order the issuance of an *alias* summons. *Ibid.*

PUBLIC OFFICERS.

§ 2. Power to Appoint.

General Assembly has power to create and appoint members of county highway and sinking fund commissions. *Freeman v. Comrs. of Madison*, 209.

General Assembly has power to appoint county tax manager. *Ibid.*

General Assembly has power to prescribe time when sheriffs-elect shall qualify and be inducted into office. *Freeman v. Board of Elections*, 63.

Ch. 322, Public-Local Laws of 1931, creating a board of health for Madison County being void, such board is without authority to appoint county physician. *Sams v. Comrs. of Madison*, 284.

§ 3. Nature of Rights in Public Office.

Public office is not a property right, nor is the right to stand for election, and therefore when Legislature extends term of public office of incumbent register of deeds from two to four years, no one has right to have his name placed on ballot at expiration of two-year term. *Penny v. Board of Elections*, 276.

An incumbent has no title in the office held by him. *Efird v. Comrs. of Forsyth*, 691.

§ 4b. Constitutional Inhibition Against Person Holding More Than One Public Office.

Ch. 341, Public-Local Laws of 1931, providing that the chairmen of certain county boards of Madison County should elect a tax manager for the county, merely imposes additional duties *ex officio* upon the said chairmen, and does not provide that any one of them should hold two public offices in violation of Art. XIV, sec. 7, of the Constitution of North Carolina. *Freeman v. Comrs. of Madison*, 209.

PUBLIC OFFICERS—*Continued.*

§ 5b. De Facto Officers.

The acts of the Madison County Board of Health created by ch. 322, Public-Local Laws of 1931, cannot be upheld on the ground that, notwithstanding the act is void, its members were *de facto* officers, since a *de jure* Board of Health for the county had been properly constituted under C. S., 7064. *Sams v. Comrs. of Madison*, 284.

§ 6. Tenure and Removal.

Public officers continue in office until their successors are chosen, and when the appointment is made by the Legislature, and it fails to provide for the election of successors to the offices, its appointees continue in office until the Legislature appoints successors or makes other provision, even after the expiration of the term of the appointment. *Freeman v. Comrs. of Madison*, 209.

General Assembly may extend term of incumbent register of deeds. *Penny v. Board of Elections*, 276.

Where the term of a public office is not fixed by statute or the Constitution, the appointing authority has the power, as an incident to the power of appointment, to remove its appointee at will without cause, notice or hearing, and the removal may be implied by the appointment of another to the office, and such power of removal cannot be contracted away and is unaffected by the fact that the appointing authority makes an appointment for a specified term. *Kinsland v. Mackey*, 508.

§ 9. Procedure to Try Title to Public Office.

Injunction is not the proper remedy to try title to public office. *Freeman v. Comrs. of Madison*, 209.

§ 10. Parties Who May Sue to Try Title to Public Office.

Taxpayers may not maintain an action to determine title to a public office, neither claimant to the office being a party, since plaintiffs are not the real parties in interest, C. S., 446, but taxpayers may maintain suit to restrain commissioners from paying salaries to unauthorized persons. *Freeman v. Comrs. of Madison*, 209.

QUASI-CONTRACTS.

§ 2. Action to Recover Upon Quantum Meruit or Quantum Valebat.

Evidence that plaintiff originated a device for use in defendant's business, that defendant promised to pay him well if the device worked, that plaintiff made drawings and a model, and that defendant constructed the device in conformity therewith and used same in his business, *is held* sufficient to be submitted to the jury and to entitle plaintiff to recover the reasonable value of his services. *Turner v. Furniture Co.*, 695.

In the absence of an agreement as to the amount of compensation to be paid for services rendered at the request of defendant, the measure of the recovery is the reasonable worth of the services rendered, based on the time and labor expended, the skill, knowledge and experience involved, and attendant circumstances, and an instruction that plaintiff is entitled to recover the value of the services to defendant is error. *Ibid.*

In an action to recover the reasonable value of plaintiff's services in making drawings and a model for a device originated by plaintiff for use in defendant's business, the use of the word "invention" in the judge's charge on the issue of damages will not be held for error when it is apparent that the word was used in its ordinary significance as meaning a contrivance, plan or device, and did not refer to a patent device under the patent laws. *Ibid.*

QUIETING TITLE.

§ 1. Nature and Grounds of Remedy.

Upon demurrer to the complaint in an action to quiet title the court is required to ascertain only if the complaint is sufficient to allege a cause of action under C. S., 1743, and when it appears from the facts alleged that plaintiffs are some of the heirs at law of a person who died intestate seized of a one-half interest in the *locus in quo*, and assert title thereto, the demurrer of the defendants in possession of the land is properly overruled. *Fisher v. Fisher*, 70.

RAILROADS.

§ 10. Injuries to Persons on or Near Track.

No presumption of negligence on the part of a railroad arises from the mere fact that a mangled body of a human being is found on or near the track. *Cummings v. R. R.*, 127.

Where, in an action for wrongful death of a person struck by a train, plaintiff relies upon the doctrine of last clear chance, the burden is on him to show that at the time intestate was struck he was down or in an apparently helpless condition on the track, that the engineer saw, or by the exercise of ordinary care in keeping a proper lookout, could have seen intestate in time to have avoided the accident, and that the engineer failed to exercise such care, which failure proximately resulted in the accident, and each of these essential elements must be shown by legal evidence which raises more than a mere speculation or conjecture in order for plaintiff to be entitled to the submission of the issue. *Ibid.*

The doctrine of last clear chance does not apply in cases where the trespasser or licensee upon the track of a railroad company is, at the time, in apparent possession of his strength and his faculties, since under such circumstances the engineer is justified in assuming, up to the very moment of impact, that such person will get off the track in time to avoid injury, and therefore the engineer need not stop the train or even slacken its speed. *Ibid.*

Evidence tending to show that defendant was struck and killed by a train on a straight and comparatively unobstructed track without evidence as to intestate's position at the time of impact is insufficient to justify the submission of an issue of last clear chance, since the essential fact of whether intestate was down on the track in an apparently helpless condition is left in speculation and conjecture. *Ibid.*

The evidence tended to show that intestate, while on or near the track, was struck and killed by a train. In its answer the defendant railroad company alleged that if plaintiff was struck or injured by its train, which it denied, that intestate carelessly and negligently lay down or placed himself on the tracks. *Held:* The statement was in the alternative, and further the words "placed himself upon the tracks" do not necessarily infer that he was lying upon the tracks, and therefore the allegation is not an admission that at the time intestate was struck he was lying on the track in a helpless or apparently helpless condition. *Ibid.*

Evidence that intestate had been drinking, that he and his companion were seen down between the rails of defendant's track, doubled up and in an apparently helpless condition, and that they were struck by defendant's train approaching along the track which was straight and unobstructed for a distance of seven hundred feet, *is held* sufficient to be submitted to the jury, and judgment of nonsuit is improperly entered. *Jones v. R. R.*, 170.

In an action to recover for the death of intestate killed on defendant's railroad tracks by a train, the doctrine of last clear chance applies only if intes-

RAILROADS—*Continued.*

tate was down on the tracks in an apparently helpless condition; and when the evidence does not tend to positively establish this essential fact, but leaves the matter in speculation and conjecture, it is insufficient to support the submission of the issue. *George v. R. R.*, 684.

RAPE.

§ 5b. Assault on a Female.

An indictment charging the defendant with rape will support a verdict of guilty of assault upon a female when warranted by the evidence, C. S., 4639, 4640. *S. v. Kiziah*, 399.

A charge to the effect that if defendants indecently fondled the prosecuting witness against her will in order to induce her to submit to them, defendants would be guilty of an assault upon a female but not of an assault with intent to commit rape, *is held* without error upon defendants' appeal from a conviction of an assault upon a female. *Ibid.*

§ 8. Sufficiency of Evidence and Nonsuit.

Evidence *held* sufficient to be submitted to jury and sustain conviction of assault on a female. *S. v. Kiziah*, 399.

RECEIVERS.

§ 9. Title, Possession and Liquidation of Property.

The total assets of the insolvent corporation consisted of warehoused lumber, and the warehouse receipts had been pledged as security for loans. There was conflict in the allegations and affidavits as to whether any equity in the property existed over and above the secured debts for the benefit of general creditors. The court denied the petition of a secured creditor that the receiver abandon the property pledged to it and that it be allowed to liquidate same. *Held:* It will be presumed on appeal that the court found facts necessary to support its judgment, and the denial of the secured creditor's petition will not be disturbed. *Wood v. Woodbury & Pace, Inc.*, 356.

§ 12c. Priorities.

While it is the duty of a receiver to preserve priorities, and while priorities are unaffected by receivership, in the absence of a finding that there is no equity in pledged property above the debt secured, it is not error to refuse the preferred creditor's petition that the property be turned over to it. *Wood v. Woodbury & Pace, Inc.*, 356.

§ 14. Costs and Charges of Receivership.

Where receiver manages and sells pledged property, the proceeds of sale are chargeable with proportionate costs of receivership. *Wood v. Woodbury & Pace, Inc.*, 356.

REFERENCE.

§ 3. Pleas in Bar.

A plea in bar such as to preclude an order of compulsory reference is one that goes to the entire controversy and which, if found in favor of the pleader, bars the entire cause of action and puts an end to the case. *Brown v. Clement Co.*, 47.

Where receipt in full satisfaction of wages and percentage of profits due employee under contract of employment is executed prior to completion of

REFERENCE—*Continued.*

some of the buildings covered by the contract, and thus could not preclude recovery of percentage of profits on such buildings, the receipt could not bar entire cause, and does not preclude compulsory reference. *Ibid.*

§ 13. Right to Jury Trial Upon Exceptions in Compulsory Reference.

While the parties to a compulsory reference must except to the order of reference, make exceptions to the findings of fact of the referee, and demand a jury trial and tender issues under such exceptions in order to preserve their right to a jury trial, it is not required that the demand and tender of issues be physically made immediately under each exception, it being sufficient if contemporaneously with the filing of exceptions, issues raised by the pleadings are tendered based on the exceptions to the referee's findings and related thereto by the number of the exceptions and the number of the finding to which it was taken, and a jury trial demanded as to each of such issues. *Brown v. Clement Co.*, 47.

Where the facts are not in dispute, whether a guardian is liable for interest on guardianship funds used by it in its own business, and whether it is entitled to commissions on stocks received by it as guardian, are questions of law for the court, and not issues of fact for the jury, and the refusal of the court to submit such issues tendered upon appeal from the referee is not error. *Rose v. Bank*, 600.

REGISTERS OF DEEDS.

§ 1. Appointment, Qualification and Tenure.

The constitutional provision for the election of registers of deeds for a term of two years, Art. VII, sec. 1, is subject to modification by statute, Art. VII, sec. 14, and therefore the Legislature has the power to make the office appointive rather than elective, to extend the term, or to abolish it altogether, and even to dispossess the incumbent, since public office is not a property right. *Penny v. Board of Elections*, 276.

SALES.

§ 18. Waiver of Breach of Warranty.

In an action between dealers upon an implied warranty, the defense that plaintiff dealer had knowledge of the defect resulting in the destruction of the car in the hands of the ultimate purchaser for some time prior to its destruction, and did not notify defendant dealer until after the ultimate purchaser had filed suit for damages, and that therefore plaintiff was estopped to maintain an action, cannot be taken by demurrer but must be raised by answer. *Aldridge Motors v. Alexander*, 750.

§ 14. Express Warranties.

Evidence that insecticide manufactured for use as a spray indoors resulted in inflammation, boils and sores on the body of plaintiff where the substance touched her body when she used the spray as directed, is sufficient to show that the insecticide was "poisonous" as to the plaintiff within the meaning of that term as used in the manufacturer's warranty. *Simpson v. Oil Co.*, 542.

§ 17. Parties to Warranties: Manufacturer, Retailer and Buyer.

Where a manufacturer of an insecticide prints on the container designed for sale to the ultimate consumer statements that the product is not poisonous to human beings, such statement, since it is made for the purpose of inducing the purchase of the article, constitutes a warranty from the manufacturer to

STATUTES.

§ 2. Constitutional Inhibition Against Passage of Special Acts.

Chapter 322, Public-Local Laws of 1931, which undertakes to create and name the members of a county board of health for Madison County alone, which board is charged with the duty to inspect county institutions and see that they are kept in a sanitary condition, and to select a physician to vaccinate against disease, is a local act relating to health and sanitation prohibited by Art. II, sec. 29, of the State Constitution. *Sams v. Comrs. of Madison*, 284.

§ 5a. General Rules of Construction of Statutes.

The cardinal rule in the construction of a statute is to effectuate the intent of the Legislature. *Morris v. Chevrolet Co.*, 428.

§ 5e. Construction of Curative Statutes.

Ordinarily, a curative statute can validate irregular procedure only when the procedural requirements not complied with could have been dispensed with by the Legislature in the first instance, and the Legislature is without power to cure a defect arising from a want of authority in the court to act in the matter. *Ward v. Howard*, 201.

§ 7. Effective Date and Ex Post Facto Statutes.

Statute extending term of office of incumbent register of deeds *held* not an *ex post facto* statute. *Penny v. Board of Elections*, 276.

§ 8. Construction of Criminal Statutes.

Criminal statutes must be strictly construed against the State and in favor of the defendant, and if patently ambiguous that construction must be adopted which operates in favor of a party accused under its provisions. *S. v. Mitchell*, 244.

§ 12. Repeal of Local Statutes.

Ordinarily, a local statute is not repealed by a general statute dealing with the same subject matter, even when the general statute is later enacted. *Freeman v. Comrs. of Madison*, 209.

TAXATION.

TAXATION—*Continued.*

§ 2a. Classification of Trades and Professions for Taxation.

A municipal corporation is empowered to tax trades or professions carried on or enjoyed within the city, unless otherwise provided by law, Constitution of North Carolina, Article V, sec. 3; C. S., 2677, but its classification of trades and professions for taxation must be based upon reasonable distinctions and all persons similarly situated must be treated alike. *Kenny Co. v. Brevard*, 269.

The classification of subjects for taxation must be based upon reasonable distinctions and must apply equally to all within each class defined. *Snyder v. Maxwell*, 617.

Classifications made by the Legislature for the purpose of taxation will not be disturbed by the courts unless the distinctions which are the bases for the classifications are arbitrary and unreasonable, and in passing upon the question the courts will take judicial notice of conditions within common knowledge pertaining to the particular subject of the classification. *Ibid.*

Classification of soft drinks sold by vending machines for tax at different rate than other merchandise sold by this method *held* valid. *Ibid.*

§ 3b. Limitation on Increase of Indebtedness.

Held: Debt was contracted during fiscal year following that in which debt was reduced, even though certificate of Secretary of Local Government Commission was not executed therein. *Board of Education v. Board of Education*, 90.

Bonds for construction of municipal hydroelectric system, payable solely out of revenues therefrom, *held* not to constitute a general indebtedness of the city. *McGuinn v. High Point*, 449.

Provision of law under which bonds are issued that they should be payable solely from revenues of the project become a part of the city's contractual obligation. *Ibid.*

Municipality *held* not to have obligated itself to use general funds to finance construction of electric generating plant. *Ibid.*

§ 13. Definition of "Tax."

Contributions imposed on employers within the purview of the Unemployment Compensation Act are compulsory and therefore constitute a tax, and they are not rendered any less a tax by reason of the provision that they should be segregated in a special fund for distribution in furtherance of the purpose of the act. *Ins. Co. v. Unemployment Compensation Com.*, 495.

§ 19. Exemption of Property of State and Political Subdivisions from Taxation.

Improved and unimproved property bought in by a municipality to protect its tax and street assessment liens, and held by it solely for the purpose of favorable resale, the improved property being rented out, *is held* subject to *ad valorem* taxes levied by the county in which the property is situated. *Winston-Salem v. Forsyth County*, 704.

§ 20. Exemption of Property of Charitable and Educational Institutions From Taxation.

Taxation is the rule; exemption the exception. *Odd Fellows v. Swain*, 632.

The Legislature in exempting property from taxation, Art. V, sec. 5, is required to observe the basic principle of equality, and exemptions allowed by it must be uniform within the class as required by Art. V, sec. 3, both before and after its amendment. *Ibid.*

TAXATION—*Continued.*

The provisions of the Revenue Acts exempting property from taxation must be considered in connection with Art. V, sec. 5, of the Constitution, since the General Assembly has no power to exempt property from taxation beyond the permissive power granted it by this section. *Ibid.*

Property *held* by charitable organization for commercial purposes is not exempt from taxation. *Ibid.*

§ 23. Construction and Operation of Revenue Acts.

All of the subsections of section 130, chapter 158, Public Laws of 1939, must be construed *in pari materia*, and upon such construction *it is held* that the section discloses the legislative intent to impose a license tax of $30.00 on slot machines vending soft drinks as an exception to the general classification of mechanical vending machines. *Snyder v. Maxwell*, 617.

§ 32e. Liability for Inheritance Taxes.

Under the provisions of the will in suit the entire beneficial interest in the estate vested in testator's three sons upon testator's death with the right of full enjoyment postponed until the termination of the trust. One of the sons died during minority, prior to the termination of the trust, leaving his two brothers as his sole heirs at law. *Held:* The surviving brothers took under the laws of descent and distribution and the estate so inherited is subject to the appropriate State and Federal inheritance taxes and is encumbered by the lien for such taxes. *Coddington v. Stone*, 714.

§ 34. Duties and Authority of Tax Collecting Officials.

Ordinarily, the nonpayment of taxes is not a criminal offense, and if a delinquent tax collector arrests a person in order to enforce the payment of a delinquent tax, the tax collector is not acting under color of his office but is acting beyond his official authority and therefore in his individual capacity. *Henry v. Wall*, 365.

§ 38b. Enjoining Levy or Collection of Taxes.

The statutory remedies and procedure provided a taxpayer before a State board must first be exhausted by him in the time and manner provided before resort to the courts, and where adequate remedies for judicial review are provided they are exclusive. *Ins. Co. v. Unemployment Compensation Com.*, 495.

Injunctive relief will not lie directly or indirectly to restrain collection of unemployment compensation tax. *Ibid.*

§ 40a. Notice and Parties in Foreclosure Proceedings.

Taxpayer may not enjoin foreclosure of lands for taxes on ground of mismanagement of its fiscal affairs by the taxing unit. *Rosser v. Matthews*, 132.

The procedure to attack judgments of foreclosure of lands for nonpayment of taxes on the ground of want of sufficient notice of such judgments is by motion in the cause and not by independent action against the commissioner to restrain him from selling the lands as directed by the judgment. *Ibid.*

Owners of property or those having registered liens thereon are not bound by judgments in tax foreclosure suits in which they are not parties, and they are not barred by the judgment therein from asserting their rights in the property or from setting up defenses to the action, but they may be joined as parties upon motion even after sale by the commissioner under the decree of foreclosure. *Johnston County v. Stewart*, 334.

Parties acquiring interest in land until after foreclosure of tax sale certificate and execution and registration of commissioner's deed are charged with notice, and were not proper parties to foreclosure. *Russell v. Fulton*, 701.

TAXATION—*Continued.*

§ 40b. Foreclosure of Tax Sale Certificates.

In an action to foreclose a tax sale certificate, a description of the property as "4 lots lying and being in Banner Township, Johnston County," is insufficient in itself and does not refer to anything extrinsic which might render the description certain, and a demurrer to the complaint containing such description should have been sustained. *Johnston County v. Stewart*, 334.

§ 42. Tax Deeds and Titles.

Plaintiff, the purchaser of property at the foreclosure of the tax sale certificate in regular proceedings, *is held* entitled to the cancellation, as a cloud on title, of a deed executed by the taxpayer on the day subsequent to the execution and registration of the commissioner's deed to plaintiff, defendants being charged with notice, and it not being necessary that they should have been made parties, since they acquired no interest in the land until after the tax lien had been foreclosed. *Russell v. Fulton*, 701.

TORTS.

(Particular torts see particular titles of torts.)

§ 8a. Fraud and Duress in Procuring Release.

Plaintiff attacked the releases set up by defendant employer on the ground that they were procured by fraud. *Held:* Previous releases signed by plaintiff for prior accidents, offered to show that plaintiff had knowledge of what the releases in controversy were, were properly excluded as irrelevant, and further, evidence of fraud in the procurement of the releases in controversy was properly submitted to the jury. *Brittain v. R. R.*, 737.

TRIAL.

§ 2. Call of Cases.

An appeal from the judgment of a justice of the peace in a summary ejectment has precedence over all other cases except those involving exceptions to homesteads, C. S., 2373, and is properly called upon demand at the beginning of the term of the Superior Court commencing next after the docketing of the appeal. *Roediger v. Sapos*, 95.

TRIAL—*Continued.*

§ 13. Order of Proof.

The order of proof rests largely within the discretion of the trial court. *D'Armour v. Hardware Co.*, 568.

§ 17. Admission of Evidence Competent for Restricted Purpose.

Where evidence is competent for a restricted purpose, it is incumbent upon the adverse party to request that its admission be restricted, and in the absence of such request its general admission will not be held for error. *D'Armour v. Hardware Co.*, 568.

Where incompetent evidence is admitted over objection, and later during the trial such evidence becomes competent for the purpose of contradicting and impeaching a witness, it is incumbent upon the adverse party, upon the evidence becoming competent for the restricted purpose, to request that its admission be so restricted. *Ibid.*

§ 19. Province of Court and Jury in Regard to Evidence.

Sufficiency of evidence is question of law for the court. *Warren v. Ins. Co.*, 705.

The weight of the evidence is for the determination of the jury. *Brittain v. R. R.*, 737.

§ 21. Time and Necessity of Motions to Nonsuit and Rendition of Judgment.

The trial court denied defendant's motions to nonsuit at the close of plaintiff's evidence and at the close of all the evidence, but during the progress of the argument reversed itself and entered judgment as of nonsuit. *Held:* The matter was *in fieri* until rendition of a verdict, and the plaintiffs' contention that the court, having denied the motion at the conclusion of all the evidence, was without power to grant it thereafter, is untenable. *Bruton v. Light Co.*, 1.

§ 22b. Consideration of Evidence on Motions to Nonsuit.

Upon motion to nonsuit, the evidence tending to support plaintiff's cause of action will 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. *Barnes v. Wilson*, 190; *D'Armour v. Hardware Co.*, 568.

§ 24. Sufficiency of Evidence.

Where the substantive testimony is insufficient to be submitted to the jury upon the fact in issue, evidence competent only for the purpose of corroboration or contradiction of the substantive testimony cannot justify the submission of the issue to the jury. *Warren v. Ins. Co.*, 705.

Where there is any evidence to support plaintiff's case, it must be submitted to the jury. *Brittain v. R. R.*, 737.

§ 27a. Peremptory Instructions in General.

Where there is no conflict in the evidence, whether it is sufficient to prove the fact in issue is a question of law for the court, and when only one inference can be drawn therefrom, the court may properly charge the jury to answer the issue accordingly if they believe the evidence. *Warren v. Ins. Co.*, 705.

§ 27b. Directed Verdict in Favor of Party Having Burden of Proof.

It is rarely, if ever, permissible for the court to direct a verdict in favor of a party upon whom rests the burden of proof. *Barrett v. Williams*, 175.

§ 29c. Instructions on Burden of Proof.

Instruction *held* for error in failing to charge that burden was on defendant to prove affirmative defense. *Jones v. Waldroup*, 178.

TRIAL—*Continued.*

§ 31. Expression of Opinion by Court in Charge.

The remarks of the trial court upon being interrupted during his charge to the jury by a witness interested in the event, who sought to correct an inadvertence in a statement by the court, C. S., 401, *held* not to disparage or discredit the witness so as to constitute prejudicial error. *McClamroch v. Ice Co.*, 106.

Exceptions to the charge on the ground that the court unduly dwelt upon the contentions of plaintiff are not sustained, it appearing from an examination of the entire charge that defendant was not prejudiced or discriminated against in the manner in which the contentions were stated. *Brittain v. R. R.*, 737.

§ 32. Requests for Instructions.

It is error for the court to refuse to give in substance, at least, a requested instruction on a material phase of the case arising on the evidence. *Clarke v. Martin*, 440.

§ 36. Construction of Instructions.

The charge of the court will be construed contextually as a whole. *Greene v. Greene*, 649.

§ 37. Form and Sufficiency of Issues.

Where the issue submitted is determinative of the controversy and embraces all real matters in dispute and enables the parties to present every material phase of the controversy, it is sufficient, and a party may not complain because a particular issue was not submitted when he has not tendered such issue. *Greene v. Greene*, 649.

An issue will be construed with reference to the pleadings, evidence and charge of the court pertinent thereto. *Clinard v. Kernersville*, 686.

§ 39. Tender of Issues.

Where issues submitted present to the jury all determinative facts presented by evidence and pleadings, refusal to submit another issue tendered is not error. *Hill v. Young*, 114; *Saiced v. Abeyounis*, 644.

When there is no sufficient evidence to support issue tendered, refusal to submit same is not error. *Greene v. Greene*, 649.

§ 40. Objections and Exceptions to Issues.

A party tendering an issue which is submitted cannot thereafter complain of the form of the issue. *Hill v. Young*, 114.

TRUSTS.

§ 6b. Power to Mortgage Property.

Courts of equity have the power to authorize the trustees of a charitable trust to mortgage the trust property when, by reason of changed conditions, such action is necessary to effectuate the purpose of the trust and preserve the trust property, and prevent depreciation which would eventually render the property useless and thus result in the loss of the benevolent undertaking. *Bond v. Tarboro*, 289.

Facts of this case *held* to sustain judgment authorizing trustees to mortgage property of charitable trust. *Ibid.*

§ 11. Termination of Trust and Distribution of Estate.

While a court of equity may have the power to terminate a trust and distribute the trust property prior to the happening of the contingency prescribed

TRUSTS—*Continued.*

by testator for the termination of the trust, when such action is necessary or expedient, or when consented to by all the interested parties, it is error for the court to do so upon consent of only a few of the beneficiaries and in the absence of any showing of necessity or expediency. *Trust Co. v. Laws*, 171.

The failure of beneficiaries to file answer to a suit praying for a construction of the will creating the trust and for the advice and instructions of the court in administering same, cannot be construed as a consent to the modification or the termination of the trust. *Ibid.*

In an action to modify or terminate a trust, unborn infants who might have some contingent interest in the assets of the trust should be represented by a guardian *ad litem*. *Ibid.*

UTILITIES COMMISSION.

§ 2. Jurisdiction.

Certificate of convenience from Utilities Commissioner *held* necessary to construction of municipal electric generating plant. *McGuinn v. High Point*, 449.

VENUE.

§ 3. Objections to Venue and Waiver of Right to Object.

A motion for change of venue as a matter of right, made after expiration of time for filing answer, is properly denied on the ground that the motion was not made in apt time. C. S., 470. *Calcagno v. Overby*, 323.

A defendant's motion to extend the time for him to file answer, allowed by consent, is an acceptance of the jurisdiction of the court and waives such defendant's right to move for change of venue as a matter of right. *Ibid.*

WATERS AND WATER COURSES.

§ 7. Sudden Release of Ponded Waters.

While the owner of a dam is not required to anticipate and is not ordinarily liable for damages resulting from unprecedented storms and floods, it is required to exercise ordinary care in anticipating flood conditions from an ordinary freshet such as might be reasonably expected or foreseen, and may be held liable for damages resulting from its negligence in failing to guard against any undue acceleration or retardation of the flood water. *Bruton v. Light Co.*, 1.

While the owner of a dam is not liable for damages arising from an unprecedented storm or flood, it may be held liable for damages resulting from its negligence in manipulation of the dam causing undue acceleration or retardation of the flood water, the lower proprietors being entitled not to have the flood waters substantially augmented by the sudden release of large quantities of flood water from the dam, and the upper proprietors being entitled not to have flood damage increase by any undue retardation of the flood water, but the owner of a dam may not be held liable for damages resulting from an unprecedented flood when it neither unduly accelerates in speed nor increases the quantity of water flowing from the dam, nor unduly retards the water above the dam, but manipulates the dam so that the water flowing from the dam is equal to that flowing into the pond above the dam. *Ibid.*

Evidence *held* insufficient to show that damages to plaintiffs' land during unprecedented flood resulted from any negligent operation of defendant's dam. *Ibid.*

WATERS AND WATER COURSES—*Continued.*

Evidence sustaining plaintiff's allegations to the effect that defendant power company permitted water from several days rain to gradually accumulate back of its dam until the dam was endangered, and then suddenly opened the floodgates of the dam, resulting in the overflow of plaintiff's lands to his damage, *is held* sufficient to be submitted to the jury in plaintiff's action to recover for the negligent operation of the dam, and the granting of defendant's motion to nonsuit is error. *Koone v. Power Corp.*, 286.

§ 11. Acquisition of Easement by Payment of Permanent Damage.

Where, in an action for damages to plaintiff's land resulting from a permanent nuisance which is protected by the power of eminent domain or because of the exigent public interest, may not be abated, award of permanent damages is made upon demand of plaintiff, defendant acquires a permanent easement entitling him to continue to maintain the nuisance in the same manner. *Bruton v. Light Co.*, 1.

WILLS.

§ 1a. Nature and Requisites of Testamentary Disposition of Property.

A will, to be sufficient in law to convey any estate, real or personal, must have been written in the testator's lifetime and signed by him, or by some other person in his presence and by his direction, and subscribed in his presence by two witnesses at least. C. S., 4131. *Paul v. Davenport*, 154.

The right to dispose of property by will is not a natural right, but is one conferred and regulated by statute, and an instrument is effectual as a testamentary disposition of real or personal property only if executed and probated according to law. *Ibid.*

A codicil must be executed with the same formality as a will, and the requirements of the statute must be strictly observed. *Ibid.*

A writing attached to a duly executed will cannot be considered a part of the will when it appears that it was written at a date subsequent to the execution of the will. *Ibid.*

§ 7. Signature of Testator.

It is not required that testator subscribe the will, it being sufficient if his name appears in his handwriting in the body of the will. *Paul v. Davenport*, 154.

When it appears that a writing attached to a duly executed will was executed subsequent to the will and that testatrix did not write her name in the writing attached, the writing is not signed by testatrix and is ineffectual as a codicil. *Ibid.*

§ 8. Subscription of Witnesses.

Witnesses to a will must write their name at the end of the instrument after it is written and after it is acknowledged by the testator. C. S., 4131. *Paul v. Davenport*, 154.

A writing attached to a duly executed will but written subsequent to the execution of the will cannot be effectual as a codicil since it is not subscribed by witnesses. *Ibid.*

§ 16. Probate.

In probating a will, the clerk is required to take in writing the proof and examinations of the witnesses touching the execution of the will and to embody the substance of such proof and examination in his certificate of probate which

WILLS—*Continued.*

must be recorded with the will, C. S., 4143, and no will is effectual to pass title to real estate until duly probated in the proper county and recorded in the office of the Superior Court clerk of the county in which the land is situate, C. S., 4163. *Paul v. Davenport*, 154.

§ 31. General Rules of Construction.

The law favors the early vesting of estates. *Coddington v. Stone*, 714.

The presumption is that testator intended to dispose of his entire estate, and the instrument will be construed to avoid partial intestacy. *Ibid.*

§ 33c. Vested and Contingent Limitations and Defeasible Fees.

Testator devised certain of his lands to each of his living children and devised the share of his deceased daughter to her children for life with the remainder over to their children, if any, and if none then by ulterior limitation to testator's children. *Held:* The ulterior limitation over to testator's children was to take effect only upon total failure of lineal descendants of testator's daughter, and upon the death of one of the grandchildren without issue the land goes to the children of the other deceased grandchild *per capita*. *Lamm v. Mayo*, 261.

Testator had more than two children, and devised the land in question to two of them, with provision that if either should die without "an heir that his share of said property be the property of the surviving brother." *Held:* Each of the devisees took a one-half interest in fee as tenant in common, subject to be defeated upon death without issue, and a contingent remainder interest in his brother's share, it being apparent that the word "heir" was not used in its technical sense, but that testator intended it to mean issue or lineal descendants. *Thames v. Goode*, 639.

The will in question devised all of testator's estate, real and personal, in trust for testator's three children by name and not as a class, with provision that when the youngest child should reach the age of twenty-one the estate should be divided into three parts and one part turned over to each of the children, and that each should thereupon become the absolute owner thereof and the trustee discharged. The will also appointed the trustee guardian for the children and provided that so much of the income of the estate as should be necessary for their maintenance and education should be expended for that purpose and that any surplus income should be added to the *corpus* of the estate. *Held:* The entire beneficial interest rested at the time of testator's death with right of full enjoyment postponed. *Coddington v. Stone*, 714

§ 34. Designation of Devisees and Legatees and Their Respective Shares.

A devise to two of testator's grandchildren for life and after their death to their children, provides a limitation over to a class and upon the death of the grandchildren, the members of the class take *per capita*. *Lamm v. Mayo*, 261.

§ 46. Nature of Devisee's Title and Right to Convey.

Where person who is to take contingent remainder is certain, he may convey such interest. *Thames v. Goode*, 639.

CONSOLIDATED STATUTES AND MICHIE'S CODE CONSTRUED.

(For convenience in annotating.)

SEC.

90, 4170. Ordinarily, administrator *c. t. a.* may exercise all powers of sale granted the executor by the will. *Trust Co. v. Drug Co.*, 502.

157. Administrator who acts in good faith and with due diligence, and makes complete accounting is entitled to commissions allowed by law. Bank acting as administrator is liable for interest on funds of estate deposited by it in its commercial department. Administrator is not entitled to commissions on choses in action which it turns over to distributee unchanged. *Rose v. Bank*, 600.

354. Sheriff and surety on his bond are liable for wrongful death of prisoner resulting from negligence of jailer. *Dunn v. Swanson*, 279.

428. Adverse possession under color of title for period of seven years ripens title in claimant. *Carswell v. Creswell*, 40.

435. Statute does not apply to acquisition of public playground by adverse possession against trustees of charitable trust. *Carswell v. Creswell*, 40.

441. Partial payment by one principal starts the statute running anew as to both principals. *Saieed v. Abeyounis*, 644.

446. Taxpayers may not maintain action to determine title to public office; but may maintain action to restrain commissioners from paying salary to unauthorized persons. *Freeman v. Comrs. of Madison*, 209. Mortgagee may maintain action against insurer on loss-payable clause. *Land Bank v. Foster*, 415. Where wages which are earned and due are assigned, assignee may sue employer thereon, even though employer has not accepted assignment, ch. 410, Public Laws of 1935, being applicable only to wages to be earned in the future. *Rickman v. Holshouser*, 377.

457. Where representative members of a community are made parties, judgment is binding upon all members of community, including minors. *Carswell v. Creswell*, 40.

469. A nonresident plaintiff may sue a nonresident defendant on a transitory cause in any county designated by plaintiff. *Alberts v. Alberts*, 443.

470. Motion for change of venue as a matter of right must be made before expiration of time for filing answer. *Calcagno v. Overby*, 323.

491 (a) (b). Nonresident wife may serve summons on nonresident husband under this section to recover for injuries sustained in automobile collision occurring in this State. *Alberts v. Alberts*, 443. Evidence *held* to support finding that auto was under control, express or implied, of nonresident corporate defendant. *Crabtree v. Sales Co.*, 587.

490, 493. A motion to dismiss for failure of plaintiff to file security for costs does not constitute a general appearance. *Mintz v. Frink*, 101.

507. Causes alleged *held* not to affect all parties, and cause in tort was joined with causes on contract, and demurrer was properly sustained. *Ellis v. Brown*, 787.

CONSOLIDATED STATUTES—*Continued.*

SEC.

514. In action instituted within one year after nonsuit, plaintiff must show that the costs in prior action have been paid or that it was brought *in forma pauperis*. *Osborne v. R. R.*, 263.

515. Where Supreme Court holds that demurrer to complaint should have been sustained, plaintiff may move to amend in accordance with this section. *Johnston County v. Stewart*, 334. *Held:* Opinion reversing judgment overruling demurrer to complaint merely indicated that plaintiff might move to amend under this section, and the opinion does not entitle plaintiff to amend without notice. *Scott v. Harrison*, 319. Plaintiff may move during term to be allowed to amend after decision on appeal sustaining demurrer, since parties are fixed with notice of all motions made during term. *Harris v. Board of Education*, 281. Has no application to amendment of answer after judgment sustaining demurrer thereto. *Cody v. Hovey*, 408.

518. Jurisdiction cannot be conferred on court by waiver or consent, and objection to jurisdiction can be taken at any time. *McCune v. Mfg. Co.*, 351.

533. In criminal prosecution, it is error to permit solicitor to read certain allegations of fact in pleading in civil action and ask defendant if he had not failed to deny the allegations. *S. v. Wilson*, 123.

537. Test of motion to strike is whether evidence in support of allegations would be competent on the trial. *Aldridge Motors v. Alexander*, 750. Denial of motion to strike allegation of answer denying allegation of complaint and at same time inartificially setting up defense *held* not error under liberal practice. *Sayles v. Loftis*, 674. Motion to strike allegations setting up defense of Compensation Act in action for wrongful death should have been allowed. *Ibid.* Motion to strike irrelevant and redundant matter is made as a matter of right. Allegations that charitable institution had obtained indemnity insurance *held* properly stricken in action against it for negligent injury. *Herndon v. Massey*, 610.

564. Appellant may not maintain exception to charge on ground that it contained expression of opinion when the alleged error is in appellant's favor. *Vaughn v. Booker*, 479.

567. Upon motion to nonsuit all the evidence tending to establish plaintiff's claim must be considered in light most favorable to plaintiff. *Barnes v. Wilson*, 190. Court may grant motion to nonsuit during the progress of the argument. *Bruton v. Light Co.*, 1.

593. As amended by ch. 92, Public Laws 1921. It is not required that provisions of consent judgment be predicated by issues raised by pleadings, it being sufficient if court has jurisdiction of subject matter of judgment. *Keen v. Parker*, 378.

600. Court's permitting counsel to withdraw from case without notice to defendant constitutes "surprise," but record *held* to show that client was not without notice, and motion to set aside was properly denied. *Roediger v. Sapos*, 95.

CONSOLIDATED STATUTES—*Continued.*

SEC.

602. Cross action against codefendant must be founded upon or necessarily connected with plaintiff's cause, and driver's administrator may not maintain cross action against codefendant for wrongful death in guest's action for negligent injury growing out of same collision. *Montgomery v. Blades*, 654.

618. While judgment on note becomes evidence of debt, relative liability of principals and sureties remains the same, even though judgment is not assigned to principal making payment. *Saieed v. Abeyounis*, 644.

628 (a). In action under Declaratory Judgment Act, court may not advise party whether to invoke provisions of C. S., 1795. *Redmond v. Farthing*, 678.

898 (f). Party to arbitration agreement has right to notice and an opportunity to present evidence as to all matters submitted. *Grimes v. Ins. Co.*, 259.

901. *Held:* Petition disclosed that plaintiffs had knowledge of all facts necessary to constitute cause of action, and petition for examination of adverse parties should have been denied. *Knight v. Little*, 681.

991. Rule that deed will be construed to convey fee applies only when instrument does not disclose intention to convey estate of less dignity. *Hines v. Hines*, 325.

1164. When owner of stock surrenders certificates to corporation with direction that it be transferred on books of corporation, transferree acquires title perfected by delivery of new certificates to him. *Jones v. Waldroup*, 178.

1297 (12). The General Assembly has power to prescribe time when sheriffs-elect shall qualify and be inducted into office. *Freeman v. Board of Elections*, 63.

1473. Complaint in action to recover damages to purchaser resulting from defective eyesight of horse sold *held* not to state cause for fraud, but cause for breach of warranty in sum within exclusive jurisdiction of justice of the peace. *Hill v. Snider*, 437.

1681. Father may recover damages sustained between time of fatal injury to son and time of son's death, and upon satisfactory proof of such damages resulting from fatal injury of son by dog, is entitled to *mandamus* to compel county commissioners to appoint freeholders to ascertain damages. *White v. Comrs. of Johnston*, 329.

1735. Abolished survivorship in personalty, with an exception relating to partnerships, only when it followed as legal incident to joint tenancy, and statute does not prevent parties from creating tenancy in common with right of survivorship in personalty. *Jones v. Waldroup*, 178.

1790, 161. Charge on issue of damages in this action for wrongful death *held* without error. *McClamroch v. Ice Co.*, 106.

1795. Widow may testify as to possession of stock in administrator's action to recover same, the testimony being of an independent fact. *Jones v. Waldroup*, 178.

CONSOLIDATED STATUTES—*Continued.*

SEC.

1823, 1824. Plaintiff *held* entitled to order for inspection of liability insurance of corporate defendant and telegrams sent by it calling on insurer to defend, the evidence being competent on question of whether corporate defendant maintained control and management of filling station on issue of *respondeat superior*. *Rivenbark v. Oil Corp.*, 592.

1849. Fact that domestic animals are at large raises no presumption that owner permits them to run at large, and evidence in this case *held* insufficient to show that escape of mule was due to negligence of owner. *Gardner v. Black*, 573.

2190. Guardian who acts in good faith and with due diligence, and makes complete accounting is entitled to commissions. Where bank as administrator turns over to itself as guardian distributive share of ward, it is entitled as guardian to commissions on cash thus received. Guardian is entitled to commissions on amount obtained by it from sale of ward's inherited interest in lands. Where bank as administrator turns over to itself as guardian an advancement on its ward's distributive share, it is entitled as guardian to commissions on amount advanced. Bank guardian is entitled to commissions on interest paid ward's estate on funds of estate deposited in its commercial department. Guardian is entitled to commissions on sum received by it from sale of stock of estate. Where guardian turns over to ward upon her majority identical stocks received by it as guardian, it is not entitled to commissions thereon. *Rose v. Bank*, 600.

2430. Mere statement that defendant had come into possession of information *contra* to prior libelous article *held* insufficient retraction. Retraction should not only contain apology and retraction, but should show that libelous article was published in good faith, that its falsity was due to honest mistake of fact, and that there were reasonable grounds for believing the statements were true. *Roth v. News Co.*, 13.

2515. Defective acknowledgment of deed conveying wife's interest in land to trustee for husband's benefit renders the deed void, and deed is not cured by prior deed of separation properly executed or by wife's subsequent quitclaim deed to same trustee. *Fisher v. Fisher*, 70.

2529. Right to convey as free trader attaches upon registration of deed of separation, and does not affect prior conveyance. It would seem that C. S., 2529, applies to conveyances by the wife to third persons and not to conveyances to her husband, C. S., 2515. *Fisher v. Fisher*, 70.

2612 (a). Authorizes city to impose $1.00 license fee on cars, and does not authorize imposition of excise tax for privilege of using parking space. *Rhodes, Inc., v. Raleigh*, 627.

2677. Municipality may tax trades and professions carried on within city, but its classifications must be reasonable. Tax on wholesale merchants not otherwise taxed, using streets for delivery by truck, *held* void as being discriminatory and as imposing tax on business not carried on within its limits. *Kenny Co. v. Brevard*, 269.

2787. Municipality has no authority to install parking meters. *Rhodes, Inc., v. Raleigh*, 627.

CONSOLIDATED STATUTES—*Continued.*

SEC.

2791, 2792. General grant of power of condemnation does not authorize city to condemn lands used for County Home site and county highways. *Yadkin County v. High Point*, 462.

2982. Purchaser of blank travelers' checks may not recover thereon free from equities. *Venable v. Express Co.*, 548.

3180. Judgment against lessors may be rendered in action to abate public nuisance only if they had actual or constructive knowledge that the property was being used in operation of nuisance. *Barker v. Palmer*, 519. Interest of mortgagee in personal property may not be sold unless mortgagee has actual or constructive knowledge that property is being used in operation of nuisance. *Sinclair v. Croom*, 526. Remedy of defendant to prevent sale of chattels not used in operation of nuisance is by motion in the cause. *Humphrey v. Churchill*, 530. Where mortgagor's equity is *nil*, mortgagee, without knowledge that property was used in operation of nuisance, is entitled to recover same at any time before it is sold by sheriff. *Habit v. Stephenson*, 447.

3205. Public officers remain in office until their successors are chosen and qualify. *Freeman v. Comrs. of Madison*, 209.

3233. Tenant in common may appeal from order for sale for partition, since he has right to actual partition unless it is made to appear that actual partition cannot be had without injury to some or all of parties. *Hyman v. Edwards*, 342.

3964. Where encumbered land is sold without bringing surplus, widow is in position of surety whose property has been sold to satisfy the debt of the principal to the extent of the value of her dower in the land, and her claim againt her husband's estate for the value of her dower is not entitled to priority. *Brown v. McLean*, 555.

3846 (rr), (ss), (tt). Claimant under dedicator is entitled to revoke dedication notwithstanding the fact that he owns only part of land embraced in dedication, and withdrawal of dedication in conformity with statute terminates easement of public and of purchasers of lots. The statute is constitutional. *Sheets v. Walsh*, 32.

3958. Summons served on Sunday is void. *Mintz v. Frink*, 101.

4131. It is not required that testator subscribed the will, it being sufficient if his name appears in the body of the will in his handwriting; witnesses must subscribe the will. *Paul v. Davenport*, 154.

4143, 4163. Will must be probated as required by statute and recorded in the county in which the land lies in order to pass title to real estate. *Paul v. Davenport*, 154.

4339. It is not required that "supporting evidence" of promise of marriage coincide with the testimony of prosecutrix as to the time the promise was made, adminicular proof being sufficient. *S. v. Smith*, 591.

4435. Sheriffs, constables and police officers may seize and destroy all slot machines not expressly permitted by section 130, ch. 158, Public Laws of 1939. *McCormick v. Proctor*, 23.

CONSOLIDATED STATUTES—*Continued.*

SEC.

4542, 2642. Officers may enter public place or private property to investigate disturbance and may make arrest without warrant to prevent breach of the peace. *S. v. Wray*, 167.

4643. Defendants must make proper motions for judgment as of nonsuit during progress of trial in order to present question of sufficiency of evidence on appeal. *S. v. Kiziah*, 399.

4639, 4640. Indictment charging rape will support conviction of assault upon a female. *S. v. Kiziah*, 399.

5039, 5044. Juvenile court has no power to place child anywhere for adoption, and when it orders child placed in asylum upon its finding that child is neglected, its order that asylum should have power to place child in home for adoption is void. *Ward v. Howard*, 201.

5356, 5361. Holder of past-due drainage bond may not foreclose drainage liens on lands within the district. *Wilkinson v. Boomer*, 217.

6243. Housing Authority is municipal corporation, and act is valid. *Cox v. Kinston*, 391.

6437. Rights of parties under loss-payable clause will be determined in accordance with the terms and provisions of the contract. *Land Bank v. Foster*, 415.

7064, 7069. Appointment of county physician by county board of health created by ch. 322, Public-Local Laws 1931, cannot be upheld on ground that members of board were *de facto* officers, since *de jure* board had been created under provision of general law. *Sams v. Comrs. of Madison*, 284.

7111. Error, if any, in admission of death certificate not certified in accordance with statute *held* cured by verdict. *McClamroch v. Ice Co.*, 106.

8081 (i) (f). Sec. 50½ (a) of Compensation Act relates only to diseases inherent in or incident to the nature of the employment, and compensation may be recovered for tuberculosis contracted as a result of an accident arising out of and in the course of the employment. *MacRae v. Unemployment Compensation Com.*, 769.

8081 (r), 160. Administrator of deceased employee may maintain action for wrongful death against third person tort-feasor. *Mack v. Marshall Field & Co.*, 55. In action for wrongful death, motion to strike allegations upon which were based defense that Industrial Commission had exclusive jurisdiction, should have been granted. *Sayles v. Loftis*, 674. Remedies under Compensation Act exclude the recovery of both actual and punitive damages at common law. *McCune v. Mfg. Co.*, 351.

8081 (ww). Medical and hospital expenses should not be included in computing maximum compensation recoverable for any one injury. *Morris v. Chevrolet Co.*, 428.

8081 (7), (o) (g). When employee does not have knowledge that he suffers with asbestosis, notice to employer by widow as soon as reasonably possible after autopsy disclosing cause of death is sufficient. *Blassingame v. Asbestos Co.*, 223.

CONSTITUTION, SECTIONS OF, CONSTRUED.

(For convenience in annotating.)

ART.

I. Failure of General Assembly to appoint or provide for election of successors of highway and sinking fund commissioners of Madison County, chosen by it, does not violate any provisions of this article, since General Assembly has power to terminate or continue appointments at any time. *Freeman v. Comrs. of Madison*, 209.

I, sec. 8. Housing Authority is not invested with legislative and supreme judicial powers, and does not violate provision for separation of powers. *Cox v. Kinston*, 391.

I, sec. 17. Legislature may limit time for the assertion of a property right, provided reasonable time is afforded after passage of act for the assertion of the right. *Sheets v. Walsh*, 32.

II, sec. 1. Delegation of power to municipalities to determine existence or nonexistence of facts necessary to creation of Housing Authority is not unconstitutional delegation of legislative authority. *Cox v. Kinston*, 391.

II, sec. 29. Ch. 322, Public-Local Laws of 1931, undertaking to create county board of health for Madison County with power, *inter alia*, to appoint county physician, is local act relating to health and is void. *Sams v. Comrs. of Madison*, 284.

IV, sec. 24. Upon vacancy in office of sheriff, county commissioners have power to make appointment for unexpired term. *Freeman v. Board of Elections*, 63.

V, sec. 3. Legislature must observe basic principle of equality in exempting property of charitable and educational institutions from taxation. *Odd Fellows v. Swain*, 632. Municipality may tax trades and professions carried on within city, but its classifications must be reasonable. Tax on wholesale merchants, not otherwise taxed, using streets for delivery by truck, *held* void as being discriminatory and as imposing tax on business not carried on within its limits. *Kenny Co. v. Brevard*, 269.

V, sec. 4. *Held:* Debt was contracted during fiscal year following that in which debt was reduced, even though certificate of Secretary of Local Government Commission was not executed during that year. *Board of Education v. Board of Education*, 90.

V, sec. 5. Property held by charitable organization for commercial purposes cannot be exempt from taxation. *Odd Fellows v. Swain*, 632.

VII, secs. 1, 14. General Assembly has power to make office of register of deeds appointive, rather than elective, to extend term, or abolish it altogether. *Penny v. Board of Elections*, 276.

VII, secs. 2, 14. General Assembly has power to provide for the appointment of tax collector or manager for a county. *Freeman v. Comrs. of Madison*, 209.

CONSTITUTION, SECTIONS OF, CONSTRUED—*Continued.*

ART.

XI, sec. 6. Imposes liability on municipalities for injuries to prisoners that result from failure to properly construct and furnish prison, and does not impose liability for assault by fellow prisoner. *Parks v. Princeton*, 361.

XIV, sec. 5. Public officers remain in office until their successors are chosen and qualify. *Freeman v. Comrs. of Madison*, 209.

XIV, sec. 7. Ch. 341, Public-Local Laws of 1931, providing that chairmen of certain county boards of Madison County should elect tax manager merely imposes *ex officio* duties upon them and does not provide that they should hold more than one public office. *Freeman v. Comrs. of Madison*, 209.