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NORTH CAROLINA REPORTS

VOL. 218

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1940

FALL TERM, 1940

REPORTED BY

JOHN M. STRONG

RALEIGH
BYNUM PRINTING COMPANY
PRINTERS TO THE SUPREME COURT
1941

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Busbee Law	"	44	"
" Eq.	"	45	"
1 Jones Law	"	46	"
2 " "	"	47	"
3 " "	"	48	"
4 " "	"	49	"
5 " "	"	50	"
6 " "	"	51	"
7 " "	"	52	"
8 " "	"	53	"
1 " Eq.	"	54	"
2 " "	"	55	"
3 " "	"	56	"
4 " "	"	57	"
5 " "	"	58	"
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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

SPRING TERM, 1940 AND FALL TERM, 1940.

CHIEF JUSTICE:

WALTER P. STACY.

ASSOCIATE JUSTICES:

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

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HARRY McMULLAN.

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JOHN M. STRONG.

CLERK OF THE SUPREME COURT:

EDWARD MURRAY.

MARSHAL AND LIBRARIAN:

DILLARD S. GARDNER.

JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA

EASTERN DIVISION

Name	*District*	*Address*
C. E. Thompson	First	Elizabeth City.
Walter J. Bone	Second	Nashville.
R. Hunt Parker	Third	Roanoke Rapids.
Clawson L. Williams	Fourth	Sanford.
J. Paul Frizzelle	Fifth	Snow Hill.
Henry L. Stevens, Jr.	Sixth	Warsaw.
W. C. Harris	Seventh	Raleigh.
John J. Burney	Eighth	Wilmington.
Q. K. Nimocks, Jr.	Ninth	Fayetteville.
Leo Carr	Tenth	Burlington.

SPECIAL JUDGES

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

WESTERN DIVISION

John H. Clement	Eleventh	Winston-Salem.
H. Hoyle Sink	Twelfth	Greensboro.
F. Donald Phillips	Thirteenth	Rockingham.
William H. Bobbitt	Fourteenth	Charlotte.
Frank M. Armstrong	Fifteenth	Troy.
Wilson Warlick	Sixteenth	Newton.
J. A. Rousseau	Seventeenth	North Wilkesboro.
J. Will Pless, Jr.	Eighteenth	Marion.
Zeb V. Nettles	Nineteenth	Asheville.
Felix E. Alley, Sr.	Twentieth	Waynesville.
Allen H. Gwyn	Twenty-first	Reidsville.

SPECIAL JUDGES

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

EMERGENCY JUDGES

T. B. Finley	North Wilkesboro.
N. A. Sinclair	Fayetteville.
Henry A. Grady	New Bern.
E. H. Cranmer	Southport.

SOLICITORS

EASTERN DIVISION

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

WESTERN DIVISION

J. ERLE MCMICHAEL	Eleventh	Winston-Salem.
H. L. KOONTZ	Twelfth	Greensboro.
ROWLAND S. PRUETTE	Thirteenth	Wadesboro.
JOHN G. CARPENTER	Fourteenth	Gastonia.
CHARLES L. COGGIN	Fifteenth	Salisbury.
L. SPURGEON SPURLING	Sixteenth	Lenoir.
AVALON E. HALL	Seventeenth	Yadkinville.
C. O. RIDINGS	Eighteenth	Forest City.
ROBERT M. WELLS	Nineteenth	Asheville.
JOHN M. QUEEN	Twentieth	Waynesville.
R. J. SCOTT	Twenty-first	Danbury.

SUPERIOR COURTS, FALL TERM, 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

Fall Term, 1940—Judge Harris.

Beaufort—Sept. 16* (A); Sept. 23†; Oct. 7†; Nov. 4* (A); Dec. 2†.
Camden—Sept. 30.
Chowan—Sept. 9; Dec. 9.
Currituck—July 15†; Sept. 2.
Dare—Oct. 21.
Gates—Nov. 18.
Hyde—Aug. 19†; Oct. 14.
Pasquotank—Sept. 16†; Oct. 7† (A) (2); Nov. 4†; Nov. 11*.
Perquimans—Oct. 28.
Tyrrell—Sept. 30 (A).

SECOND JUDICIAL DISTRICT

Fall Term, 1940—Judge Burney.

Edgecombe—Sept. 9; Oct. 14†; Nov. 11† (2).
Martin—Sept. 16 (2); Nov. 18† (A) (2); Dec. 9.
Nash—Aug. 26; Sept. 16† (A) (2); Oct. 7†; Nov. 25*; Dec. 2†.
Washington—July 8; Oct. 21†.
Wilson—Sept. 2; Sept. 30†; Oct. 28† (2); Dec. 2 (A).

THIRD JUDICIAL DISTRICT

Fall Term, 1940—Judge Nimocks.

Bertie—Aug. 26; Nov. 11 (2).
Halifax—Aug. 12 (2); Sept. 30† (A) (2); Oct. 21* (A); Nov. 25 (2).
Hertford—July 29, Oct. 14 (2).
Northampton—Aug. 5; Oct. 28 (2).
Vance—Sept. 30*; Oct. 7†.
Warren—Sept. 16 (2).

FOURTH JUDICIAL DISTRICT

Fall Term, 1940—Judge Carr.

Chatham—July 29† (2); Oct. 21.
Harnett—Sept. 2*; Sept. 16†; Sept. 30† (A) (2); Nov. 11* (2).
Johnston—Aug. 12*; Sept. 23† (2); Nov. 4†; Nov. 11† (A); Dec. 9 (2).
Lee—July 15; Sept. 9†; Sept. 16† (A); Oct. 28.
Wayne—Aug. 19; Aug. 26†; Sept. 2† (A); Oct. 7† (2); Nov. 25 (2).

FIFTH JUDICIAL DISTRICT

Fall Term, 1940—Judge Thompson.

Carteret—Oct. 14; Dec. 2†.
Craven—Sept. 2; Sept. 30† (2); Nov. 18† (2).
Greene—Dec. 2 (A); Dec. 9 (2).
Jones—Aug. 12†; Sept. 16; Dec. 9 (A).
Pamlico—Nov. 4 (2).
Pitt—Aug. 19†; Aug. 26; Sept. 9†; Sept. 23; Oct. 21†; Oct. 28; Nov. 18† (A).

SIXTH JUDICIAL DISTRICT

Fall Term, 1940—Judge Bone.

Duplin—July 22*; Aug. 26† (2); Sept. 30*; Dec. 2† (2).
Lenoir—Aug. 19; Sept. 23†; Oct. 14; Nov. 4† (2); Dec. 9 (A).
Onslow—July 15‡; Oct. 7; Nov. 18† (2).
Sampson—Aug. 5 (2); Sept. 9† (2); Oct. 21† (2).

SEVENTH JUDICIAL DISTRICT

Fall Term, 1940—Judge Parker.

Franklin—Sept. 2†; Sept. 9† (A); Oct. 14*; Nov. 11† (2).
Wake—July 8*; Sept. 2* (A); Sept. 9*; Sept. 16† (2); Oct. 7*; Oct. 14† (A); Oct. 21† (2); Nov. 4*; Nov. 11† (A) (2); Nov. 25†; Dec. 2* (2); Dec. 16†.

EIGHTH JUDICIAL DISTRICT

Fall Term, 1940—Judge Williams.

Brunswick—Sept. 2†; Sept. 30.
Columbus—Aug. 19 (2); Oct. 7*; Nov. 18† (2).
New Hanover—July 22*; Sept. 9*; Sept. 16†; Oct. 14† (2); Nov. 11*; Dec. 2† (2).
Pender—July 15; Oct. 28 (2).

NINTH JUDICIAL DISTRICT

Fall Term, 1940—Judge Frizzelle.

Bladen—Aug. 5†; Sept. 16*.
Cumberland—Aug. 26; Sept. 23† (2); Oct. 21† (2); Nov. 18* (2).
Hoke—July 29†; Aug. 19; Nov. 11.
Robeson—July 8† (2); Aug. 12*; Aug. 26† (A); Sept. 2* (2); Sept. 23* (A); Oct. 7† (2); Oct. 21* (A); Nov. 4*; Nov. 11† (A); Dec. 2† (2); Dec. 16*.

TENTH JUDICIAL DISTRICT

Fall Term, 1940—Judge Stevens.

Alamance—July 29†; Aug. 12*; Sept. 2† (2); Nov. 11† (A) (2); Nov. 25*.
Durham—July 15*; Sept. 2* (A); Sept. 9† (A); Sept. 16† (2); Oct. 7*; Oct. 21† (A); Oct. 28† (2); Dec. 2*.
Granville—July 22; Oct. 23†; Nov. 11 (2).
Orange—Aug. 19; Aug. 26†; Sept. 30†; Dec. 9.
Person—Aug. 5; Oct. 14.

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT

Fall Term, 1940—Judge Pless.

Ashe—July 22† (2); Oct. 21*.

Alleghany—Sept. 23.

Forsyth—July 8 (2); Sept. 2 (2); Sept. 16†; Sept. 23 (A); Oct. 7 (2); Oct. 21† (A); Oct. 28†; Nov. 4 (2); Nov. 18† (2); Dec. 2 (2).

TWELFTH JUDICIAL DISTRICT

Fall Term, 1940—Judge Nettles.

Davidson—Aug. 19*; Sept. 9†; Sept. 16† (A); Oct. 7† (A); Oct. 14†; Nov. 20 (2).

Guilford—July 8* (2); July 29*; Aug. 5† (2); Aug. 26† (2); Sept. 16*; Sept. 16† (A) (2); Sept. 30 (2); Oct. 14* (A); Oct. 21*; Oct. 28† (2); Nov. 4* (A); Nov. 11*; Nov. 18† (A) (2); Dec. 16*.

THIRTEENTH JUDICIAL DISTRICT

Fall Term, 1940—Judge Alley.

Anson—Sept. 9†; Sept. 23*; Nov. 11†.

Moore—Aug. 12*; Sept. 16†; Sept. 23 (A); Dec. 9†.

Richmond—July 15†; July 22*; Sept. 2†; Sept. 30*; Nov. 4†.

Scotland—Aug. 5; Oct. 28†; Nov. 25 (2).

Stanly—July 8; Sept. 2† (A) (2); Oct. 7†; Nov. 18.

Union—July 29*; Aug. 19† (2); Oct. 14† (2).

FOURTEENTH JUDICIAL DISTRICT

Fall Term, 1940—Judge Clement.

Gaston—July 22*; July 29† (2); Sept. 9* (A); Sept. 16† (2); Oct. 21*; Nov. 25* (A); Dec. 2† (2).

Mecklenburg—July 8* (2); Aug. 12* (2); Aug. 26*; Sept. 2† (2); Sept. 2† (A) (2); Sept. 16† (A) (2); Sept. 16* (A) (2); Sept. 30† (A) (2); Sept. 30*; Oct. 7† (2); Oct. 14† (A) (2); Oct. 28† (2); Oct. 28† (A) (2); Nov. 11*; Nov. 11† (A) (2); Nov. 18† (2); Nov. 25† (A) (2); Dec. 2* (A) (2); Dec. 9† (A) (2).

FIFTEENTH JUDICIAL DISTRICT

Fall Term, 1940—Judge Sink.

Alexander—Aug. 26 (A) (2).

Cabarrus—Aug. 19*; Aug. 26†; Oct. 14 (2); Nov. 11† (A); Dec. 2† (A).

Iredell—July 29 (2); Nov. 4 (2).

Montgomery—July 8; Sept. 23†; Sept. 30; Oct. 28.

Randolph—July 15† (2); Sept. 2*; Oct. 21† (A) (2); Dec. 2 (2).

Rowan—Sept. 9 (2); Oct. 7†; Oct. 14† (A); Nov. 18 (2).

SIXTEENTH JUDICIAL DISTRICT

Fall Term, 1940—Judge Phillips.

Burke—Aug. 5 (2); Sept. 23† (3); Dec. 9† (2).

Caldwell—Aug. 19 (2); Nov. 25 (2).

Catawba—July 1 (2); Sept. 2† (2); Nov. 11*; Nov. 18†; Dec. 2† (A).

Cleveland—July 22 (2); Sept. 9† (A) (3); Oct. 28 (2).

Lincoln—July 15; Oct. 14† (2).

Watauga—Sept. 16.

SEVENTEENTH JUDICIAL DISTRICT

Fall Term, 1940—Judge Gwyn.

Avery—July 1*; July 8† (2); Oct. 14*; Oct. 21†.

Davie—Aug. 26; Dec. 2†.

Mitchell—July 22† (2); Aug. 16 (2).

Wilkes—Aug. 5 (2); Sept. 30† (2); Oct. 28† (2).

Yadkin—Aug. 19*; Dec. 9† (2).

EIGHTEENTH JUDICIAL DISTRICT

Fall Term, 1940—Judge Bobbitt.

Henderson—Oct. 7 (2); Nov. 18† (2).

McDowell—July 8† (2); Sept. 2.

Polk—Aug. 19 (2).

Rutherford—Sept. 23† (2); Nov. 4 (2).

Transylvania—July 22 (2); Dec. 2 (2).

Yancey—Aug. 5 (2); Oct. 21† (2).

NINETEENTH JUDICIAL DISTRICT

Fall Term, 1940—Judge Armstrong.

Buncombe—July 8† (2); July 22; July 29; Aug. 5† (2); Aug. 19; Sept. 2† (2); Sept. 16; Sept. 30; Oct. 7† (2); Oct. 21; Nov. 4† (2); Nov. 18; Dec. 2† (2); Dec. 16.

Madison—Aug. 26; Sept. 23; Oct. 28; Nov. 25.

TWENTIETH JUDICIAL DISTRICT

Fall Term, 1940—Judge Warlick.

Cherokee—Aug. 5 (2); Nov. 4 (2).

Clay—Sept. 30.

Graham—Sept. 2 (2).

Haywood—July 8 (2); Sept. 16† (2); Nov. 18 (2).

Jackson—Oct. 7 (2).

Macon—Aug. 19 (2); Dec. 2 (2).

Swain—July 22 (2); Oct. 21 (2).

TWENTY-FIRST JUDICIAL DISTRICT

Fall Term, 1940—Judge Rousseau.

Caswell—July 1; Nov. 11 (2).

Rockingham—Aug. 5* (2); Sept. 2† (2); Oct. 21†; Oct. 28* (2); Nov. 25† (2); Dec. 9*.

Stokes—Aug. 19; Oct. 7*; Oct. 14†.

Surry—July 8† (2); Sept. 16*; Sept. 23† (2); Dec. 16*.

†For civil cases.

*For criminal cases.

‡For jail and civil cases.

(A) Special Judge to be assigned.

UNITED STATES COURTS FOR NORTH CAROLINA

DISTRICT COURTS

Eastern District—ISAAC M. MEEKINS, *Judge*, Elizabeth City.
Middle District—JOHNSON J. HAYES, *Judge*, Greensboro.
Western District—EDWIN YATES WEBB, *Judge*, Shelby.

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. W. A. WYLIE, Deputy Clerk, Wilmington.

OFFICERS

J. O. CARR, United States Attorney, Wilmington.
CHAUNCEY H. LEGGETT, Assistant United States Attorney, Tarboro, N. C.
CHAS. F. ROUSE, Assistant United States Attorney, Kinston.
F. S. WORTHY, United States Marshal, Raleigh.
THOMAS DIXON, Clerk United States District Court, Raleigh.

MIDDLE DISTRICT

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

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

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

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

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

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

Wilkesboro, third Monday in May and November. HENRY REYNOLDS, Clerk, Greensboro; C. H. COWLES, Deputy Clerk.

OFFICERS

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

WESTERN DISTRICT

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

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

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

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

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

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

OFFICERS

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

LICENSED ATTORNEYS

FALL TERM, 1940.

I, Edward L. Cannon, Secretary of the Board of Law Examiners of the State of North Carolina, do certify that the following named persons have duly passed examination of the Board of Law Examiners, August, 1940:

ADAMS, MARGARET LOUISE.....Esterly, Penn.
ARNOLD, HERMAN ROSS, JR.....Jacksonville, Ala.
AVERY, ISAAC THOMAS, JR.....Morganton.
BARNES, BEAMER HENRY.....Linwood.
BOUCHER, HARRY KENNETH.....Rutherfordton.
BROGDEN, WILLIS JAMES.....Durham.
CALDWELL, SIMEON FOSTER.....Lumberton.
CAMPBELL, ROBERT BURBAGE.....Charlotte.
CARTER, JAMES YOUNG.....Winston-Salem.
CARTER, THOMAS DALE.....Winston-Salem.
CHANDLER, MAHLON COLUMBUS.....Albemarle.
CLARK, HEMAN ROBINSON.....Fayetteville.
COAN, JAMES WIGGINS.....Winston-Salem.
CODY, HIRAM SEDGWICK, JR.....Winston-Salem.
COLLINS, EARL CLIFTON.....Sylva.
COOKE, ARTHUR OWEN.....Greensboro.
COUGHENOUR, WILLIAM CHAMBERS.....Salisbury.
DANIELS, GEORGE NEIL.....Elkins, W. Va.
DORSETT, CHARLES HOWARD.....Mount Gilead.
DOUGLAS, VIRGINIA ADAMS.....Greensboro.
EAGLES, FREDERICK MOYE.....Wilson.
EVERETT, CLIFTON WHITE.....Robersonville.
FALLS, BAYARD THURMAN, JR.....Shelby.
GADDY, CARL EDMOND, JR.....Micro.
GILBERT, WILEY LLOYD.....Dunn.
GOVER, ALEX MCGOWIN.....Charlotte.
GRIER, JOSEPH WILLIAMSON, JR.....Charlotte.
HAMER, EDWARD RYAN.....Chapel Hill.
HARKINS, HERSCHEL SPRINGFIELD.....Asheville.
HARRIS, ROGER KENNEDY.....Newport, Ark.
HAYES, JAMES MADISON, JR.....Winston-Salem.
HAYES, JOHNSON JAY, JR.....Wilkesboro.
HENDRICKSEN, BURNELL HOWE.....Viborg, S. D.
HERRING, DAVIS CARROLL.....Fayetteville.
HOBBS, CLAUDE ELTON, JR.....Charlotte.
HOBGOOD, HAMILTON HARRIS.....Louisburg.
HOPKINS, SAMP CRAIG.....Albemarle.
HOVEY, GEORGE DUNMORE.....Lenoir.
JOHNSON, MARGARET CLOYD.....Pittsburgh, Penn.
JOSEPHS, ALEX RUSTIN.....Charlotte.
KAHN, EDWIN LEONARD.....Charlotte.
LEWIS, HENRY WILKINS.....Jackson.
LINSEY, JAMES GRAY.....Washington.
LITTLE, JAMES CRAWFORD, JR.....Raleigh.
LONG, ROBERT EDGAR.....Roxboro.
LOWE, JAMES RUSSELL.....Elon College.

LYON, WILLIAM POPE.....Smithfield.
MCMULLAN, HARRY, JR.....Washington.
MCRAE, JOHN ALBERT, JR.....Charlotte.
MARION, JAMES TAYLOR.....Charlotte.
MAUZE, CHARLES WARWICK.....Greensboro.
MILLER, FRANK THOMAS, JR.....Greensboro.
MOORE, JOHN SHELBY.....Bridgeport, W. Va.
MOORE, L. S.....Skyland.
OETTINGER, ELMER ROSENTHAL, JR.....Wilson.
PATTERSON, FRANK NEVILLE, JR.....Albemarle.
PEYTON, WALTER BURDETTE.....Asheville.
PHILLIPS, EUGENE HAROLD.....East Flat Rock.
POPE, ALBERT HARRELL.....Dunn.
PORT, ARTHUR TYLER.....Winston-Salem.
POYNER, JAMES MARION.....Raleigh.
ROBERTSON, FORREST IVEY.....Rutherfordton.
ROUZER, ELMER ELLSWORTH.....Hagerstown, Md.
RUSS, DAVID PERRY, JR.....Fayetteville.
SELIGSON, PAUL JEROME.....Raleigh.
SHEWMAKE, ELIZABETH WARREN.....Davidson.
SIMS, NATHANIEL GRAVES.....Charlotte.
SMITH, ARCHIE LEAK.....Maxton.
SMITH, WILLIS CRAUTH.....Belmont.
SNIPES, ROBERT FINLEY.....Ahoskie.
SPEARS, JOHN WESLEY.....Lillington.
STEELE, GEORGE SPENCER, JR.....Rockingham.
STEWART, ROBERT PLUMMER.....Charlotte.
STONE, RUSSELL DELEON.....Wilmington.
STYLES, WILLIAM MARION.....Asheville.
WEAVER, RICHARD ELWOOD.....Lake Waccamaw.
WEINSTEIN, MAURICE AARON.....Salem, N. J.
WELFARE, BRADLEY LAMAR, JR.....Winston-Salem.
WILKINS, ELMER VERNON.....Smithfield.
WILLIAMS, WALTER FRED.....Wake Forest.
WYCHE, BENJAMIN, III.....Charlotte.
YARBOROUGH, EDWARD FOSTER.....Louisburg.
YOUNG, GEORGE LEWIS.....Durham.
YOUNT, MARSHALL VIVIAN.....Hickory.

COMITY LICENSEES.

CRUMBLEY, ANDY T.....Charlotte from Tennessee.
HEITMANN, ELMER H.....Mill Spring from Illinois.
LOWNDES, CHARLES LUCIEN BAKER.....Duke University, Durham, from New York.
UPSON, STEPHEN LUMPKIN.....Greensboro from Georgia.

Given under my hand and the seal of the Board of Law Examiners, this the 6th day of January, 1940.

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

(SEAL—The North Carolina
Board of Law Examiners.)

CASES REPORTED

A

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1940

W. J. FLETCHER, FOR HIMSELF AND ON BEHALF OF ANY OTHER TAXPAYERS OF THE SAND HILL CONSOLIDATED SCHOOL DISTRICT OF BUNCOMBE COUNTY WHO MAY BE INTERESTED AND DESIRE TO MAKE THEMSELVES PARTIES PLAINTIFF, v. ROBERT C. COLLINS, JOHN C. VANCE AND HARRY L. PARKER, CONSTITUTING THE BOARD OF COUNTY COMMISSIONERS FOR BUNCOMBE COUNTY.

(Filed 19 June, 1940.)

1. Schools § 27—

The School Machinery Act of 1933, while providing for State maintenance of the public schools in all of the counties of the State, left the duty to provide for necessary capital outlay upon the several counties.

2. Statutes § 2: Schools § 3—Article II, section 29, does not prohibit Legislature from setting up machinery under which county may establish special tax school districts.

Article II, section 29, of the State Constitution prohibits the Legislature from passing any special, private or local act which *ex proprio vigore* undertakes to establish or change the boundaries of a school district, but the section does not proscribe the Legislature from setting up machinery under which a county, as the administrative unit charged with making provision for necessary capital outlay, may create school districts or special bond tax units within the county to accomplish this purpose, and therefore chapter 279, Public-Local Laws of 1937, which provides the machinery under which the county of Buncombe may establish school districts or special bond tax units in the county is not in contravention of this section of the Constitution.

3. Constitutional Law § 6b—

The Supreme Court cannot declare a statute unconstitutional and void where there is any doubt.

4. Statutes § 10—

An act applicable to one county alone is not repealed by implication as being contrary to the public policy enunciated in a statute having State-wide application and dealing with the same subject matter, passed at the same session of the Legislature, since the stronger indication of policy lies in the exception rather than the rule.

5. Same—

Where a special and a general statute dealing with the same subject matter are passed at the same session of the Legislature the acts are to be considered *in pari materia* and ordinarily the particular statute will prevail as an exception to the general statute.

6. Same: Schools § 3—

Chapter 279, Public-Local Laws of 1937, providing for the establishment of special tax school districts in Buncombe County *is held* not repealed by implication by the School Machinery Act of 1937, since the particular statute prevails as an exception to the general statute.

BARNHILL, J., dissenting.

DEVIN and WINBORNE, JJ., concur in dissent.

APPEAL by defendants from *Warlick, J.*, at March Term, 1940, of BUNCOMBE. Reversed.

Plaintiff, on behalf of himself and other taxpayers of Sand Hill Consolidated School District of Buncombe County like situated, brought this action against the Board of County Commissioners for Buncombe County to restrain the issue of certain bonds by the defendants in behalf of the school district named.

The case was heard before Judge Warlick, without the intervention of a jury, upon an agreed statement of facts, as follows:

"It is hereby agreed by and between counsel representing the plaintiff and counsel representing the defendants that the following constitutes the facts in controversy between the parties:

"1. That pursuant to chapter 279 of the Public-Local and Private Laws of North Carolina, Session 1937, the Board of Education of Buncombe County in accordance with the terms of said statute created the Sand Hill Consolidated School District of Buncombe County, a school district or special bond tax unit, and pursuant to said action of the Board of Education of Buncombe County the Board of County Commissioners of Buncombe County, in strict compliance with the terms of said statute, ordered an election in said district or bond tax unit to be held Tuesday, October 3, 1939, at which election a majority of the qualified voters of said district voted in favor of the issuance of $100,000.00 school bonds and/or notes and the levying of a sufficient tax *ad valorem* on the

taxable property within the district for the payment thereof for the purposes of acquiring, erecting, enlarging, altering and equipping school buildings or any one or all of said purposes, and that pursuant to said election the Board of County Commissioners in accordance with the terms of said chapter 279, canvassed the returns of said election and complied with the statute with respect to declaring the results of said election and giving notice thereof.

"2. That pursuant to the authorization aforementioned, the Board of County Commissioners of Buncombe County unless prohibited by order of court proposes to issue bonds and/or notes in the amount of $100,000.00, to be paid both principal and interest from taxes levied exclusively on the taxable property within the Sand Hill Consolidated School District for the purposes authorized in said chapter 279.

"3. That the Sand Hill Consolidated School District of Buncombe County comprises the identical territory as that contained within the limits of the Sand Hill Administrative School District created by order of the Board of Education and with the approval of the State School Commission in 1933 under the provisions of chapter 562 of the Public Laws of North Carolina, Session 1933.

"AND IT IS FURTHER AGREED by and between counsel for the plaintiff and the defendants that the sole question involved in this action is whether chapter 279 of the Public-Local and Private Laws of 1937 violates the provisions of Article II, section 29, of the Constitution of North Carolina."

The statute referred to is too long for detailed quotation. In substance it provides that upon a petition of not less than ten per cent of the qualified voters of the territory affected such territory shall be created into a school district and that bonds or notes shall be issued under the provisions of the act, payable exclusively out of the taxes levied in the district, for the purpose of erecting school buildings therein, etc.

Upon pertinent findings of fact, the trial court concluded that the pertinent statute—chapter 279, Public-Local and Private Laws of North Carolina, Session of 1937—is in conflict with the provisions of Article II, section 29, of the Constitution of North Carolina, prohibiting the General Assembly from passing "any local, private, or special act or resolution establishing or changing the lines of school districts" and is, therefore, void and constitutes no authority for issuing the proposed bonds.

Judgment was, therefore, rendered, permanently restraining the defendants from issuing the bonds and from levying the necessary tax to pay the principal and interest thereon. From this judgment the defendants appealed.

W. A. Edgerton and Zebulon Weaver, Jr., for plaintiffs, appellees.
Brandon P. Hodges and Claude L. Love for defendants, appellants.
Joseph C. Whisnant for County Board of Education of Cleveland County, and Masslich & Mitchell, of New York City, as amicus curiæ.

SEAWELL, J. The School Machinery Act of 1933 abolished all existing special tax districts in the State, including special charter districts, and automatically deprived all school districts of the power to issue bonds or create debt. Such districts were continued only as tax-collecting districts for the liquidation of debts already incurred. Subsequently, the debts of many of these districts were taken over by the counties, under powers expressly conferred by law or under decisions of the Court approving such action as lawful. The effect of this legislation was to leave the several counties solely responsible for furnishing school buildings and certain other school facilities.

Mears v. Board of Education, 214 N. C., 89, 197 S. E., 752, illustrates the inadequacy of existing general laws to meet this requirement, and the inability of communities in need of school facilities to procure relief under them by court action, however great the emergency.

The difficulty and delay thus experienced were enhanced by the widespread financial distress which made some of the counties unable and others, perhaps, unwilling to exercise a discretion favorable to the erection of school buildings. Several counties of the State, perhaps eleven in number, secured legislation similar to the act under consideration, permitting the communities within such counties to proceed on the principle of self-help. Many thousands of dollars in bonds have been issued and sold under such laws and school buildings have been erected. The machinery in all the acts is strikingly similar.

While, of course, the primary purpose of the act under consideration was to create a taxing district so that necessary facilities for conducting the schools might be provided by the community itself, at its own expense, there is no need to evade the fact that school districts are thus created, or may be created under the law, anywhere in the county upon compliance with the conditions named in the act.

We do not think it necessary here to go more minutely into distinctions between laws that are general and uniform as to all parts of the State and those which are special, local, or private. The field is controversial and it will be found that in many instances laws are general, special, or local merely by way of contrast. The law applying to a whole county in which numerous school districts might be created cannot be classed as private or special. As to whether a law may be called local is often to be determined by the "facts and circumstances of each particular case." *In re Harris,* 183 N. C., 633, 112 S. E., 425. Some laws,

which must of necessity apply to all persons of the particular class selected throughout the State at the risk of offending against the constitutional provisions against discrimination, have been pronounced local because they applied to only a few counties in the State. *S. v. Dixon,* 215 N. C., 161, 1 S. E. (2d), 521. Since, however, a county must be considered a unit, so far as its responsibility for furnishing school facilities is concerned, as well as for the purpose of division into school districts, it may well be questioned whether an act providing for the creation, not of one particular school district within the county, but the creation of any number of them, under its machinery, could properly be called "local." *In re Harris, supra.*

The question presented is one of first impression, since the decisions of this Court striking down legislation purporting to establish school districts as in opposition to Article II, section 29, of the Constitution, have applied to the attempted creation of a single or special district. *Robinson v. Comrs.,* 182 N. C., 590, 109 S. E., 855; *Galloway v. Board,* 184 N. C., 245, 114 S. E., 165; *Trustees v. Trust Co.,* 181 N. C., 306, 107 S. E., 130; *Sechrist v. Comrs.,* 181 N. C., 511, 107 S. E., 503. The precise question involved here is different. However the act is labeled, it is our opinion that the constitutional provision cited does not prevent or forbid the creation of school districts by the method set out in the act applicable to any district which may be so created in the county.

It will be observed that the act in question prescribes a method whereby school districts or special bond tax units may be uniformly established throughout the county. The act itself deals only with the mechanics of establishing or changing the lines of school districts or special bond tax units, and does not, *ex proprio vigore,* undertake to establish or to change any such lines. These are matters which, in terms, are committed to the sound discretion of the county board of education. The constitutional prohibition as respects the matter now in hand is against direct action on the part of the General Assembly and not against the establishment of machinery for the accomplishment of these ends.

In *Trustees v. Trust Co., supra,* and again in *Sechrist v. Comrs., supra,* it was inadvertently stated that this constitutional inhibition was directed against the passage of any local, private or special act "relating to establishing or changing the lines of school districts." The word "*relating*" is used seven times in the section. It does not appear in connection with the prohibition against establishing or changing the lines of school districts. The elusion is significant. The difference was not material in the cited cases, as both of the acts there considered were clearly prohibited, but in the instant case the precise meaning of the section is important.

In cases like this it is incumbent upon us to remember the limitations

which have been wisely set to the power of this Court in dealing with the acts of the Legislature. We cannot declare them unconstitutional and void where there is any doubt. *Hood, Comr., v. Realty, Inc.,* 211 N. C., 582, 191 S. E., 410; *S. v. Brockwell,* 209 N. C., 209, 183 S. E., 378; *Glenn v. Board of Education,* 210 N. C., 525, 187 S. E., 781; *Albertson v. Albertson,* 207 N. C., 547, 178 S. E., 352; *Wells v. Housing Authority,* 213 N. C., 744, 197 S. E., 693.

The litigant parties agreed that the sole question presented to this Court was whether the act under consideration is offensive to Article II, section 29, of the Constitution. A careful consideration convinces us that the study given to the case by counsel on both sides of the controversy has led them to a correct conclusion in this regard.

Questions of policy derived solely from statutes can be of little avail in determining the priority or potency of separate statutes upon the same subject where there is a suggested conflict. Certainly the same power which creates a policy may destroy it, or modify it, or make exceptions, or do with it as it will; and frequently the stronger indication of policy lies in the exception rather than in the rule.

It has been suggested here that because the School Machinery Act of 1933 has provided a uniform method by general law for redistricting the counties of the State a policy has been produced which will not tolerate amendment or exception. The suggestion is that the School Machinery Act of 1937, having vested in the State School Commission "all the powers and duties heretofore conferred by law upon the State Board of Equalization and the State School Commission, together with such other powers and duties as may be conferred by this act," this board has now the exclusive power to divide the counties into school districts. But such power as the School Commission has been given, under this law, is clearly subject to such exceptions and modifications as had been previously made; and the repealing clause must be held advertent to the rule that the particular act is considered an exception to the general act, and not in contradiction of its terms. *Hammond v. Charlotte,* 205 N. C., 469, 171 S. E., 612.

It is recognized that a comprehensive law may bear internal evidence that it is intended to be exclusive upon the subjects with which it deals, and where the repealing clause is of sufficient character to carry out such intent, other statutes upon the subject must give way. This, however, is nothing more nor less than repeal by implication, which is not favored in the law.

The statute under consideration and the School Machinery Act were passed at the same Legislature and are, therefore, to be construed as having been enacted at one and the same time. They are to be considered *in pari materia* and, as stated, it is the prevailing rule that the

particular statute shall prevail as an exception to the general statute. *Bramham v. Durham,* 171 N. C., 196, 88 S. E., 347; *Rankin v. Gaston County,* 173 N. C., 683, 92 S. E., 719; *Hammond v. Charlotte, supra.* A proper construction of these statutes must reconcile them under this rule, which is so clearly expressed in *Felmet v. Comrs.,* 186 N. C., 251, 119 S. E., 353.

It has been said that the policy of the State is epitomized in the expression, "An equal educational opportunity for every boy and girl in the State." Equality in educational opportunity must not be achieved by a leveling down process. We find no public policy in this State which can be invoked to nullify the statute and suppress initiative in educational advancement in communities which have greater resources or more faith, and are willing to translate them into tangible educational facilities. The law intended they should have this power. We see no reason to depart from the ordinary rules of statutory construction in an attempt to invest the public school laws with a legalistically satisfying but devitalizing symmetry which would destroy it.

We are speaking of the building of schoolhouses, not of the maintenance of the schools. When the State took over the maintenance of the public schools, it did not take over the business of building schoolhouses. The law simply abolished all taxing districts, including special charter districts, to which the great advance in the building program had been largely due. To call the resulting condition one of uniformity is to tax optimism. There are one hundred counties in the State, each with its own difficulties and problems, some of which seem to be almost unsolvable. There are one hundred governing boards, composed of men who have widely different ideas upon this subject and with a discretion which may be exercised and reflected in widely divergent standards throughout the State. Under such conditions the recognition of community initiative seems to be as imperative as it has ever been. At any rate it is our opinion that the Legislature was acting within its constitutional limitations in enacting the law under consideration and that it is not invalidated or repealed by any general law.

The judgment of the court below is

Reversed.

BARNHILL, J., dissenting: The question here presented involves an interpretation of Art. II, sec. 29, of the North Carolina Constitution which places certain limitations upon the power of the General Assembly to enact private, local or special legislation. The pertinent part thereof reads as follows:

"The General Assembly shall not pass any local, private or special act . . . establishing or changing the lines of school districts; . . .

nor shall the General Assembly enact any such local, private or special act by the partial repeal of a general law. . . . Any local, private or special act or resolution passed in violation of the provisions of this section shall be void. The General Assembly shall have power to pass general laws regulating matters set out in this section."

In the interpretation of the meaning of the word "local," as used in this section, we must do so as that term is contra-distinguished from the word "general" as used in the same section.

Having due regard for the language of the section as a whole it seems clear that "local" and "general" are to be given their usual and ordinary meaning. *Local means belonging or confined to a particular place or locality. A local law is one whose operation is intended to be restricted within certain limits less than the limits of the legislative jurisdiction. Though restricted in its operation to a particular territory, it may be either public or private. It is local because it is operative in a limited jurisdiction only.* On the other hand, *general means common to all or to the greatest number. A general law is one framed in terms restricted to no locality and operating equally upon all.* Callahan, Cyc. Law Dict. If the act applies to restricted territory it is local even though it may be public. It is general when it is State-wide in application.

That, to be general, a law must be State-wide in scope was modified by this Court in *In re Harris,* 183 N. C., 633, 112 S. E., 425; but the rule was followed in *S. v. Harris,* 216 N. C., 746.

This interpretation, which seems to be the clear intent of the section, is fortified when we consider the evil that the people sought to remedy when the amendment was adopted. It had come to be that the major portion of the time of the Legislature was consumed in the consideration and passage of private acts, special acts and acts, though public in character, which were limited to a restricted territory—usually one or more counties. This was so to such an extent that it had become an evil to which the people sought to put a stop by the adoption in 1916 of this section of the Constitution. This evil is graphically illustrated by the brief history of the financial affairs of Buncombe County set out in the brief of defendants.

Article II, sec. 29, of the Constitution expressly withdraws from the Legislature the power to create a school district. This, I understand, is conceded, and it has been so held by this Court. *Galloway v. Board of Education,* 184 N. C., 245, 114 S. E., 165; *Sechrist v. Comrs.,* 181 N. C., 511, 107 S. E., 503; *Trustees v. Trust Co.,* 181 N. C., 306, 107 S. E., 130; *Robinson v. Comrs.,* 182 N. C., 590, 109 S. E., 885; *Woosley v. Comrs.,* 182 N. C., 429, 109 S. E., 368.

How then can the General Assembly delegate to a county board of education or to other local authorities a power it does not possess?

This is not answered by the assertion that the act deals only with the mechanics. The county board of education has no inherent power to create a school district nor does it possess other statutory authority so to do. It derives its authority from this act. Delete the authority to create a district and the act is meaningless. Eliminate the creation of a district and the other action of the county authorities is void.

Thus it has been expressly held by this Court that the provisions for bonds and taxation to carry out the purposes of an act unconstitutionally creating a school district are void. *Trustees v. Trust Co., supra; Sechrist v. Comrs., supra; Armstrong v. Comrs.,* 185 N. C., 405, 117 S. E., 388. In the *Sechrist case, supra,* the Court expressly declined to reconsider the *Trust Co. case.*

The Legislature may not delegate power which directly contravenes constitutional provisions. 16 C. J. S., 407; *Arnold v. Sullenger,* 254 Pac., 267. The exercise of power by a subordinate agency delegated to it is the same in effect as if such power were directly exercised by the Legislature. 16 C. J. S., 412; *S. v. Morwood,* 57 S. W., 875. The power to delegate authority is subject always to the rule that the Legislature may not authorize the exercise of any power or the doing of any act which exceeds or transgresses its constitutional limitation. It may not authorize others to do what it is forbidden to do. "A stream may not rise higher than its source."

Clearly the primary purpose of the act is to authorize the creation of school districts. The provisions for bonds and taxation are merely incidental—though essential—to the primary purpose.

The act is captioned in part: "An act to authorize creation of school districts." The body of the act provides that upon the hearing of a petition signed by not less than 10% of the qualified voters of a designated territory requesting the creation of a school district, etc., "the board of education . . . may grant such petition and enter an order creating a school district, comprising either the territory described in such petition or a part of such territory and additional territory." It then provides for the naming of the district so created. It is then, and only then, that the board of education may petition the county authorities for an election. Having authorized the creation of the district and the issuance of bonds and the levy of a tax in furtherance of the purposes for which the district was created, it was essential that the Legislature prescribe the mechanics and the method of procedure so as to make the delegation of authority effective.

It is to be noted that while, under the act, a district may be formed without the election or the issuance of bonds, both the holding of the election and the issuance of the bonds are dependent upon the prior creation of a district.

It is also to be noted that in creating a district the board of education is not limited to the territory described in the petition but it may create a district "comprising either the territory described in such petition or a part of such territory and additional territory." This authority carries with it plenary power not only to establish a district but also to change the lines of existing administrative districts for the power to include other territory in the proposed district is not limited. It is left to the board of education to determine and to describe the lines of the new district—a power withheld from the General Assembly by the language of the section.

Our present Constitution in Art. IX, sec. 2, provides that "The General Assembly, at its first session under this Constitution, shall provide by taxation and otherwise for a general and uniform system of public school, wherein tuition shall be free of charge to all children of the State between the ages of six and twenty-one years."

If time and space would permit it would be interesting to trace fully the history of school legislation under this provision and to note the various evasions of the solemn duty thus imposed upon the General Assembly before it finally in fact provided a general and uniform system of public schools.

Suffice it to say that for many years after the adoption of the Constitution, due to the prevailing economic conditions and the belief of many that "the taxation of the rich for the education of the poor is socialistic," no real substantial effort was made to provide an adequate school system. As a consequence, we had the one-room, one-teacher school for a four months' term in many communities and no school at all in others, until the Aycock era. Then, at the turn of the century, Aycock, aided by McIver, Daniels and other contemporary leaders, inaugurated an educational renaissance in North Carolina.

The first result was the creation of local taxing units and local charter districts in those communities best able to pay the tax. This resulted in an unequalized patchwork school system in that the prosperous communities were provided with adequate modernized schools while rural, sparsely settled communities were left without adequate facilities or funds.

The General Assembly first attempted to remedy this condition by providing gradually enlarged equalization funds. This in turn proved inadequate and failed to meet the constitutional requirement. So for the first time, in 1933, the Legislature undertook to meet squarely the constitutional mandate by enacting ch. 562, Public Laws 1933, which was an act "to provide for the operation of a uniform system of schools in the whole of the State for a term of eight months without the levy of any *ad valorem* tax therefor."

The outstanding features of the change from a localized, unbalanced and patchwork system to a State-wide, unified plan of organization and operation are:

(1) The abolition of local charter, bond and tax levying districts.

(2) The elimination of land tax for support of the constitutional term.

(3) Prohibition of tax levies except as allowed in the general law.

(4) The designation of the counties and the city charter districts as the local administrative units operating under the direction and supervision of the State School Commission.

(5) The operation of all schools under a unified State-wide plan with funds provided by the State derived through taxes other than upon real property.

(6) The requirement that capital outlay funds for buildings and equipment and for maintenance of physical property is to be supplied by the several counties (or city units as the case may be), by uniform county-wide tax to supplement fines, forfeitures, etc.

(7) Adequate provision for measurably equal facilities and opportunities for all communities—rural and urban alike.

The prohibition against the levy of any tax except as authorized in the general law has not been repealed and the other material provisions of the 1933 Act have been brought forward biennially in the several State School Machinery Acts since adopted.

So now we have a public school system which is "general" and "uniform" as required by the Constitution. No longer is the matter of school facilities left to the caprice of the several localities but every community, yea, every child, is to have substantially the same advantage and be subject to the same rules and regulations. *Lane v. Stanly,* 65 N. C., 153. See also *Board v. County Comrs.,* 174 N. C., 469, 93 S. E., 1001. Likewise, each county of the State is divided into a convenient number of districts, in which one or more public schools must be maintained at least six months (now eight) in every year, as provided by Art. IX, sec. 3, of the Constitution.

That the local act under consideration is in direct conflict with the general law as outlined seems to be clear. It undertakes to authorize the county authorities to create a district, which district is not created upon a uniform basis, nor is it created under the supervision of the State School Commission. It establishes a corporate or charter district in conflict with the avowed policy of the general law eliminating such districts. It authorizes a tax otherwise than as provided in the general law, which tax is not levied on a uniform, county-wide basis, and it is in other respects in conflict with the general law. This is in direct conflict with the general policy of the State in respect to the levy of school taxes, the creation of school districts and the administration of

the school law. *S. v. Dixon,* 215 N. C., 161, 1 S. E. (2d), 521, is directly in point. It is there said: "Sound policy demands that when the General Assembly has adopted a general and uniform plan or policy to be applied consistently throughout the State, local measures which tend to disrupt or destroy that plan, must yield to the more basic demands, State policy. The policy of the 'general law of the land' prevails over that of a contrary, local act." Therefore, the act is unconstitutional under the principles in the *Dixon case, supra.*

If we hold that the provisions of the local law are in conflict with the provisions of ch. 394, Public Laws 1937, which is the State School Machinery Act of that year and which contains the same material provisions incorporated in the 1933 act—and I think that we must—then the local act has been repealed and is nonexistent. The local act under consideration was ratified 13 March, 1937. Ch. 394, Public Laws 1937, was ratified 23 March, 1937, ten days thereafter, and contains in section 32 thereof the following provision: "All Public, Public-Local or Private Laws and clauses of laws in conflict with this act, to the extent of such conflict only, are hereby repealed." *Evans v. Mecklenburg County,* 205 N. C., 560, 172 S. E., 323; *Moore v. Board of Education,* 212 N. C., 499.

The Court, in the *Moore case, supra,* quotes with approval from the opinion in the *Evans case, supra,* as follows:

"These and other provisions of the Act of 1933 . . . including the clause which repeals all conflicting Public, Public-Local and Private Laws, indicate a legislative intent to annul or to subordinate to the new law all statutes relating to the public schools which were in effect at the time of its enactment and to establish a uniform system under which all the public schools of the State shall be conducted."

From whichever angle we view it this act is discriminatory.

Under the present law the duty to provide capital outlay funds is placed upon the several counties. It is a county obligation and must be met by a county-wide tax.

If we hold that this act is to enable the county to meet this obligation, then it constitutes a discrimination against the taxpayers of the district who are to pay the necessary tax to the exclusion of all other taxpayers within the county. Why should the taxpayers within a restricted district be required to pay the tax to meet a county-wide obligation? *Comrs. v. State Treasurer,* 174 N. C., 141, 93 S. E., 482.

If we treat the obligation created by the issuance and sale of the bonds as that of the district and not of the county, it is a discrimination against the taxpayers living outside the bounds of the district for the act permits—though it does not require—the payment of the bonds out of general county funds. The grant of the power to a county to pledge its credit or the authority to expend its funds is an incipient step in the

exercise of the power of taxation and, unless the obligation to be promoted be such as may be provided for by taxation, the power to make the pledge or to expend the fund does not exist and the Legislature cannot confer it. Being a district obligation it is not a necessary expense and the county may not use general funds for the payment thereof unless authorized by a favorable vote of the electors of the county as a whole; *Comrs. v. State Treasurer, supra.* The act which seeks to authorize the county officials to do so is, in this respect, in conflict with Art. I, sec. 17, of the Constitution and is invalid.

The power to pay out of general funds having been conferred upon the county authorities we must assume that the power thus conferred will be exercised. It is no answer to this position to say that in the particular case before us no harm is likely to occur, for when a statute is being squared to the requirement of constitutional provision, it is what the law authorizes and not what is being presently done under it and not what is anticipated that furnishes the proper test of validity. *Comrs. v. State Treasurer, supra.* It is not within the legislative power to grant the right to tax one community for the exclusive benefit of another. *Comrs. v. State Treasurer, supra; Keith v. Lockhart,* 171 N. C., 451, 88 S. E., 460; *Faison v. Comrs.,* 171 N. C., 411, 88 S. E., 761. See also Cooley on Taxation (3d), 420; Judson on Taxation, sec. 254; 37 Cyc., 749.

For the reasons stated I am of the opinion that the act under consideration is unconstitutional and void for that: (1) It is local; (2) it is in direct conflict with the general policy and law of the State; and (3) it is discriminatory. Furthermore, it has been repealed.

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

J. S. HINSON, H. L. EVANS, CARL ROSE, JOHN COLBERT, R. S. WALTERS, AND J. A. LYONS v. THE BOARD OF COMMISSIONERS OF YADKIN COUNTY, D. A. REYNOLDS, J. W. SHORE, AND L. L. SMITHERMAN, COMMISSIONERS.

(Filed 19 June, 1940.)

ON rehearing appeal of defendants from *Ervin, Special Judge,* at Chambers in Newland, N. C., 6 July, 1939. Reversed.

Barker & Hampton and Folger & Folger for plaintiffs, appellees.

Wm. M. Allen, Hoke F. Henderson, and David L. Kelly for defendants, appellants.

SEAWELL, J. Chapter 525, Public-Local Laws of 1939, applicable to Yadkin County, provides that upon the receipt of a petition signed by not less than ten per cent of the qualified voters of the territory described in the petition, the County Board of Education may create a school district and define the boundaries thereof; and that upon a further petition by the County Board of Education the Board of County Commissioners shall order a special election to be held in such district upon the question of issuing bonds and notes and levying tax for the payment thereof; and may, upon a favorable vote, proceed to issue such bonds and notes.

Under this act petitions were duly filed, the district created, and an election held; and the defendants undertook to issue the bonds and incur the indebtedness provided for in the act. The plaintiffs, citizens and taxpayers of Yadkin County, brought an action to restrain the issue of the bonds and further proceedings, for that the statute above cited offends against Article II, section 29, of the Constitution, and is, therefore, void.

A temporary restraining order was issued and hearing upon an order to show cause why the injunction should not be continued to the hearing was had before Hon. Sam J. Ervin, Special Judge, at Chambers in Newland, N. C., on 6 July, 1939. Finding pertinent facts, the judge continued the injunction to the hearing upon the ground that the statute was offensive to the section of the Constitution referred to, providing that the General Assembly shall not "pass any local, private, or special act or resolution . . . establishing or changing the lines of school districts."

The statute is similar to that discussed in *Fletcher v. Comrs. of Buncombe, ante,* 1, and there is no necessity for a further discussion of the principles involved. Upon authority of that case, the judgment of the court below, continuing the injunction to the hearing, is

Reversed.

BARNHILL, J., dissenting: I am compelled to dissent to the majority opinion for the reasons set forth in my dissent filed in *Fletcher v. Comrs. of Buncombe, ante,* 1, and for a further reason not therein set out, which reason is equally applicable to the *Fletcher case, supra.*

In prohibiting the enactment of local laws creating school districts or changing or altering the lines thereof, Art. II, sec. 29, of the Constitution provides: "Nor shall the General Assembly enact any such local, private or special act by the partial repeal of a general law." The local law under which defendants seek to create a school district was, in this case, enacted after the General School Machinery Act of 1939. It constitutes a partial repeal of at least two of the provisions of the general law, to wit: (1) The provision that no taxes shall be levied except as

provided in the general law, and (2) The provision that the capital outlay funds shall be provided by a county-wide levy.

I do not consider *Brown v. Comrs.*, 173 N. C., 598, authoritative. At the time that decision was rendered the State had not assumed control of the State Highways or the maintenance of county roads. The act under consideration in that case was not in conflict with any State policy and there is no provision in the Constitution requiring the State to construct and maintain public roads similar to the requirement in respect to schools, and it related exclusively to financing roads.

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

G. E. MOTSINGER v. W. D. PERRYMAN AND ASSOCIATED INDEMNITY CORPORATION.

(Filed 19 June, 1940.)

1. Master and Servant § 45c—Cancellation of policy depends upon receipt of notice and not the reading and ascertainment of effect thereof.

The compensation insurance policy in suit provided that the policy might be canceled at any time upon written notice stating when, not less than ten days thereafter, cancellation should be effective. *Held:* Under the terms of the policy, cancellation is dependent upon the receipt of the notice and not upon whether insured reads the notice and ascertains its contents and effect, and tender of unearned premiums is not essential to cancellation, and upon evidence tending to show that insured received notice of cancellation and that the injury in suit occurred over three months thereafter, the holding of the Industrial Commission that the policy was not canceled as to insured is error.

2. Contracts § 8—

General laws of the State in force at the time of the execution and performance of a contract enter into and form a part of it as though they were referred to or incorporated in its terms.

3. Constitutional Law § 4c—

The making of law is a function of the Legislature which it may not delegate, and while it may grant administrative boards and commissions power within definite, valid limits, to promulgate rules and regulations for the administration of a law or to determine the existence of facts upon which a legislative declaration of policy is to apply, such rules and regulations adopted by administrative agencies do not have the effect of substantive law.

4. Contracts § 8—

Rules promulgated by an administrative agency do not constitute part of the law of the State within the meaning of the rule that the laws

of the State in existence at the time become a part of the contract as though referred to or incorporated therein.

5. Master and Servant §§ 45c, 52a—Rule of Industrial Commission requiring notice to it of cancellation of policy does not become a part of the policy contract.

The compensation insurance policy in suit provided that any State law requiring notice of cancellation should become a part of the contract and that it was subject to the North Carolina Compensation Act. At the time the policy was issued, a rule of the Industrial Commission was in effect requiring ten days notice to the Commission of cancellation. The evidence disclosed that notice of cancellation in accordance with the terms of the policy was sent to and received by insured but that no notice of cancellation was given the Industrial Commission, and that the injury in suit occurred some three and one-half months after notice of cancellation had been received by insured. *Held:* The administrative rule of the Industrial Commission is not substantive law, and does not come within the rule that a contract will be construed with reference to laws in existence at the time of its execution, and the holding of the Industrial Commission that as to the injured employee the policy had not been canceled because of want of notice to the Industrial Commission, is error.

6. Master and Servant § 45c—

A rule of the North Carolina Rating Bureau requiring notice to it of cancellation of a compensation insurance policy does not affect the contractual rights of the parties, the bureau being merely an organization or association of insurance companies and not a State agency.

CLARKSON, J., dissenting.

SCHENCK, J., concurs in dissent.

APPEAL by defendant Associated Indemnity Corporation from *Warlick, J.*, at February Term, 1940, of FORSYTH. Reversed.

Claim for compensation under the Workmen's Compensation Act prosecuted by plaintiff, the injured employee.

Plaintiff and defendant employer are both bound by the Workmen's Compensation Act. The defendant Associated Indemnity Corporation is the alleged insurance carrier for the employer.

On 9 October, 1937, plaintiff suffered an accident which arose out of and in the course of his employment which resulted in a complete loss of the sight of his left eye. The hearing Commissioner awarded compensation. On appeal to the Full Commission the award was affirmed. On appeal to the Superior Court the award of the Full Commission was likewise affirmed.

The defendant employer makes no contention that the plaintiff is not entitled to compensation and did not appeal from the award. The controversy is as to the liability of the alleged insurance carrier. On this controversy the following facts appear:

Some time prior to 1 June, 1937, the defendant Perryman applied to The Phoenix Company, insurance agency and broker, for a policy of

compensation insurance. The Phoenix Company in turn applied to Baylor Insurance Service of Durham, which was a State agency for the Associated Indemnity Corporation of San Francisco, California. As a consequence of said negotiation the Associated Indemnity Corporation issued its compensation policy to W. D. Perryman bearing date 1 June, 1937.

The defendant Perryman, upon receipt of the policy, issued his two checks to G. L. Zimmerman, representative of The Phoenix Company, in an amount equal to the advance premiums for the period of 6 months for which the policy was issued. Thereafter, on or about 15 June, 1937, the Associated Indemnity Corporation sent to W. D. Perryman by registered letter notice of cancellation of the policy. This registered letter was received by Perryman. No notice of cancellation was mailed to or served on the Industrial Commission or on the North Carolina Rating Bureau.

Zimmerman, representative of The Phoenix Company, never accounted for the premium received, either to Baylor Insurance Service or to the defendant Indemnity Corporation. After the injury to plaintiff, he repaid to the defendant Perryman an amount equal to the premium received to be applied on claims arising out of the injury for hospital expenses, etc. Subsequent to the injury the defendant insurance carrier was paid the amount due as earned premium to the date of the cancellation.

The individual Commissioner concluded that the policy was still in full force and effect and granted an award against the corporate defendant. This conclusion and award was affirmed both by the Full Commission and by the Superior Court. From judgment of the Superior Court affirming the award of the Full Commission the defendant Associated Indemnity Corporation appealed.

J. F. Motsinger and E. M. Whitman for plaintiff, appellee.

Henry Bane, Fred S. Hutchins, and H. Bryce Parker for defendant Associated Indemnity Corporation, appellant.

BARNHILL, J. It was admitted here that the defendant Perryman is solvent and able to pay the award made so that the rights of the plaintiff are not endangered by the controversy presented which is, as found by the Commission, primarily between the defendant Perryman and the defendant Associated Indemnity Corporation. This controversy is to be determined by the answers to two questions: (1) Was the policy canceled as between the employer and the insurance carrier? and (2) If so, was such cancellation effective as against the rights of the plaintiff employee?

If the policy was not canceled the insurance carrier is liable both as to the employer and as to the employee. If the policy was canceled as to the employer but not as to the employee, then the plaintiff may have recourse against the insurance carrier as well as against his employer for the collection of his award.

The Commission found that "on or about 15 June, 1937, the Associated Indemnity Corporation attempted to cancel their policy No. P. 10206 issued to W. D. Perryman June 1, 1937, upon which the premium was paid for a period of six months, by addressing a registered letter to said W. D. Perryman at his last known address; and, the Commissioner finds as a fact that said letter was received by W. D. Perryman but was misplaced by him before ever being read by him and before he ever ascertained the contents thereof, and he did not know that the Associated Indemnity Corporation had attempted to cancel said policy. The Commissioner further finds that W. D. Perryman, the insured, never at any time prior to the alleged injury in this case or thereafter agreed or consented to the cancellation of the policy of compensation insurance offered in evidence in this case." As to this the defendant Perryman testified: "I received a registered letter from the Associated Indemnity Corporation through Baylor's Insurance Service, Inc., one evening when I got home and I opened it and it said something about an insurance policy, and I had promised to be at Thomasville Orphanage at 7:30 and I stuck it in my pocket and I have never seen it since. I said to myself, Mr. Zimmerman will let me know if there is anything wrong." He further testified that his daughter received the letter at his office and that she turned the notice over to him and that he received it on the same day it arrived at the office. He likewise testified that he never filed any notice of the accident with the insurance carrier or with the Industrial Commission and that Zimmerman always handled his insurance and represented him in all of these transactions as his agent.

The cancellation of the policy under the terms thereof as to the defendant employer is dependent upon receipt of the notice and not upon whether he read the notice, ascertained its contents and knew that it was a cancellation. In holding to the contrary the individual Commissioner and the Industrial Commission relied upon *Pettit v. Trailer Co.*, 214 N. C., 335, 199 S. E., 279. This decision does not sustain the position assumed by the Commission. That case merely held that the 10-day period began to run from the date of the receipt and not from the date of mailing the notice.

The policy in question provides that "this policy may be canceled at any time by either of the parties upon written notice to the other party stating when, not less than 10 days thereafter, cancellation shall be effective. The effective date of such cancellation shall then be the end

of the Policy Period." Under the express terms of the contract written notice is the condition upon which the policy may be canceled. *Mfg. Co. v. Assurance Co.,* 161 N. C., 88, 76 S. E., 865; *Sherrod v. Insurance Assn.,* 139 N. C., 167, 32 C. J., 1249. That the recipient of the notice shall read and ascertain the contents thereof is not a condition precedent to cancellation. It was error for the Commission to so hold.

The notice was in accord with the terms of the contract. A tender of the unearned premiums was not essential. This identical question is discussed and so decided in *Hughes v. Lewis,* 203 N. C., 775, 166 S. E., 909.

But it is contended that even if the policy was canceled as against the employer it was not canceled as against the employee. This contention is bottomed upon a provision in the policy and a rule adopted by the Industrial Commission.

The policy provides in part that "the law of any State, in which this policy applies, which requires that notice of cancellation shall be given to any Board, Commission or other State agency is hereby made a part of this Policy and cancellation in such state shall not be effective except in compliance with such law." It is provided further by rider attached:

"The obligations of Paragraph One (a) of the Policy to which this Endorsement is attached include such Workmen's Compensation Laws as are herein cited and described and none other.

"Chapter 120, Laws of 1929, State of North Carolina, known and cited as the North Carolina Workmen's Compensation Act, and all laws amendatory thereof or supplementary thereto which may be or become effective while this Policy is in force."

The rule adopted by the Industrial Commission, relied upon by appellee, is as follows: "Any insurance carrier having issued a policy to an employer and desiring to cancel same shall be required to give ten days prior notice thereof to the Industrial Commission at its office in the city of Raleigh. Cancellation of policies shall give cause and be reported promptly to the Commission."

Is the rule thus adopted by the Industrial Commission a part of the law of the State within the meaning of the provision in the policy and the prevailing rule of construction which writes the law of the State into the contract so that there could be no cancellation thereof without ten days prior notice to the Industrial Commission? The Commission so held. We reluctantly conclude that in this there was error.

It is well established that the general laws of a state in force at the time of the execution and performance of a contract become a part thereof and enter into and form a part of it, as if they were referred to or incorporated in its terms. *Hood v. Simpson,* 206 N. C., 748, 175 S. E., 193, and cases cited; *Headen v. Ins. Co.,* 206 N. C., 270, 176 S. E.,

568; *Abernethy v. Ins. Co.*, 213 N. C., 23, 195 S. E., 30; *Bank v. Bryson City*, 213 N. C., 165, 195 S. E., 398, and cases cited; 17 C. J. S., 782, sec. 330. This principle embraces laws which affect its validity, construction, discharge and enforcement. *Von Hoffman v. City of Quincy*, 4 Wall, 535, 18 L. Ed., 403.

Since under the doctrine of the separation of the powers of government the lawmaking function is assigned exclusively to the Legislature, it is a cardinal principle of representative government that except when authorized by the Constitution—as may be the case in reference to municipal corporations—the Legislature cannot delegate the power to make laws to any other authority or body. 11 Am. Jur., p. 921, sec. 214. Except where expressly directed or permitted by the Constitution, it is a doctrine well established and frequently reiterated by the courts that the functions of the Legislature, strictly and exclusively legislative, such as making the law, must be exercised by it alone and cannot be delegated. 16 C. J. S., p. 337, sec. 133; *Provision Co. v. Daves*, 190 N. C., 7, 128 S. E., 593; *Meador v. Thomas*, 205 N. C., 142, 170 S. E., 110.

However, any power not legislative in character which the Legislature may exercise, it may delegate. While the Legislature may not delegate the exercise of its discretion as to what the law shall be, it may confer discretion in the administration of the law. 16 C. J. S., p. 339, sec. 133; *Provision Co. v. Daves, supra.*

The authority to make rules and regulations to carry out an express legislative purpose or to effect the operation and enforcement of a law is not an exclusively legislative power, but is rather administrative in its nature and may be delegated. An administrative commission, within definite valid limits, may be authorized to provide rules and regulations for the complete operation and enforcement of the law within its expressed general purpose. So long as a policy is laid down and a standard is established by a statute, no unconstitutional delegation of legislative power is involved in leaving to selected instrumentalities both the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply. 11 Am. Jur., p. 955, *et seq.;* 11 Am. Jur., p. 960, sec. 242. However, boards and commissions of this character having authority to adopt rules and regulations do not exercise any of the powers delegated to the Legislature. They do not make laws. 11 Am. Jur., 961, sec. 242; *Provision Co. v. Daves, supra,* and cases cited.

The authority granted is to "fill in the details" in respect to procedural and administrative matters. Such board may not adopt a rule under such delegated authority which has the effect of substantive law. Neither urgency of necessity nor gravity of situation arising from economic or social conditions allows the Legislature to abdicate, transfer or to dele-

gate its constitutional authority or duty to another branch of government. *Holgate Bros. Co. v. Bashoe,* 331 Pas., 255, 200 Atl., 672, 117 A. L. R., 639.

Thus it appears that the quoted rule adopted by the Industrial Commission under the provisions of ch. 120, sec. 54, Public Laws 1929, authorizing the Commission to make rules, not inconsistent with the act, for carrying out the provisions of the act and providing that processes and procedure under the act shall be as summary and simple as reasonably may be, must be held to relate to administrative and procedural matters and cannot be given the force and effect of law within the rule that general laws of a state enter into and form a part of a contract. *Provision Co. v. Daves, supra; Kildow v. Industrial Comr.,* 192 N. E., 873 (Ohio); *Bailey v. Indemnity Ins. Co.,* 145 S. W. (2d), 798.

The only case directly in point we have found is that of *Zurich General Accident & L. Ins. Co. v. Industrial Comr.,* 325 Ill., 452, 156 N. E., 307. In that case it is made to appear that the Industrial Commission of the State of Illinois under authority of the provision in the statute creating the Commission which vested the Commission with power to adopt rules "for carrying out the duties imposed" adopted a rule as follows: "No insurance policy shall be terminated either by cancellation or expiration without ten (10) days' notice being given to the Commission and the liability of the insurer thereunder shall not cease until the expiration of such ten (10) days." In discussing the subject it is there said: "The power conferred is not general in its scope but is limited to the making of rules for the performance of the duties imposed upon the Commission by law. Such rules necessarily relate to matters of procedure. The act itself prescribes the conditions under which the compensation shall be paid. Rule 28 required 10 days notice of the termination of liability upon an insurance policy. Liability upon such a policy may have ceased to exist at the time notice to the effect was given, yet the rule extends that liability for an additional period of 10 days. The rule is not confined to the matter of procedure, but exceeds the authority conferred upon the Commission and creates a liability on the part of the insurer where none may exist in fact. The Commission cannot create a liability where the law creates none. *Morris & Co. v. Industrial Comr.,* 295 Ill., 49, 128 N. E., 727. It was not intended to extend the substantive provisions of the Workmen's Compensation Act by rules which the Commission might adopt, nor could such provisions be so extended. The power to enact laws is vested in the General Assembly and is a sovereign power, requiring the exercise of judgment and discretion, and cannot be delegated. 1 Lewis' Sutherland on Stat. Const. (2d), sec. 89; Cooley's Const. Lim. (7d), p. 163."

Bethlehem Shipbuilding Corp. v. Mullens, 119 Atl., 314 (Del.), is not authoritative. There the Court was considering a rule which required the notice of injury to be in writing. This rule was adopted under statutory authority and the requirement of notice is stipulated in the statute. The rule merely prescribes the form of the notice and is in accord with other provisions of the statute requiring written notice. Nor is the statement in 71 C. J., 914, quoted in the appellee's brief, in point. There the text writer is discussing the right of cancellation and the duty to give notice to the Commission in jurisdictions in which the compensation act itself provides a method for cancellation of Workmen's Compensation insurance.

The North Carolina Rating Bureau is an organization or association of insurance companies. It is not a State agency. Even if it has a rule requiring notice to it of the cancellation of a policy, such rule has no bearing on the questions here presented. A failure to notify this bureau of the cancellation does not have the effect of continuing the policy in force beyond the 10 days after notice to the insured.

Technically, the contract of insurance is between the employer and the insurance carrier. However, the policy is issued for the protection of the employee and it is the duty of the Industrial Commission to have the employer provide adequate security for the payment of awards. It is, therefore, of vital concern, both to the Industrial Commission and to the employee, that the Industrial Commission be advised of the cancellation of a policy issued pursuant to the terms of this statute. The need for a statutory requirement of such notice as a condition precedent to cancellation may well merit the attention of the Legislature.

For the reasons herein pointed out it was error for the court below to affirm the conclusions of the Industrial Commission in the respects indicated. The policy issued by the defendant Indemnity Corporation was duly canceled prior to the date of the injury sustained by the plaintiff. It is not liable for the payment of the award made.

Reversed.

CLARKSON, J., dissenting: I think the judgment of the court below should be sustained. It may seem trite to refer to the major purpose involved in the adoption of workmen's compensation acts. The facts in this case are such, however, that we deem it proper to discuss this purpose. At common law an injured employee was so often defeated in his efforts to recover damages growing out of injuries arising out of and in the course of his employment by the interposition of various defenses, such as contributory negligence, negligence of fellow servants, lack of negligence on the part of the employer, etc., that it was deemed to be in the interest of justice and the public welfare to give the employee

compensation for injuries sustained in the course of his employment irrespective of the various and sundry defenses which had previously been recognized. Negligence was eliminated as a defense. Workmen's compensation acts were, therefore, adopted to afford employee a certain, specific and swift mode of relief for occupational injuries. Thus we believe that the welfare of employees was the primary concern of legislative bodies enacting legislation of this type, but there has crept up in this beneficent act technicalities and refinements that are tending to nullify it. The present case is an example.

In order to best effectuate the purpose of the Workmen's Compensation Act in the State of North Carolina, means were provided for the creation of a body known as the North Carolina Industrial Commission, it being made the duty and responsibility of the said Industrial Commission to enforce the terms and provisions of the said Workmen's Compensation Act. The Industrial Commission was given broad power to formulate rules and regulations for the protection of all employees coming within the purview of this act. N. C. Code, 1939 (Michie), sec. 8081 (jjj), subsection (a), in part, is as follows: "The Commission may make rules, not inconsistent with this article, for carrying out the provisions of this article. Processes and procedure under this article shall be summary and simple as reasonably may be."

It has been held that the rules of Industrial Commissions have the force and effect of law. *Bethlehem, etc., Corp. v. Mullen* (Del.), 119 A., 314.

The North Carolina Industrial Commission under the authority vested in it by the Workmen's Compensation Act passed a rule which is known as Rule 4, said rule being as follows: "Any insurance carrier having issued a policy to an employer and desiring to cancel same shall be required to give ten days prior notice thereof to the Industrial Commission at its office in the city of Raleigh. Cancellation of policies shall give cause and be reported promptly to the Commission."

The reason for the adoption of rules such as Rule 4 hereinbefore quoted is well stated in Corpus Juris, as follows: "A provision that any termination of the insurance policy shall not be effective as far as the employees of insured are concerned until a specified number of days after notice thereof is received by the board or commission has for its purpose to provide a period of time within which the board or commission and the employer may see that new insurance is provided in place of the canceled insurance, and an insurer who fails to file notice of the cancellation of the policy, as required by statute, is bound to pay the compensation due an injured employee, where no other insurer has become liable therefor, . . ." Workmen's Compensation Act, 71 C. J., at p. 914.

There is a provision in the policy of insurance involved in this case which reads as follows: *"The law of any state, in which this policy applies, which requires that notice of cancellation shall be given to any board, commission or other state agency is hereby made a part of this policy and cancellation in such state shall not be effective except in compliance with such law."*

Rule 4 of the Industrial Commission was in existence at the time this policy was issued, and therefore became, in effect, a part of the policy. It has been the policy of this State and every other state, so far as we know, to vest in boards and commissions certain powers and duties with regard to insurance business, and insurance companies have been required to comply with reasonable requirements made by said boards and commissions. As a matter of fact, the insurer in this case had actual knowledge of Rule 4 of the Industrial Commission, but thought that its agent would give notice to the Commission. The agent thought that the insurance company would give notice to the Commission. Since they were relying on each other, neither of them gave notice.

This case has been before three tribunals, namely, the trial Commissioner, the Full Commission and the Superior Court. The examination of Mrs. S. B. Clark and the statements made by the court and by Mr. Bane as shown in the record indicate that Rule 4 was under discussion.

We are of the opinion that the Industrial Commission, as well as other trial bodies, have a right to take cognizance of its own rules in hearings before it. Whether this is true or not we believe that the Supreme Court has the right to take judicial notice of the rules of the Industrial Commission. *Comrs. v. Steamship Co.,* 128 N. C., 558; *Staton v. R. R.,* 144 N. C., 135.

In the case of *Pettit v. Trailer Co.,* 214 N. C., 335, the insurer gave notice to the insured, the Industrial Commission and the Rating Bureau. The Rating Bureau received the notice of a sufficient length of time prior to the accident, but neither the insured nor the Industrial Commission received the notice in time to effect a cancellation of the policy prior to the accident. The Supreme Court held that since sufficient notice was given the insured, it was not "necessary to determine whether notice to the North Carolina Rating Bureau by compensation carrier that it is canceling a compensation policy is notice to the Industrial Commission." We infer from this decision that the Supreme Court regards notice to the Industrial Commission as being necessary. It should be noted that Rule 4 was in effect on 23 November, 1936, when the insurer attempted to give notice of cancellation to the insured in the *Pettit case, supra,* and this was done more than six months prior to the attempted cancellation of the policy involved in the case at bar.

The case of *Zurich, etc., Co. v. Industrial Commission* (Ill.), 156 N. E., 307, involves a different state of facts from the case now under consideration. In the *Zurich case, supra,* the insurer sent a notice to the Industrial Commission stating that the insurer was issuing a policy of insurance, but as a matter of fact no such policy was ever issued or delivered. In other words, there was no contract of insurance involved. The Court held that the Industrial Commission could not create a contract where none existed. *On the other hand, in the case under consideration, the policy of insurance was issued and the premium paid for a period of six months. The Industrial Commission did not attempt to create a contract; the parties had made the contract, and the rule of the Industrial Commission became a part of the contract in accordance with its terms.*

Rule 4 is really procedural in nature when applied to the facts of this case. The parties had entered into a contract, and in the contract provided that notice required by law to be given to any board or commission would have to be given before the policy could be canceled. At that time Rule 4 was in existence which required that notice be given to the Industrial Commission prior to cancellation. The Industrial Commission was saying to the insurer that if it desired to cancel the policy after it went into effect, it must proceed in a certain manner to do so.

The plaintiff, appellee, is entitled to protection. He paid the premium. He doubtless thought that he was fully protected by insurance issued under and in accordance with the terms of the Workmen's Compensation Act. If the appellant had notified the Industrial Commission of its intention to cancel the policy, the Commission would have immediately demanded that the employer furnish a new policy or give adequate security for the protection of his employees. The failure of the appellant to give the Industrial Commission such notice, therefore, resulted in the loss of plaintiff's protection, unless appellant is held liable. The appellee was entirely innocent, but the appellant was negligent in failing to give proper notice to the Industrial Commission.

The N. C. Rating Bureau has nothing to do with the facts in this case. The contention by plaintiff is that under legislative authority as before set forth, the Commission may make rules. It has done so, as follows: "Any insurance carrier having issued a policy to an employer shall be required to give ten days prior notice thereof to the Industrial Commission," etc. The language in the carrier's policy in this case says: "The law of any state, in which this policy applies, which requires that notice of cancellation shall be given to any board, commission or other state agency is hereby made a part of this policy and cancellation in such state shall not be effective except in compliance with such law."

The carrier had actual notice of this rule in existence when the policy was issued. It is well settled that this entered into and became a part of the carrier's contract. The premium was paid to the carrier. It is further well settled that the insurance carrier usually draws the policy contracts and a liberal construction is put on same in favor of the insured.

If the appellant had not been negligent and careless as hereinabove mentioned, the insured would doubtless have procured an insurance policy elsewhere and the employee would have been amply protected by other insurance. The appellee is entirely innocent.

The Legislature has spoken, the Industrial Commission has acted, and the defendant Indemnity Company had notice of the ten-day provision. The carrier's policy contract should be held valid.

SCHENCK, J., concurs in dissent.

MRS. JOHN M. CLONINGER, DIVORCED WIFE AND GUARDIAN OF MILTON CLONINGER AND DAINES CLONINGER, MINOR CHILDREN OF JOHN M. CLONINGER, DECEASED (EMPLOYEE), v. AMBROSIA CAKE BAKERY COMPANY (EMPLOYER) AND LIBERTY MUTUAL INSURANCE COMPANY (CARRIER).

(Filed 19 June, 1940.)

1. Master and Servant § 55d—

The finding of the Industrial Commission that deceased was an employee of defendant at the time of his fatal injury is conclusive on the courts if supported by competent evidence, notwithstanding that the Court might have reached a different conclusion if it had been the fact finding body.

2. Master and Servant § 39b—Evidence held sufficient to support finding that deceased was an employee of defendant and not a jobber.

Deceased, at the time of his fatal injury, was engaged in selling the products of defendant. Letters to him from defendant's home office were introduced in evidence which contained instructions for the collection of an account which, as an exception, had been charged directly to the purchaser by defendant, and also a letter stating that defendant would fill his orders C.O.D. without deducting commissions and at the end of the week would then figure his commissions and send him check therefor plus any difference "to make up the $25.00 salary" and also stating that a certain sum was due for social security and asking for his social security number. *Held:* The evidence, with other evidence in the case, *is held* sufficient to support the finding of the Industrial Commission that the deceased was an employee of the defendant, and not a jobber or independent contractor.

WINBORNE, J., dissenting.

STACY, C. J., and BARNHILL, J., concur in dissent.

APPEAL by defendants from *Stevens, J.*, at February Term, 1940, of ROBESON. Affirmed.

This is an action brought by plaintiffs against defendants under the N. C. Workmen's Compensation Act (Laws 1929, ch. 120; N. C. Code, 1939 [Michie], sec. 133-A).

The hearing Commissioner found certain facts and conclusions of law and made an award in favor of plaintiffs. This was sustained by the Full Commission and the court below. The plaintiffs' deceased, John M. Cloninger, died 3 September, 1937, as a result of injuries in an automobile collision, about 11 p.m., 31 August, 1937, while engaged in the business of selling and delivering cakes for defendant Ambrosia Cake Bakery Company, of Greensboro, N. C.

The defendants contend that the plaintiffs' deceased was a "jobber" or distributor and as such he was not an employee. Upon all of the competent evidence the Commission made the following findings of fact:

"1. That the Ambrosia Cake Bakery, Inc., was incorporated under the laws of North Carolina, and doing business in North Carolina.

"2. That said bakery had five or more employees; had accepted the Compensation Law; and purchased compensation insurance from the Liberty Mutual Insurance Company.

"3. That said bakery was engaged in the business of manufacturing and distributing cakes from its Greensboro headquarters.

"4. That the Ambrosia Cake Bakery, Inc., was a closed corporation with E. P. Colby as president, and with said E. P. Colby, his brother W. J. Colby and R. T. Griffin the sole and only stockholders.

"5. That said E. P. Colby was president of two other similar baking corporations with headquarters in Jacksonville, Florida, and Birmingham, Alabama.

"6. That the plaintiffs' deceased, John M. Cloninger, was formerly employed by the Jacksonville baking corporation for a period of approximately 10 years; that said employment terminated in June, 1937.

"7. That said plaintiffs' deceased and E. P. Colby, president, were close personal friends; that said Colby arranged for said plaintiffs' deceased to come to North Carolina to sell cakes in a territory to be selected by said deceased subject to approval of the Greensboro office.

"8. That said deceased came to North Carolina in July, 1937, and after visiting several parts of North Carolina, he selected three counties, including Cumberland and Robeson.

"9. That said deceased, before leaving Florida, arranged to trade his private passenger car for a delivery truck which was used in connection with selling Ambrosia cakes in North Carolina.

"10. That said deceased entered into an agreement with the Ambrosia Cake Bakery, Inc., of North Carolina, whereby he was to sell cakes for a commission of 22%.

"11. That said deceased also sold pies for a Chattanooga, Tenn., firm.

"12. That said deceased's principal business was selling Ambrosia cakes.

"13. That said Ambrosia Bakery did not object to the deceased selling for other firms.

"14. That said bakery sold to the deceased on a C.O.D. basis but frequently made exceptions and permitted the shipments to go through and charge them.

"15. That orders were taken on tickets furnished by said bakery according to their instructions.

"16. That E. P. Colby arranged for Cloninger to have a drawing account or an advance up to $25.00 per week, less Cloninger's commissions until such times as Cloninger's commissions totaled $25.00 per week; that Cloninger's commissions totaled less than $25.00 per week except the full week immediately preceding Cloninger's death.

"17. That said bakery made certain payments upon Cloninger's truck account, his public liability insurance, and purchased business licenses in several towns in Cloninger's territory; that the city of Fayetteville license was bought in the name of 'Ambrosia Cake Bakery, Inc., Greensboro, N. C., Box 210,' 'to engage in business of wholesale and retail bakery products'; that the town of Lumberton license was 'granted to Ambrosia Cake Bakery, Inc., for the privilege . . . delivery of bakery products from truck.'

"18. That in shipping merchandise to Cloninger C.O.D., the bakery made an exception in the case of the Hope Mills canteen account; that said account was charged direct by the bakery to Hope Mills; that Cloninger took the orders and delivered said merchandise to Hope Mills and received the usual 22% commission.

"19. That Graham A. Armisted, sales manager for the said bakery, made two trips to Hope Mills with the deceased, Cloninger, to assist in securing the account of Hope Mills and approved arrangements.

"20. That said bakery gave instructions in letters to the deceased, Cloninger, from time to time, to wit:

" 'August 26, 1937.

" 'MR. JACK CLONINGER,
Fayetteville, N. C.

" 'DEAR JACK: You will help us out considerably if you can arrange to get your order in one day sooner. The reason for this is that your cake goes forward on the noon train and we do not always have your

complete order baked up, then again on these damp days it is hard to get your icing dried in time. We will appreciate a line from you letting us know if this can be arranged. Please get Hope Mill check in as we don't want Jacksonville to criticise our collections.

Very truly yours,
AMBROSIA CAKE BAKERY, INC.,
By DICK, *Manager.'*

" 'August 24, 1937.

" 'MR. JACK CLONINGER,
Fayetteville, N. C.

" 'DEAR JACK: We are enclosing a corrected statement on the Hope Mills account. Sorry you didn't let us know the trouble at once so that there would not have been so much delay. Would appreciate it if you would get check in at once.

Very truly yours,
AMBROSIA CAKE BAKERY, INC.,
By VERNON, *Office Manager.'*

" 'August 21, 1937.

" 'MR. JACK CLONINGER,
Fayetteville, N. C.

" 'DEAR JACK: We have not received a check from the Hope Mills as yet in payment of the statement which we mailed to you on August 15th as per your instructions. This is already one week past due. Kindly call on the Hope Mills, if you have not already done so, present this matter and mail the check to us at once. The amount of this statement is $38.51.

Very truly yours,
AMBROSIA CAKE BAKERY, INC.,
By R. T. GRIFFIN, *Manager.'*

" 'MR. JACK CLONINGER,
c/o General Delivery,
Fayetteville, N. C.

" 'DEAR JACK: Just received communication from the town of Fairmont asking us to pay a license of $10.00. This will be good until June 1, 1938. Do you think we should pay this license? If you do let us know and we will send them a check at once.

Very truly yours,
AMBROSIA CAKE BAKERY, INC.,
By DICK, *Manager.'*

"Excerpt from July 23, 1937, letter of President E. P. Colby to the deceased, Cloninger: 'I don't want you to quit under any circumstances without first letting me know the reason.'

"21. That the plaintiffs' deceased, John M. Cloninger, was an employee of the Ambrosia Cake Bakery, Inc.; that as such employee he sustained an injury by accident arising out of and in the course of his employment with said bakery on the night of August 31, 1937, about 11 o'clock, when his truck collided with another vehicle on the highway between Lumberton and Fayetteville; that said injury by accident was the proximate cause of his death September 3, 1937.

"22. That said Cloninger was not an independent agent or distributor.

"23. That Cloninger's average weekly wage was $25.00.

"24. That Cloninger left wholly dependent upon him at the time of his injury and death by accident, two minor sons, to wit: Daines Rutherford Cloninger, age 15, and John Milton Cloninger, Jr., age 13; that said sons were the only persons wholly dependent upon said deceased.

"25. That the widow, Mrs. John Cloninger, was divorced some time prior to the accident.

"26. That the widow, Mrs. John M. Cloninger, is the legal guardian for the said two dependent minor children.

"Conclusions of law: The defendants offered parol evidence explaining such terms in the written correspondence as 'salary' and 'Social Security' number; that plaintiffs' deceased had been a valued employee of the Florida corporation for several years and because of certain conditions, which were unexplained, Cloninger was discharged in Florida, but permitted to represent the North Carolina corporation in this State as a jobber, or distributor; that the Florida official desired and attempted to withhold from the Greensboro office the circumstances of the deceased's discharge in Florida so that the deceased could have an unprejudiced new start in life. While the expressed motives of the Florida management were ideal, the written evidence originating in the Greensboro office tended to treat the deceased as another employee; therefore, the Commission concludes as a matter of law that Cloninger was an employee.

"Award: The Commission awards and the defendants will pay Mrs. John M. Cloninger, as guardian of the two minor dependent children, Daines Rutherford Cloninger and John Milton Cloninger, Jr., share and share alike, compensation at the rate of $15.00 per week for 350 weeks, plus payment of burial expenses to the proper parties, not exceeding $200.00 and payment of all hospital, nursing, and medical expense after bills have been submitted to and approved by the Industrial Commission. The defendants will pay the costs of this hearing. T. A. Wilson, Chairman."

The defendants excepted, assigned error and appealed to the Full Commission. The opinion of the Full Commission is as follows: "This was an appeal in apt time by the defendants from an award of the hearing Commissioner to the Full Commission and was in due course heard before the Full Commission, at which time the case was ably argued and presented by the learned counsel representing both the claimants and defendants, and the Commission listened with a great deal of interest to the able arguments, has examined the record, the evidence, and considered what other matters there were in the record pertinent to the issue, and after doing so are unable to find any reason to justify disturbing the findings of fact, conclusions of law and the award of the hearing Commissioner. Therefore, the Full Commission adopts the findings of fact, conclusions of law, and award of the hearing Commissioner as its own and directs that the appeal of the defendants be dismissed. Defendants will pay the cost of the hearing. Buren Jurney, Commissioner."

The defendants excepted, assigned error and appealed from the Full Commission to the Superior Court.

The following is the judgment of the Superior Court: "This cause coming on to be heard and being heard at this the February, 1940, Term of Superior Court of Robeson County for the trial of civil cases and being heard before his Honor, Henry L. Stevens, Jr., Judge presiding, in an appeal by defendants from an award in favor of plaintiffs from the full North Carolina Industrial Commission on the record and it appearing to the court and the court being of the opinion that there was and is sufficient competent evidence upon which the Commission could adopt their findings of fact and the court being of the opinion that the conclusions of law as adopted by the Commission justify the conclusions that the deceased, John M. Cloninger, was to the time of his death an employee of defendant, Ambrosia Cake Bakery Company, Inc. The court therefore adopts its conclusions of law, and it is therefore ordered, adjudged and decreed that the defendant shall pay to Mrs. John M. Cloninger, as guardian of the two minor dependent children, Daines Rutherford Cloninger and John Milton Cloninger, Jr., share and share alike, compensation at the rate of $15.00 per week for 350 weeks, plus payment of burial expense to the proper parties not to exceed $200.00 and payment of all hospital, nurse and medical expenses after statements of same have been submitted to and approved by the Industrial Commission. And further, that defendants pay the costs of this action. Henry L. Stevens, Jr., Judge Presiding."

The defendants excepted, assigned error and appealed to the Supreme Court.

The exceptions and assignments of error are as follows:

"1. That the court erred in adopting the findings of fact and conclusions of law of the Full Commission.

"2. That the court erred in adjudging that defendants pay to Mrs. John M. Cloninger, as guardian of the two minor, dependent children, D. R. Cloninger and John M. Cloninger, Jr., share and share alike, compensation at the rate of $15.00 per week for 350 weeks, plus payment of the funeral expenses to the proper parties not to exceed $200.00, and payment of all hospital, nurses and medical expenses, after statements of the same have been submitted to and approved by the North Carolina Industrial Commission, and that defendants pay the cost of this action.

"3. That the court erred in overruling the objections and exceptions of defendants to the award of the North Carolina Industrial Commission."

McKinnon, Nance & Seawell for plaintiffs.
McLean & Stacy for defendants.

CLARKSON, J. The question involved: Was there sufficient competent evidence before the Industrial Commission that deceased was an employee of the defendant, Ambrosia Cake Bakery, Inc., the appellant? 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."

There is no dispute that John M. Cloninger sustained an injury by accident, which was the proximate cause of his death, on 31 August, 1939, about 2 miles from St. Pauls, between Fayetteville and Lumberton. He died 3 September, 1937. But defendants contend that he was not in the course of the employment when the injury by accident occurred. The defendants admitted that the Ambrosia Cake Bakery Company, Inc., of Greensboro, had five or more employees and had accepted the provisions of the Compensation Law and that the Liberty Mutual Insurance Company is the carrier. The defendants deny that Cloninger was an employee and contend that he was a jobber on a commission basis—an independent agent for defendant company, not a servant, agent or employee.

In *Lassiter v. Telephone Co.*, 215 N. C., 227 (230), we find: "It is established in this jurisdiction that the findings of fact made by the Industrial Commission, if supported by competent evidence, are conclusive on appeal and not subject to review by the Superior Court or this Court, although this Court may have reached a different conclusion if it

had been the fact finding body." *Lockey v. Cohen, Goldman & Co.*, 213 N. C., 356 (358-9); *Baxter v. Arthur Co.*, 216 N. C., 276 (280); *McNeill v. Construction Co.*, 216 N. C., 744 (745).

Among other findings of fact the hearing Commissioner found, which was sustained by the Full Commission and the court below: "That said bakery made certain payments upon Cloninger's truck account, his public liability insurance, and purchased business licenses in several towns in Cloninger's territory; that the city of Fayetteville license was bought in the name of 'Ambrosia Cake Bakery, Inc., Greensboro, N. C., Box 210,' 'to engage in the business of wholesale and retail bakery products'; that the town of Lumberton license was granted to Ambrosia Cake Bakery, Inc., for the privilege of . . . delivery of bakery products from truck.' That said Cloninger was not an independent agent or distributor."

A letter dated 27 July, 1937, from defendant Ambrosia Cake Bakery Company, Greensboro, N. C. (office manager), to John M. Cloninger, Fayetteville, N. C., is as follows:

"DEAR JACK: Your orders will have to be handled differently in the future. We will send your orders C.O.D. for the full amount—that is, without deducting the 22%, then at the end of the week we will figure up the 22% due you plus any difference *to make up the $25.00 salary.* We have released the shipment made to you on the 6th as per your telegram. We are enclosing our check for $9.81 which is the difference between the commission already allowed you and *the balance to make up the $25.00 salary.* Kindly endorse this check and return it to us to apply on this shipment that we allow to go to you open. This leaves a balance due us on this shipment of 52c plus 25c for *Social Security.* Kindly send me your *Social Security Number.*" (Italics ours.)

There was other evidence tending to show that Cloninger was an employee. There was evidence on the part of defendants to the contrary. It was a disputed fact and the Industrial Commission found the fact against defendant company. We have read the evidence with care and are persuaded that there was sufficient competent evidence to sustain the findings of the Industrial Commission.

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.'" *Rivenbark v. Oil Corp.*, 217 N. C., 592 (600).

We think the cases of *Creswell v. Publishing Co.*, 204 N. C., 380; *Bryson v. Lumber Co.*, 204 N. C., 665, and *Hollowell v. Dept. of Conservation and Development*, 206 N. C., 206, cited by defendants, distinguishable from the present action. The able brief of defendants and the forceful argument was persuasive, but not convincing. The record is full of distressing circumstances and shows a fine humane attitude and great kindness of the defendant company, by its president, E. P. Colby, to the dead man and his wife and children. Cloninger had been an employee of Colby in Florida for ten years before he came to North Carolina. In a long letter to the dead man, on 23 July, 1937, Colby writes: "I don't want you to quit under any circumstances without first letting me know the reason."

For the reasons given, the judgment is

Affirmed.

WINBORNE, J., dissenting: After careful consideration of the entire record I am unable to agree with the conclusion reached by the majority of the Court.

Reduced to its simplest terms, the case is this: The deceased was formerly employed in Florida and was there discharged for reasons not disclosed by the record. As a matter of kindness he was allowed to come to North Carolina and handle the defendant's goods, not as an employee, but as a jobber or distributor in the Fayetteville territory. The Commission finds this as a fact, but concludes as a matter of law that, by reason of certain correspondence "originating in the Greensboro office" which "tended to treat the deceased as another employer," he was, therefore, an employee at the time of his death. The conclusion is a *non sequitur*. This correspondence is fully explained in the record, and neither in effect nor in authority warrants the conclusion reached by the Commission. Employment was declined in this State, for reasons which the deceased fully understood. There is no evidence on the record that his status was ever changed from that of a jobber to that of an employee while working in North Carolina.

In any event, the case should go back to the Industrial Commission for further consideration for that the findings of fact are wholly inconsistent. Findings of fact nine to fourteen are opposed to findings of fact twenty-one and twenty-two. The former point unerringly to the fact that Cloninger was a jobber, buying and selling goods of the bakery, and not an employee of the bakery.

The findings of fact must be specific. Otherwise, the case will be remanded to the Industrial Commission. *Gowens v. Alamance County,* 214 N. C., 18, 197 S. E., 538.

When findings of fact are insufficient for proper determination of the questions raised, the proceeding will be remanded to the Industrial Commission for further consideration. *Farmer v. Lumber Co.,* 217 N. C., 158, 7 S. E. (2d), 376.

Likewise, where the findings of fact are inconsistent, the case should be remanded.

Moreover, the Commission put the conclusion of law upon a third ground: the correspondence "originating in the Greensboro office." That correspondence does not support the conclusion, as a matter of law, that Cloninger was an employee.

Facts found under misapprehension of the law will be set aside on the theory that the evidence should be considered in its true legal light. *McGill v. Lumberton,* 215 N. C., 752, 3 S. E. (2d), 324. See, also, *Bank v. Motor Co.,* 216 N. C., 432, 5 S. E. (2d), 318.

Conclusions of law reached upon misapprehension of legal effect of facts found should also be set aside.

Furthermore, the case of *Rivenbark v. Oil Corp.,* 217 N. C., 592, referred to in the majority opinion, has no bearing upon the facts in the case at bar.

STACY, C. J., and BARNHILL, J., concur in dissent.

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

(Filed 19 June, 1940.)

1. Money Received § 1—Evidence held for jury in action against payee accepting corporate check in payment of personal obligation of its president.

In an action by the receiver of a corporation to recover corporate funds allegedly used by the president of the corporation in purchasing land for his individual account, admissions by defendant that it entered into contracts for the sale of the land with the president individually, that in payment of the sum due upon the execution of the contracts it accepted checks drawn on the funds of the corporation by the president, together with evidence that the president had no authority to so use the corporate funds, that the corporation was not indebted to him, and that the transaction was not made for the corporation, *is held* sufficient to be submitted to the jury under the provisions of ch. 85, Public Laws of 1923, Michie's Code, 1864 (d) (q).

2. Money Received § 4—In this action under Michie's Code, 1864 (d) (q), the issues submitted are held sufficient.

In this action by the receiver of a corporation to recover corporate funds allegedly used by the president of the corporation in purchasing lands for his individual account, issues relating to the making of the contracts for the sale of the land with the president individually, the delivery of corporate checks in payment of the president's personal obligation under the contracts, acceptance of the checks by defendant with knowledge that they were in payment of obligations under the contracts, and want of authority in the president to draw the checks, are sufficient to present all questions determinative of the rights of the parties.

3. Evidence § 51—

The competency of a witness to testify as an expert is a question primarily addressed to the sound discretion of the court, and its discretion is ordinarily conclusive.

4. Evidence § 48d—

An accountant, found by the court to be an expert, may testify from his personal examination of the books and records of a corporation that a corporate check given in partial payment for lands was drawn on funds derived from sale of customers' securities and from cash received from customers, that there was no indication that the president had authority to purchase the land or that the corporation was indebted to him or had authorized any loan of corporate funds to him, and that the corporate books did not disclose the purchase of any land by the corporation.

5. Trial § 39—

Where the issues submitted are sufficient to present all determinative facts in dispute and to afford the parties opportunity to introduce all pertinent evidence and to apply it fairly, the refusal to submit other issues tendered will not be held for error.

6. Trial § 37—

Objection to the issues submitted cannot be sustained when they present to the jury all determinative facts in dispute and afford the parties opportunity to introduce all pertinent evidence and to apply it fairly.

7. Trial § 27b—

While ordinarily a verdict may not be directed in favor of the party having the burden of proof, when only one inference can be drawn from the facts admitted or established, the court may draw the inference and peremptorily instruct the jury.

8. Money Received § 4—

Where defendant admits that it entered into a contract for the sale of lands to an individual, that in satisfaction of the obligations thereunder it accepted checks on corporate funds drawn by the individual as president of the corporation, and all the evidence tends to show that the individual was without authority to draw the checks, a peremptory instruction in favor of the receiver of the corporation is not error.

APPEAL by defendant from *Olive, Special Judge,* at February-March Term, 1940, of DURHAM.

Civil action to recover for moneys of Paine Statistical Corporation, of New Jersey, alleged to have been wrongfully appropriated and used by John Overton Paine in paying personal debt to defendant.

This case came to this Court on former appeal from order refusing to allow motion of plaintiff for judgment on pleadings, 215 N. C., 73, 1 S. E. (2d), 119, and was considered on petition to rehear, 216 N. C., 28, 3 S. E. (2d), 276. There the Court held that plaintiff was not entitled, as a matter of law, to judgment on the pleadings for there was a denial of "a breach of his obligation as fiduciary."

Plaintiff alleges that on 3 and 4 March, 1937, John Overton Paine, in his individual capacity, entered into four certain contracts to purchase from the defendant four tracts of land situate in North Carolina, at the price of $36,625.00, payable one-fifth on execution of the contracts, and balance in eight annual installments; that as a payment on the purchase price of said lands John Overton Paine delivered to defendant two checks, one dated 3 March, 1937, for $5,500.00, drawn on Union National Bank, Newark, New Jersey, and the other dated 4 March, 1937, for $1,825.00, on Caldwell National Bank, Caldwell, New Jersey, each drawn in the name of "Paine Statistical Corporation, J. O. Paine, President," and payable to the order of defendant; that, in giving said checks of Paine Statistical Corporation as payments for his individual transactions, John Overton Paine misappropriated and wrongfully and unlawfully used funds of the corporation, of which fact defendant had notice in that it accepted the checks drawn on Paine Statistical Corporation, by J. O. Paine in his capacity as an officer of the corporation, which fully appeared upon the face of the checks, and that by so accepting the checks defendant participated in the misappropriation and wrongful use of the funds of the corporation and wrongfully received and now unlawfully withholds such funds, although demands for their return have been made by plaintiff; and that in contracting with defendant as above set forth John Overton Paine acted without the knowledge, authority or permission of Paine Statistical Corporation, and wholly in violation of his trust as an officer of the corporation.

Defendant, in answer, admits that on or about 1 March, 1937, it entered into certain contracts for the sale of real estate with John Overton Paine; that he paid 20 per cent of the agreed purchase price . . . "and in payment of said amount delivered to the defendant two checks of the Paine Statistical Corporation signed by John Overton Paine, President, and presumably they were in words and figures as indicated . . . in the complaint"; . . . and that it "accepted the checks of the Paine Statistical Corporation signed by John Overton Paine, President," but denies the remainder of allegations above set forth. For a further defense defendant avers that, on or about 2 March, 1937, through its duly authorized agents and officers, and in good faith, it sold

to John Overton Paine four tracts of land and entered into contracts with respect thereto referred to in the complaint; that John Overton Paine made the 20 per cent cash payment in accordance with his agreement and entered into possession of the land under certain agreements with respect to receiving of rents and payment of taxes and insurance; that he received the rents but failed to pay the taxes and insurance; that one of the tracts was sold to John Overton Paine through a broker to whom defendant paid a commission; and that defendant has been, and now stands able, ready and willing to carry out its agreement with John Overton Paine to execute deeds for said four tracts of land upon the payment of the purchase money due to defendant under said contracts.

Upon the trial below plaintiff introduced in evidence the admission of defendant, the original contracts which defendant then produced, the two checks, deposition of Andrew J. Markey, Assistant Attorney-General of the State of New Jersey in charge of the securities division of the Attorney-General's office, by whom, without objection, the minute book of the Paine Statistical Corporation was identified—the minute book being offered in evidence over objection by defendant—and deposition of Morris M. Beiner, certified public accountant of the State of New Jersey. Testimony of the witness Beiner, upon examination in chief, tends to show that: He was personally in charge of investigation and audit of the books and records of Paine Statistical Corporation for firm which was designated and appointed for the purpose by the court of chancery in the receivership proceeding, made a complete examination of the books and records, and prepared a statement of assets and liabilities of the corporation as of 18 February, 1939. As of that date the aggregate amount of assets was $77,070.73, and of claims filed by creditors with receiver $362,000.00. The assets included a claim in the amount of $7,325.00 against the defendant. The nature of the business was buying and selling of securities and rendering a stock quotation service. Under the plan for conducting its business the corporation received from customers deposits of cash or securities which were used as collateral for the purchase of additional securities for the customers. In practically every instance the securities deposited by the customers were immediately disposed of for cash and the cash received for the customers was taken in and mingled with the funds received from the sale of these securities. All money on deposit in the bank account of Paine Statistical Corporation at the Union National Bank and the Caldwell National Bank represented the cash received from customers, together with the proceeds received by the Paine Statistical Corporation as a result of the sale of securities deposited by customers with the corporation as collateral. The check of 3 March, 1937, for $5,500 drawn on Union National Bank, as well as the check of 4 March, 1937, on Caldwell National Bank, payable to the order of defendant, were drawn on the

funds of the corporation so deposited by the corporation. Neither the books nor records reflect the purchase or ownership of any real estate in North Carolina, nor do they contain any statement or indication of any authority or directions to John Overton Paine to purchase for the corporation any property in North Carolina, or that the corporation was indebted to him in any amount, or that it loaned any money, or authorized the loan of any corporate funds to him. The only record of the checks in question is the stub of the check book. Upon examination the minute book does not contain record authorizing John Overton Paine to use the funds of the corporation to purchase any real estate in North Carolina. (When the deposition was taken defendant entered objection to each question by which the foregoing evidence was elicited.)

Defendant offered no evidence.

Defendant reserved exception to refusal of court (1) to grant its motion for judgment as in case of nonsuit, and (2) to submit issues tendered by it.

The case was submitted to the jury upon these issues:

"1. Did J. O. Paine, as an individual, and the North Carolina Joint Stock Land Bank of Durham, N. C., enter into the four contracts marked Exhibits 4, 5, 6 and 7, as alleged in the complaint?

"2. If so, did J. O. Paine, as an officer of the Paine Statistical Corporation, execute and deliver to the North Carolina Joint Stock Land Bank of Durham, North Carolina, the two checks for $5,500 and $1,825 marked Exhibits 2 and 3, in payment of the cash payments due the defendant Land Bank under said contracts?

"3. If so, did the North Carolina Joint Stock Land Bank of Durham, N. C., accept said checks of the Paine Statistical Corporation with the actual knowledge that they represented the initial payments on said contracts?

"4. Was J. Overton Paine authorized by the Paine Statistical Corporation to draw or deliver said checks to the defendant North Carolina Joint Stock Land Bank?

"5. What amount, if any, is the plaintiff entitled to recover of the defendant?"

Defendant excepts to submission of third and fourth issues.

From judgment upon adverse verdict defendant appeals to Supreme Court, and assigns error.

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

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

WINBORNE, J. The questions involved on this appeal, as stated by appellant, relate to rulings of the court below in these respects: (1) In

refusing to grant its motion for judgment as in case of nonsuit; (2) in overruling objections to the testimony of the witness Beiner; (3) in refusing to submit issues tendered by it; (4) in submitting the third and fourth issues; and (5) in instructing the jury peremptorily. After a full and careful consideration we find no error in any of these rulings.

(1-2) The plaintiff is proceeding under the provisions of the Uniform Fiduciaries Act, Public Laws of 1923, ch. 85; Michie's Code, 1935, sec. 1864 (d) to (q). Similar acts have been passed by fourteen other states, including the District of Columbia. It is said that the purpose of the acts is to establish uniform and definite rules in the place of diverse and indefinite rules, relating to "constructive notice" of breaches of fiduciary obligations.

At the outset it is noted that in section one of the act it is declared that unless the context or subject matter otherwise requires (a) the word "fiduciary" includes, among others named, "officer of a corporation, public or private," (b) the word "person" includes "a corporation," and others named; and (c) the word "principal" includes any person to whom a fiduciary as such owes an obligation.

Plaintiff invokes the provisions of section five of the act, particularly the latter part thereof. For practical application to the case in hand that portion of the act, paraphrased, provides: That if a check is drawn in the name of his principal by a fiduciary, the creditor or other payee is liable to the principal (1) if such check is payable to a personal creditor of the fiduciary and delivered to the creditor in payment of a personal debt of the fiduciary to the actual knowledge of the creditor, or (2) is drawn and delivered in any transaction known by the payee to be for the personal benefit of the beneficiary, (3) if the fiduciary in fact commits a breach of his obligation as fiduciary in drawing or delivering the check.

Applying this portion of the act to the factual situation in hand, defendant admits that it entered into contracts for the sale of certain lands to John Overton Paine, and that in payment of the amounts payable on execution of the contracts, John Overton Paine delivered to defendant and it accepted two checks drawn in the name of Paine Statistical Corporation, by John Overton Paine, President, and payable to defendant. This admission brings defendant within the purview of the first and second paragraphs of section five as above paraphrased. Furthermore, in the further defense defendant avers that it, in good faith, sold the lands to John Overton Paine, that he went into possession and collected rents and that it stands ready to carry out the transactions with him. Is there, then, any evidence that the "fiduciary" John Overton Paine in fact committed a breach of his obligation as fiduciary, that is, as an officer of Paine Statistical Corporation, in so drawing or delivering the two checks to defendant? The testimony of the certified public

accountant, Beiner, is such evidence. It tends to show that the books and records do not reflect the purchase by the corporation of any land in North Carolina, nor do they contain any statement or indication of any authority to John Overton Paine to purchase any such land for the corporation, or otherwise, or that the corporation was indebted to him in any amount, or that it loaned any moneys or authorized the loan of any corporate funds to him; and that the checks were actually drawn on bank accounts of the corporation in which it had deposited cash received from customers and funds derived from sale of customers' securities.

The evidence further tends to show that the nature and course of the business of Paine Statistical Corporation was such as not to indicate a relationship from which implied authority in John Overton Paine to draw the checks for his personal use may be inferred. But, defendant contends that the testimony of the witness Beiner is incompetent.

In this connection it is noted that the court below, without objection, finds and holds the witness to be an expert accountant. The competency of a witness to testify as an expert is a question primarily addressed to the sound discretion of the court, and his discretion is ordinarily conclusive. *S. v. Wilcox,* 132 N. C., 1120, 44 S. E., 625; *Shaw v. Handle Co.,* 188 N. C., 222, 124 S. E., 325; *Liles v. Pickett Mills,* 197 N. C., 772, 150 S. E., 363; *S. v. Brewer,* 202 N. C., 187, 162 S. E., 363; *S. v. Cofer,* 205 N. C., 653, 172 S. E., 176; *Hardy v. Dahl,* 210 N. C., 530, 187 S. E., 788.

The witness being an expert accountant, his testimony, based upon personal examination of the books and records of the corporation, is clearly competent. *S. v. Hightower,* 187 N. C., 300, 121 S. E., 616; *Loan Assn. v. Davis,* 192 N. C., 108, 133 S. E., 530; *Bank v. Crowder,* 194 N. C., 331, 139 S. E., 604; *S. v. Maslin,* 195 N. C., 537, 143 S. E., 3; *S. v. Rhodes,* 202 N. C., 101, 161 S. E., 722; *S. v. Brewer, supra.*

Having held that the testimony of the witness Beiner is competent and admissible, it is deemed unnecessary to consider the contention of plaintiff that the exceptions relating thereto are not timely entered in accordance with the provisions of C. S., 590. Yet, let it not be understood that the exceptions are timely entered.

(3-4) 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 tendered by defendant. *Saieed v. Abeyounis,* 217 N. C., 644; *Hill v. Young,* 217 N. C., 114, 6 S. E. (2d), 840, and cases cited. Therefore, the objection to the submission of the third and fourth issues is untenable.

5. While it is true as a general principle of law that the trial judge cannot direct a verdict in favor of the party upon whom rests the burden of proof, but "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." McIntosh, North Carolina P. & P., 632. In the present case the admissions of defendant virtually cover the facts sought to be elicited by the first, second and third issues. As to the fourth issue, the evidence is all one way, and is susceptible of only one inference.

In the judgment below we find

No error.

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 19 June, 1940.)

1. Appeal and Error § 49a—

The decision on a former appeal is the law of the case upon the facts then presented both upon the subsequent hearing and upon subsequent appeal.

2. Husband and Wife § 4b—It must appear from certificate of officer that deed from wife for husband's benefit was acknowledged as required by statute.

The finding of the court from oral testimony that a deed executed by husband and wife to a trustee for the benefit of the husband was a part of a properly acknowledged separation agreement dated five days before and acknowledged one day before the deed to the trustee, cannot have the effect of curing defective acknowledgment of the deed to the trustee, since it must appear from the certificate of the officer before whom the deed of trust was acknowledged that it was acknowledged as required by the statute or was a part of the properly acknowledged deed of separation.

3. Estoppel § 1—A void deed cannot be the basis of an estoppel.

A husband and wife conveyed lands owned by them by entireties to a trustee for the benefit of the husband, which deed was void because not acknowledged as required by C. S., 2515. *Held:* The void deed does not estop the husband or his heirs from claiming a one-half undivided interest in the lands vesting in him as tenant in common upon the rendition of an absolute divorce.

4. Trusts § 8c—

C. S., 1740, merges the legal and equitable titles in the beneficiary of a passive trust, but as to active trusts, the legal title vests and remains in the trustee for the purposes of the trust.

5. Same—

A conveyance of property to a trustee with provision that the rents and profits should be paid to the beneficiary or to any person he might designate, but granting power to the trustee to mortgage or sell the property and to reinvest the proceeds of sale, *is held* to create an active trust, and title remains in the trustee, and the beneficiary is without power to require a conveyance to him.

6. Trusts § 10—Upon death of beneficiary, trust property held to descend to beneficiary's heirs subject to widow's dower.

A husband and wife executed a deed to lands held by them by entireties to a trustee for the benefit of the husband, which deed was void because not acknowledged as required by C. S., 2515. Thereafter the parties were divorced absolutely, and later the wife and her second husband conveyed the property by quitclaim deed to the same trustee upon the same uses and purposes as set out in the former deed to the trustee, which uses and purposes constituted the trust an active trust. The husband subsequently married for the second time and the trustee conveyed the lands to him and his second wife. Subsequently, the husband died intestate. *Held:* The first deed in trust being void, had no effect, and upon the rendition of the decree of divorce, the husband and wife became tenants in common, each owning a one-half undivided interest, and the quitclaim deed properly executed by the wife and her second husband conveyed her one-half interest for the husband's benefit in an active trust, and therefore the trustee's deed to the husband and his second wife conveyed no interest, since the trustee held the legal title only for the purposes set forth in the deed to him and the husband had no right to demand and the trustee no right to convey to the husband or any person designated by him, and upon the death of the husband the trust terminated, and his heirs take the entire land subject only to the dower rights of his second wife.

APPEAL by defendant Lois Ruth Fisher from *Alley, J.*, at 15 April Term, 1940, of GUILFORD.

Civil action, instituted under C. S., 1743, to quiet title and to remove cloud from 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.

The facts alleged in the complaint set forth in the main in the opinion on former appeal pertaining to demurrer to complaint and reported in 217 N. C., 70, 6 S. E. (2d), 812, are here referred to in order that unnecessary repetition may be avoided. These facts are noted: W. Homer Fisher and his first wife, Cleo M. Fisher, owned the lands in controversy as tenants by the entirety. On 16 December, 1931, they entered into a separation agreement which was executed in accordance with C. S., 2515. Five days later, 21 December, 1931, he and she, as husband and wife, joined in the execution of a deed to Sydnor DeButts, Trustee, conveying the lands in question for the use and benefit of W. Homer Fisher. As to this deed, the provisions of C. S., 2515, were not followed. Later,

W. Homer Fisher and Cleo M. Fisher were divorced absolutely. Afterward he married defendant Lois Ruth Fisher. And Cleo M. Fisher married Luther D. Hatchell, and on 30 June, 1936, they executed a quitclaim deed to Sydnor DeButts, Trustee, to all right, title and interest they had in the lands in question for the uses and purposes set forth in the former deed from W. Homer Fisher and wife, Cleo M. Fisher, to Sydnor DeButts, Trustee. Thereafter, on 19 May, 1938, Sydnor DeButts, Trustee, made a deed to W. Homer Fisher and wife, Lois Ruth Fisher, purporting to convey the lands in question. The terms of the several deeds are set forth in the complaint.

W. Homer Fisher died on 14 July, 1938, leaving defendant Lois Ruth Fisher as his widow, and plaintiffs, Gladys Fisher, Mrs. Edna F. Cannady, Anna Fisher, and Ellen Fisher, and the defendant William H. Fisher, Jr., as his only heirs at law.

Upon decision of this Court being certified to Superior Court, Lois Ruth Fisher filed answer in which she admitted all the allegations of fact in the complaint and for further defense makes, in addition to the facts admitted, these pertinent averments: (1) That the deed of 19 May, 1938, from Sydnor DeButts, Trustee, to W. Homer Fisher and Lois Ruth Fisher, who were then husband and wife, conveyed the lands in question to them in fee simple as tenants by the entirety. (2) That W. Homer Fisher and Cleo M. Fisher agreed with each other as to the settlement of all property rights, including the lands in question, as they recited in the deed of separation, but placed the agreement concerning the lands in a separate instrument, to wit: the deed of trust of 21 December, 1931, from them to Sydnor DeButts, Trustee; that the conveyance by this deed of trust was part of the separation agreement and same was considered and passed upon by the clerk; and that in passing upon the separation agreement he found as a fact that the conveyance of said lands to Sydnor DeButts, Trustee, was not unreasonable and injurious to said Cleo M. Fisher. (3) That W. Homer Fisher was estopped, and plaintiffs Gladys Fisher, Mrs. Edna F. Cannady, Ellen Fisher and Anna Fisher, and the defendant William H. Fisher, Jr., as heirs at law and privies of W. Homer Fisher, are estopped by the deed of trust from W. Homer Fisher and wife, Cleo M. Fisher, to Sydnor DeButts, Trustee, to claim the lands in question, and same is pleaded as an estoppel in bar of this action. (4) That by reason of the matters and things averred, defendant is owner and is entitled to possession of said lands, and that plaintiffs and William H. Fisher, Jr., as heirs at law of W. Homer Fisher, have no right or title thereto.

Plaintiff in reply filed denies such material averments of the answer as are not alleged in the complaint. Guardian *ad litem* for William H.

Fisher, Jr., minor, by answer filed, admits all of the allegations of complaint.

On the trial below the parties waived jury trial and agreed that the judge presiding might find the facts and render judgment thereon. Whereupon, the judge found as facts in substantial conformity the facts alleged in the complaint and stated in substance in opinion on former appeal, with these additions thereto: (1) That the deed of trust from W. Homer Fisher and wife, Cleo M. Fisher, to Sydnor DeButts, Trustee, conveyed the entire landed estate of the wife and same "was executed for the purpose of enabling the husband aforesaid to deal with the property as his own, freed from his said wife's interest therein. That, at all times before and after the execution of said trust deed, W. Homer Fisher, the said husband, was and remained in possession of the lands entrusted as aforesaid and collected all rents and profits therefrom and used the same for himself up to and until the time of his death as hereinafter alleged; and at no time did the trustee take possession of the lands entrusted as aforesaid, or take charge thereof, or collect rents and profits therefrom and pay over same to W. Homer Fisher"; (2) that the deed of separation and the deed of trust to Sydnor DeButts, Trustee, together form the separation agreement between W. Homer Fisher and his wife, Cleo M. Fisher; (3) that after W. Homer Fisher and Lois Ruth Fisher were married they lived together in the same house formerly occupied by W. Homer Fisher and wife, Cleo M. Fisher, and family; (4) that after the execution of the original deed of trust of 21 December, 1931, W. Homer Fisher did not execute or deliver a deed of any kind conveying to Sydnor DeButts as trustee or otherwise any interest, title or estate in and to the lands in question, or any part of them, before or after his divorce from Cleo M. Fisher, and whatever title, interest or estate Sydnor DeButts acquired as trustee or otherwise in said lands is fully and completely expressed in the deed of trust of 21 December, 1931, and the so-called quitclaim deed of 30 June, 1936; (5) that in the deed of trust of 19 May, 1938, from Sydnor DeButts, Trustee, to W. Homer Fisher and wife, Lois Ruth Fisher, no other consideration passed or moved between the grantor and grantees for the conveyance of the said lands, except that expressed in the deed of trust; and that among the recitals therein is this: "And, whereas, as part of agreement said W. Homer Fisher and wife conveyed to Sydnor DeButts by deed dated 21 December, 1931, . . . the lands hereinafter described for the sole and separate use and benefit of said W. Homer Fisher with power to sell and convey the same."

Upon these findings of fact the court entered judgment declaring (1) That the plaintiffs Gladys Fisher, Mrs. Edna F. Cannady, Anna Fisher and Ellen Fisher, and the defendant William H. Fisher, Jr., are the

owners of an estate in fee simple in the lands in question and are entitled to the immediate possession thereof; (2) that Lois Ruth Fisher is entitled to such dower right in said lands as may hereafter be allotted to her, and that her claim to a fee simple estate in said lands is a cloud upon the title of the plaintiffs aforesaid and the defendant William H. Fisher, Jr.; (3) that the cloud arising from the claim of Lois Ruth Fisher be and it is removed; and (4) that the plaintiffs recover the costs to be taxed.

Defendant Lois Ruth Fisher appeals from said judgment to the Supreme Court, and assigns error.

Harry R. Stanley for plaintiffs, appellees.
Moseley & Holt and Hoyle & Hoyle for defendant, appellant.

WINBORNE, J. This Court held on the former appeal, 217 N. C., 70, 6 S. E. (2d), 812, that the court below correctly ruled that deed from W. Homer Fisher and wife, Cleo M. Fisher, to Sydnor DeButts, Trustee, is void, and conveyed nothing; that the tenancy by the entirety continued to exist between W. Homer Fisher and Cleo M. Fisher, his wife; and that, upon absolute divorce being granted, they became tenants in common, each owning an undivided one-half interest therein in fee simple. To that extent the decision on the former appeal, upon the facts then appearing, constitutes the law of the case, both in the subsequent proceedings in the court below and in this appeal. *Robinson v. McAlhaney,* 216 N. C., 674, 6 S. E. (2d), 517, and cases there cited.

Appellant contends, however, that the factual situation is now different, in that the court below finds as a fact that the deed of separation between W. Homer Fisher and his wife, Cleo M. Fisher, and the deed of trust from them to Sydnor DeButts, Trustee, together form the separation agreement between W. Homer Fisher and his said wife. It appears, however, from the record that this finding of fact is made upon oral testimony, and not from the certificate of the officer before whom the deed of trust was acknowledged as required by the provisions of C. S., 2515, and is, therefore, ineffectual to, and does not, alter the decision on former appeal.

Appellant further contends that W. Homer Fisher was, and that plaintiffs and defendant who are his children and heirs at law are estopped by the said deed of trust to said trustee to claim the lands in question. However, the failure to observe the requirements of the statute makes the deed absolutly void. *Wallin v. Rice,* 170 N. C., 417, 87 S. E., 239, and other cases cited on former appeal. In the *Wallin case, supra,* the Court held that if the deed is void for noncompliance with the statute, the covenant of warranty is likewise void, and will not work as an estoppel.

As indicated by the findings of fact, W. Homer Fisher did not convey to Sydnor DeButts, as trustee or otherwise, the undivided one-half interest which vested in him as tenant in common with Cleo M. Fisher upon the granting of absolute divorce to them, and that he died seized of it. Therefore, title thereto vested in his children as his heirs at law subject to the dower right of his widow.

Now, then, regarding the remaining undivided one-half interest in said land of which Cleo M. Fisher became vested as tenant in common with W. Homer Fisher upon their divorce being granted, the question arises as to the effect of the subsequent deed of 30 June, 1936, from Cleo M. (Fisher) Hatchell and her second husband, Luther D. Hatchell, to Sydnor DeButts, Trustee, in which they conveyed to the trustee, his successors and assigns, all their right, title and interest in the lands in question.

This deed recites in brief that, "Whereas, W. Homer Fisher and wife, Cleo May Fisher, executed to Sydnor DeButts, as trustee, a certain deed . . . therein conveying certain lands . . . upon the trusts and for the uses and purposes set out in said deed . . . and, whereas, the question has been raised as to the technical form and acknowledgment of said form of 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* in said deed reads: "To have and to hold said lands and premises . . . 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 interest of parties of the first part." In the former deed the uses and purposes upon which the land was attempted to be conveyed to the trustee are stated in this manner: "In trust, nevertheless, that the said trustee, or his successors, shall take, hold and manage the said property for the use and benefit of the said W. Homer Fisher, one of the parties of the first part, his heirs, executors or administrators, and the said trustee shall have the 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."

As to passive trusts, the statute, C. S., 1740, merges the legal and equitable titles in the beneficiary and converts the beneficial use into legal ownership. But this is not true as to active trusts. *McKenzie v. Sumner,* 114 N. C., 425, 19 S. E., 375; *Perkins v. Brinkley,* 133 N. C., 154, 45 S. E., 541; *Cameron v. Hicks,* 141 N. C., 21, 53 S. E., 728; *Lummus v. Davidson,* 160 N. C., 484, 76 S. E., 474; *Rouse v. Rouse,* 167 N. C.,

208, 83 S. E., 305; *Springs v. Hopkins,* 171 N. C., 486, 88 S. E., 774; *Lee v. Oates,* 171 N. C., 717, 88 S. E., 889; *Cole v. Bank,* 186 N. C., 514, 120 S. E., 54; *Patrick v. Beatty,* 202 N. C., 454, 163 S. E., 572; *Bank v. Sternberger,* 207 N. C., 811, 178 S. E., 595; *Chinnis v. Cobb,* 210 N. C., 104, 185 S. E., 638.

"Where the use is executed by the statute the trustee takes no estate or interest, both legal and equitable estates vesting in the *cestui que trust;* but where the use is not executed, the legal title passes to the trustee." . . . 39 Cyc., 607, quoted in *Lee v. Oates, supra.*

In the deed from Cleo M. (Fisher) Hatchell and husband, being presently considered, as the trustee has no discretion as to payment, but is required to pay over the income from the trust estate to W. Homer Fisher, "or to whomsoever he designates," the trust in that respect is passive, *Fowler v. Webster,* 173 N. C., 442, 92 S. E., 157, and if nothing else appeared the statute, C. S., 1740, would execute the use and vest the whole title in W. Homer Fisher. But as to the *corpus* of the estate, the trustee has active and discretionary duties to perform. In that respect the trust is active. Hence, the use is not converted by the statute. Thus, the trustee took the legal title for the purposes of the trust, and W. Homer Fisher the beneficial title. The extent to which each took title is dependent upon the intention of the grantors as ascertained from the language used. *Heyer v. Bulluck,* 210 N. C., 321, 186 S. E., 356.

When the deed is so considered, the language used clearly indicates the intention of the grantors to quitclaim to the trustee all their right, title and interest in the land, to have and to hold for the use and benefit of W. Homer Fisher upon the trust stated. It is manifest that there is no intention that the title revert to the grantors as in *Land Co. v. Newell,* 185 N. C., 410, 117 S. E., 341. But, patently, the intention is to create a personal trust for the use and benefit of W. Homer Fisher. In that event, there being no limitation over, the trust would terminate at his death and the whole title to the Cleo M. Fisher undivided one-half interest would descend to his heirs at law. *Baker v. McAden,* 118 N. C., 740, 24 S. E., 531.

What, then, is the effect of the deed of 19 May, 1938, from Sydnor DeButts, Trustee, to W. Homer Fisher and his second wife, defendant Lois Ruth Fisher? Bearing in mind that at that time W. Homer Fisher already owned in fee the undivided one-half interest which vested in him by reason of the divorce from Cleo M. Fisher, and the beneficial title to the other undivided one-half interest by virtue of the deed from Cleo M. (Fisher) Hatchell and husband to Sydnor DeButts, Trustee, DeButts, Trustee, held only the legal title to the undivided half interest conveyed by that deed, and that only for the purpose and with the powers set forth in the said deed to him. No right is therein given to him to convey the

legal title to W. Homer Fisher and his wife, Lois Ruth Fisher, for the better carrying out of the trust as is recited in the premises as reason for executing the deed. Nor did W. Homer Fisher possess the right to call upon the trustee to do more than to pay to him or to whomsoever he designated the income from the trust estate. He was given no right to call for a conveyance of the legal title to him or to anyone else. Furthermore, the rights of a purchaser for value and without notice are not here involved.

Hence, by the deed from Sydnor DeButts, Trustee, W. Homer Fisher and his wife, Lois Ruth Fisher, acquired no title either as tenants by the entirety, as tenants in common, or otherwise, to the land in question.

The trust terminated upon the death of W. Homer Fisher, and the title to the whole of the land descended to his children as his heirs at law, subject to the dower right of his widow. *Baker v. McAden, supra.*

The judgment below is

Affirmed.

JOSEPH T. CARRUTHERS, JR., ADMINISTRATOR OF HERBERT L. BURROUGHS, v. ATLANTIC & YADKIN RAILWAY COMPANY,

and

JOSEPH T. CARRUTHERS, JR., ADMINISTRATOR OF LUTHER BURROUGHS, v. ATLANTIC & YADKIN RAILWAY COMPANY.

(Filed 19 June, 1940.)

1. Evidence § 56: Negligence § 19a—Probative force of negative evidence.

Since in negligent injury actions plaintiff must often prove that defendant failed to perform a duty imposed by law, and therefore must rely upon negative evidence to prove his cause, and since testimony of a witness of the nonexistence of a fact may run through all degrees of credibility, depending upon the witness' ability and opportunity to have perceived the fact had it occurred, his degree of attention, memory and veracity, a positive statement of a witness that a fact did not occur may have as much probative force as the testimony of a witness for the adverse party that the fact did occur, and the conflicting testimony raise merely a question of the credibility of the witnesses.

2. Railroads § 9: Negligence § 20—Instruction upon credibility to be given negative evidence held for error.

Plaintiff's witness testified that he was about four hundred feet from the crossing where the accident occurred, that he saw defendant's train approaching the crossing and testified that the whistle did not blow and that the bell did not ring. Defendant's witness testified that the engineer rang the bell and blew the whistle. There was no evidence of any defect in the hearing of plaintiff's witness, or of circumstances rendering it im-

possible or difficult for him to have heard the warning signals were they given. *Held:* The conflicting testimony raised the question of the credibility of the witness for the determination of the jury, and an instruction containing a long, metaphysical discussion of the weight and credibility to be given negative testimony is error.

3. Trial § 31—

Since the Supreme Court is not precluded from expressing an opinion on the evidence, its decisions frequently may not be embodied in instructions to the jury *in ipsissimis verbis* without danger of resulting in an expression of an opinion on the evidence by the trial court.

4. Same—

A charge characterizing plaintiff's evidence as negative and weak *is held* erroneous as an expression of opinion on the weight of the evidence. entitling the plaintiff to a new trial.

APPEAL by plaintiff from *Clement, J.*, at 2 October Term, 1939, of GUILFORD. New trial.

Frazier & Frazier and Walser & Wright for plaintiff, appellant.
Hobgood & Ward and Chas. M. Ivey, Jr., for defendant, appellee.

SEAWELL, J. (Pertinent facts are included in the opinion.)

The plaintiff Carruthers, as administrator of Herbert L. Burroughs, and as administrator of Luther Burroughs, brought separate actions against the defendant Railway Company for recovery of damages for the injury and death of his intestates, respectively, alleged to have been brought about by the negligence of the defendant. The actions were consolidated and tried by consent in the lower court, and in this Court the appeals of plaintiff were heard together.

The evidence pertinent to our investigation may be succinctly stated. It tends to show that plaintiff's intestates were approaching and attempting to cross defendant's track at a highway crossing, and that a train operated by defendant collided with the motor vehicle in which plaintiff's intestates were traveling, causing injuries which resulted in the death of both of them.

The occupants of the car were approaching the track from a westerly direction and the train was approaching the crossing from a southerly direction. The evidence tended to show that to the right of the occupants of the car and in the direction from which the train was approaching there was an embankment which partially obscured the approach of the train for some distance in that direction from anyone approaching at some distance from the track. The evidence as to these distances does not purport to be exact.

The plaintiff offered the evidence of Arlie Dunn that he was approaching the crossing from the north over a road parallel with the railroad

and saw the train approaching the crossing from the south. That he was about 400 feet from the crossing, and that the whistle did not blow and that the bell did not ring; that there is a bank on the right-hand side of the highway along which the deceased were traveling and on the west side of the railroad; that there were woods on the right of the road and a dirt embankment 12 or 15 feet high.

Witnesses for the defendant testified that the whistle did blow.

Several witnesses testified that they did not see Arlie Dunn at the scene of the wreck, and there was evidence on the part of the defendant tending to show that he arrived later.

All of plaintiff's assignments of error relate to instructions given the jury upon the trial. Mainly, they hinge about the oft-repeated instructions given by the judge characterizing the evidence of the plaintiff as to the blowing of the whistle and ringing of the bell of the approaching train as "negative" evidence and "weak."

Plaintiff contends that in these instructions the trial judge not only mistakenly characterized his evidence as negative but pointed out that it was weak, drawing a distinction between positive and negative evidence, thereby directly attacking the evidence on which he sought to show the negligence of the defendant in not sounding a timely warning at the crossing as being of a negative character and weak.

The matter objected to is embodied in a special instruction asked for by the defendant and given in the charge, which in part reads as follows:

"Negative evidence, meaning testimony that an alleged fact did not exist, although weak, is admissible, if the witness' situation was such that he would have known of it if it had existed. While the affirmative testimony of a credible witness is ordinarily more reliable than the negative testimony of an equally credible witness, still testimony that a person nearby who could have heard and did not hear the sounding of a whistle or the ringing of a bell is some evidence that no such signal was given."

"The entire probative value of the negative fact lies in the circumstance at once to be stated. Such evidence is meaningless, however, if the non-seeing or the non-hearing are equally consistent with the occurrence of the events themselves. Nothing is shown of any value in evidence if at the time of the alleged occurrence of these events the witness was so situated that they well might have occurred and he neither have seen nor heard them. 3 Modern Law of Evidence, sec. 1758. The basic psychological, as well as probative weakness of negative evidence lies in this: The fact may have taken place in the sight or hearing of a person who may not have perceived it; or who perceived it falsely because of defective perceptive apparatus, unfavorable surrounding conditions, or the state of mind of the witness; or who, having originally perceived it correctly, has since forgotten it. Testimony of witnesses that they did

not hear a locomotive signal at a given time and place is given probative effect according to the surrounding circumstances, and is as 'forceful as the opportunities for observation, and the concentration and attention of the witness on what was going on at the time, indicate, when considered with all the circumstances which bear on the credibility of witnesses generally.' "

"The witness Dunn's testimony that the whistle did not blow nor the bell ring is what is called negative evidence. But before you have the right to give any weight whatever to this testimony, you must find by the greater weight of the evidence that he was in a position to hear and could have heard the whistle if it had blown or the bell if it had rung. Unless you find by the greater weight of the evidence that he was within hearing distance of the whistle of the engine or the ringing of the bell as the engine drew near to the crossing, if the whistle had blown or the bell had rung, you cannot find that he was in a position to hear and you would not be entitled to give any weight whatever to his statement that the whistle did not blow nor the bell ring and you will answer the first issue 'No.' "

We do not feel that the case at bar justifies an extended discussion of the distinctions between positive and negative evidence, either here or before the jury. Discussions of that sort, often scholastic, or at least highly metaphysical, could give the jury little aid in arriving at the truth of the matter and are likely to lead to confusion. Scientifically trained jurors, whether desirable or not, cannot be produced at one sitting while *in medias res.* And, perhaps, the school in which jurors learn to think straight is to be preferred, although it never closes a session, dismisses a pupil, or gives a diploma. It will be found that most of the things the court needs to impress are well within the everyday experience and understanding of the jurors in simpler form, and in dealing with the elements of credibility actually involved the court will usually find familiar instruments of guidance for the jury, without the necessity of making an excursion into the field of epistemology and psychology.

Perception of the existence of the fact or the nonexistence of the fact depends upon the exercise of the same sensory faculties—usually in legal investigations that of sight or hearing—and frequently it is a matter of common experience that an observer may be as positive of one as of the other. *Taylor v. Security Co.,* 145 N. C., 383, 59 S. E., 139. The reliability of the testimony in either case depends on the same factors: ability to perceive, opportunity, degree of attention, memory, and honesty of subsequent statement in evidence.

The omission of a legal duty for which actionable negligence may be imputed is always a negative fact. In the majority of negligence cases plaintiff must establish that the defendant did not perform some act or

did not do some thing which it was his duty to do or perform in the observance of due care. "In following out this distinction, courts have sometimes overlooked the fundamental fact that in such a case the plaintiff is necessarily confined to negative evidence. If such evidence is unworthy of belief simply because it is negative, then the plaintiff must nearly always fail." *Chicago, R. I. & P. R. Co. v. Stepp,* 164 F., 785, 22 L. R. A. (N. S.), 350. The testimony of a witness is to be considered in the light of attendant circumstances.

Textwriters usually make a distinction between the form of the statement—"It did not blow" and "I did not hear it blow"—referring to a required warning or signal, since the former expression implies that the witness was giving attention to the matter, while the latter suggests that he may not have been giving such attention. Chamberlayne, Modern Law of Evidence, section 1758; 22 C. J., p. 66, section 9; *Cox v. Schuylkill Valley Track Co.,* 214 Pa., 223, 228, 63 A., 599. The comment from Chamberlayne, forming the basis of the special instruction, was upon evidence of the latter kind. See *McConnell v. State,* 67 Ga., 633.

But whatever the form of the statement, its value as evidence depends on the factors we have mentioned, and it is, therefore, obvious that there may be circumstances under which such evidence loses its purely negative character and becomes of such substance that, when contradicted, only a question as to credibility between the witnesses is raised. *Philadelphia, B. & W. R. Co. v. Gatta* (Del.), 85 A., 721, 47 L. R. A. (N. S.), 933; *Coughlin v. People,* 18 Ill., 266; *Cotton v. Wilmar & S. F. Railroad Co.,* 99 Minn., 366, 109 N. W., 835; *Georgia P. R. Co. v. Bowers,* 86 Ga., 22, 12 S. E., 182.

In such cases it will be found that supporting circumstances give to the evidence a quality of objectivity and substance that would render the rule applied in this case inapplicable. Such evidence, when properly supported by circumstances, may run through "all degrees of credibility." *Chicago, R. I. & P. Co. v. Stepp, supra; Mobile & O. R. Co. v. Johnson,* 157 Miss., 266, 126 So., 827. In *Johnson v. R. R.,* 214 N. C., 484, 199 S. E., 704, there were no supporting circumstances—in fact, the circumstances were of a contrary nature such as to render the evidence purely negative and sterile of any probative value. *Hofford v. Illinois C. R. Co.,* 138 Iowa, 543, 110 N. W., 446; *Baltimore & Ohio R. Co. v. State,* 96 Md., 67, 53 A., 672.

Speaking of the application of the distinction between the two classes of evidence made by rule of thumb, Mr. Wigmore says: "The rule is a discredit to the science of law, and should be discarded. The vain lucubrations to which it leads have no relation to the real probative value of specific testimony." 1 Wigmore Ev., 2d Ed., section 664. In most states where, as in ours, the trial judge is prohibited from expressing an

opinion on the evidence, such comparisons are held for error as necessarily involving an expression of opinion. The Chamberlayne Trial Evidence, Tompkins (1936), p. 107, section 136; *Atchison, etc., R. Co. v. Feehan,* 149 Ill., 202, 36 N. E., 1036; *Erhman v. Nassau Elec. R. Co.,* 48 N. Y. S., 379; *Lonis v. Lake Shore, etc., R. Co.,* 111 Mich., 458, 69 N. W., 642.

The attitude of our own Court on the subject is clearly set forth in *Rosser v. Bynum,* 168 N. C., 340, 344, 84 S. E., 393, and cases cited.

In *Smith v. McIlwaine,* 70 N. C., p. 287, the Court said: "Such rule is subject to so many exceptions as not to be of practical use; and if carelessly administered may work much mischief." And in *Reeves v. Poindexter,* 53 N. C., 308, *Judge Manly,* speaking for the Court, said: "With respect to the rule, it is clear that its applicability to any state of facts must depend upon whether the negative testimony can be attributed to inattention, error, or defect of memory." In the case at bar it amounts to no more than a contradiction between witnesses, and the question is "to which side, under all circumstances, is credit due?" *Reeves v. Poindexter, supra.* In *Rosser v. Bynum, supra,* these authorities are cited in support of the principle involved in our present holding. There the inquiry was directed toward the presence or absence of a certain notation on a check at the time it was given, there being evidence both ways, and the Court said: "In the case before us there is a direct contradiction between the witnesses on a material fact to which their attention was directed, and the issue should have been submitted to the jury without comment as to the existence and application of the rule referred to."

We think the case at bar comes within the principle approved in *Rosser v. Bynum, supra,* and cases cited therein, and that the special instructions asked for should have been declined.

It may be noted here that much of the defendant's evidence challenging the truth of Arlie Dunn's statement that the signal was not given is in the negative form of statement. Witnesses said they did not see him at the scene of the wreck, yet this was thought of such substantial import that attention was drawn to this phase of the case repeatedly throughout the charge.

In *Johnson v. R. R., supra,* the Court was dealing with the question whether there was a scintilla of evidence and the negative character of the evidence was a proper subject of discussion. This Court, of course, is not bound by the rule forbidding an expression of opinion, and its discussions may not always be embodied in instructions to the jury *in ipsissimis verbis* without danger of infringing the rule.

But whatever attitude is taken with regard to the propriety of instituting such a comparison, we come to the independent statement in the

challenged instruction that plaintiff's evidence is not only negative, but that it is weak. This is an inadvertent but nevertheless direct expression of opinion on the weight of the evidence which entitles the plaintiff to a new trial. It is so ordered.

New trial.

CITY OF RALEIGH v. J. R. JORDAN ET AL.

(Filed 19 June, 1940.)

1. Taxation § 40d—Action to enforce lien for taxes under C. S., 7990, for year 1926 and years prior thereto held barred by ch. 181, Public Laws of 1933.

An action by a municipality under C. S., 7990, to foreclose the lien for taxes for the years 1925 and 1926, is barred by the provision of chapter 181, section 7, Public Laws of 1933, since the Legislative intent to bar the enforcement of all liens for unpaid taxes for the year 1926 and the years prior thereto, under whatever guise attempted, is apparent from the use of the phrase "all tax liens" in the Act of 1933, and the fact that at the time of the passage of the act of 1933 foreclosure of tax sales certificates under C. S., 8037, was already barred, and the fact that the Act of 1933 provides for the refunding of taxes only for the years subsequent to 1926. The discretionary provisions contained in section 14 of the Act of 1933 were not applicable to plaintiff municipality.

2. Same—

The Legislature has the power to deal with the lien of taxes as it sees fit, and may determine when there should be a lien, when it should attach, and when it should cease.

STACY, C. J., dissenting.

BARNHILL and WINBORNE, JJ., concur in dissent.

APPEAL by plaintiff from *Williams, J.*, at March Term, 1940, of WAKE. Affirmed.

P. H. Busbee and John G. Mills, Jr., for plaintiff.

R. W. Winston, Jr., for defendant Insurance Company.

CLARKSON, J. This was a civil action instituted by the city of Raleigh under C. S., 7990, to enforce a lien for unpaid taxes for the years 1925 and 1926. Taxes for those years were levied on certain lots in the city of Raleigh then owned by J. R. Jordan and C. P. Grantham. These lots were subsequently acquired by the defendant, the Metropolitan Life Insurance Company, in 1931.

The cause was heard upon an agreed statement of facts. The court below held that under the provisions of ch. 181, Public Laws of 1933, the

taxes on this property for 1925 and 1926 were barred and uncollectible. Plaintiff appealed.

Section 7 of the Act of 1933 is in these words: "All tax liens held by counties, municipalities, and other governing agencies for the year one thousand nine hundred and twenty-six and the years prior thereto, whether evidenced by the original tax certificates, or tax sales certificates, and upon which no foreclosure proceedings have been instituted, are hereby declared to be barred and uncollectible."

It seems reasonably clear that it was the intention of the Legislature to bar the enforcement of liens for unpaid taxes for the year 1926 and prior years, under whatever guise attempted, and that this intention is adequately expressed in the act. Nor do we think there is any constitutional limitation upon the power of the General Assembly which would invalidate the enactment of such a law. One of the purposes of the Act of 1933 was to permit past due taxes to be refunded, that is, to permit the counties and municipalities to enter into agreements with distressed taxpayers by which the taxes might be paid by installments. But the statute gives the counties no power to enter into any arrangement with regard to taxes for the year 1926, or any years prior thereto. The act permitted the refunding for the years subsequent to 1926 only. The use of the phrase "all tax liens" was obviously intended to include more than tax sales certificates, and to render uncollectible all taxes, however the lien was evidenced, upon which no foreclosure proceeding had been brought. The term "held," as used in this connection, may not be limited to the physical holding of a tangible thing, but is sufficiently comprehensive to include rights appertaining.

The power of the Legislature to release delinquent taxes, where not forbidden by the Constitution, is well recognized. Cooley on Taxation, 4th Edition, section 1254; *Illinois Central Railroad Co. v. Commissioners,* 128 Ky., 268, 108 S. W., 245; *Auditor-General v. O'Connor,* 83 Mich., 464, 47 N. W., 443; *Stone v. Comrs.,* 210 N. C., 226, 186 S. E., 342.

In some states the Constitution directly forbids the Legislature to pass any law releasing or remitting taxes. There is no such provision in our Constitution. If other parts of the Constitution should be considered as preventing the direct release of taxes, there would seem to be no question that the Legislature may deal with the lien of taxes as it sees fit, may determine when there should be a lien, when it should attach, and when it should cease. Compare: *S. v. Fibre Co.,* 204 N. C., 295, 168 S. E., 207, and cases cited; *Lumber Co. v. Graham County,* 214 N. C., 167, 198 S. E., 842, and statutes cited. The effect of this act is to destroy the lien, and, therefore, C. S., 7990, does not afford an appropriate remedy. The instant action is not to recover taxes from a delin-

quent taxpayer but to enforce a lien on land acquired by the present owner from the delinquent taxpayer, five years after the taxes were levied. It should be understood that in 1933, when this act was passed, action on tax sales certificates for 1926 and prior years under the foreclosure act, C. S., 8037, had already become barred by the time limitation in the foreclosure act itself.

The discretionary provision contained in section 14 of the act does not apply to Wake County. We conclude that the judgment of the court below should be

Affirmed.

STACY, C. J., dissenting: My vote is for a reversal of the judgment below.

The facts are not in dispute. It is admitted that city taxes, amounting to $310.50, were duly levied against the lots in question for the years 1925 and 1926. The Metropolitan Life Insurance Company purchased the property at foreclosure sale in 1931, subject to the lien of these taxes. The taxes have not been paid.

I. *The construction of the statute.*

Admittedly, the plaintiff is entitled to enforce collection of the taxes in question in this action brought under C. S., 7990, *New Hanover County v. Whiteman,* 190 N. C., 332, 129 S. E., 808, unless they are barred and rendered uncollectible by section 7, ch. 181, Public Laws 1933, which provides: "All tax liens held by counties, municipalities and other governing agencies for the year one thousand nine hundred twenty-six and years prior thereto, whether evidenced by the original tax certificates or tax sales certificates, and upon which no foreclosure proceedings have been instituted, are hereby declared barred and uncollectible."

This language standing alone, or considered without reference to other provisions of the act, might naturally lead to some ambiguity. But taken contextually the intent of the lawmaking body is apparently involved in no serious doubt.

As recited in the title and the preamble to the act, the primary purpose was to authorize counties, municipalities and other governing agencies, in those localities to which it is applicable, "to refund tax sales certificates." The first six sections of the act deal with such refunding for the years 1927 to 1931, both inclusive, and in section 7 it is provided that all tax liens held by counties, municipalities and other governing agencies for 1926 and prior years, "whether evidenced by the original tax certificates, or tax sales certificates, and upon which no foreclosure proceedings have been instituted," shall be barred and rendered uncollectible, giving clear indication, we think, that what the General Assem-

bly intended to cut short was the foreclosure of certificates for the years designated upon which no court proceedings had theretofore been instituted. *Wilkes County v. Forester,* 204 N. C., 163, 167 S. E., 691. Note, the liens to be barred are those *held* by counties, municipalities, or other governing agencies, which connotes something more than levied, *i.e.,* sale and purchase, whether evidenced by the original tax certificates or tax sales certificates, and upon which no foreclosure proceedings have been instituted. As further indication of this intent, it is provided that no part of the section shall apply to liens "for street and/or sidewalk improvements." Such liens are not evidenced by tax certificates or tax sales certificates.

Moreover, it is not after the manner of our Assembly to grant immunities or special privileges to those who have neglected to pay their taxes. Rather, the idea was to preclude foreclosure suits on certificates when held by those governing agencies which, for so long, had slept on their rights. *Asheboro v. Morris,* 212 N. C., 331, 195 S. E., 424; *Logan v. Griffith,* 205 N. C., 580, 172 S. E., 348.

This view is strongly fortified by section 14 of the act wherein it is provided that the applicability of the act in a number of counties shall be "within the discretion of the governing bodies of said counties or municipalities therein"—a provision quite incompatible with the opposite interpretation, as, in that view, it clearly leads to an unwarranted delegation of legislative authority. *Provision Co. v. Daves,* 190 N. C., 7, 128 S. E., 593. *Cf. Livesay v. DeArmond,* 131 Or., 563, 284 Pac., 166, 68 A. L. R., 422. The fact that this discretion is not extended to Wake County renders it no less apposite in searching for the legislative intent.

The whole act deals with "tax certificates." This is so, not only in the title, but throughout the act. There is no occasion for lifting section 7 from its setting. *Warrenton v. Warren County,* 215 N. C., 342, 2 S. E. (2d), 463. Language is but a vehicle of thought and may vary in color and content according to the circumstances of its use. *Cole v. Fibre Co.,* 200 N. C., 484, 157 S. E., 857. The pervading purpose of a statute is to prevail over any awkwardness of expression. *Belk Bros. Co. v. Maxwell,* 215 N. C., 10, 200 S. E., 915; *S. v. Earnhardt,* 170 N. C., 725, 86 S. E., 960. "It is fully established that where a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded"—*Hoke, J.,* in *S. v. Barksdale,* 181 N. C., 621, 107 S. E., 505.

This interpretation, however, is rejected by the majority. A different meaning is ascribed to the section. As a result, the owner of property who neglected to pay his taxes for the year 1926, and years prior thereto,

is rewarded for his delinquency by a gift of his taxes. The State then abandons its primary function as a protector of rights and becomes a giver of gifts. *Briggs v. Raleigh,* 195 N. C., 223, 141 S. E., 597.

In this view of the matter it is pertinent to inquire whether any constitutional offense was intended in section 7 of the act. Such ought not to be presumed; rather, a contrary implication should be indulged. *S. v. Lueders,* 214 N. C., 558, 200 S. E., 22. It is never to be presumed that the Legislature *intends* an infringement of the Constitution. *Jacobs v. Smallwood,* 63 N. C., 112. "A statute must be so construed, if fairly possible, as to avoid, not only the conclusion that it is unconstitutional, but also grave doubts upon that score." *In re Seizure of Seven Barrels of Wine,* 79 Fla., 2, 83 So., 627; 11 Am. Jur., 735, *et seq.;* 6 R. C. L., 78, *et seq.*

II. *The pertinent constitutional provisions.*

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 the amendment because such was the law at the time the taxes in question were levied, albeit the rule of uniformity within the class was not changed by the amendment. *Odd Fellows v. Swain,* 217 N. C., 632.

2. "No man or set of men are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services." Art. I, sec. 7.

It has been said in a number of cases that these provisions of the Constitution announce the principle of uniformity in taxation, with special privileges to none except in consideration of public services. *R. R. v. Alsbrook,* 110 N. C., 137, 14 S. E., 652; *Simonton v. Lanier,* 71 N. C., 498. The failure to pay taxes is not classified as a public service. *R. R. v. Comrs.,* 82 N. C., 260.

To grant exemptions to those who have neglected to pay their taxes without extending some comparable privilege to those who have paid, is wanting in equality. *S. v. Graham,* 17 Neb., 43, 22 N. W., 114. The thesis of the Constitution is that all taxpayers, similarly situated, are entitled to the same treatment from the government they support. *Leonard v. Maxwell,* 216 N. C., 89, 3 S. E. (2d), 316. To make the levy uniform and then to release it in respect of a few, simply because they have neglected to pay, is not only to run counter to the rule of uniform-

ity, but also to accomplish by indirection that which may not be done directly. *LeDuc v. City of Hastings,* 39 Minn., 110, 38 N. W., 803. The final result is unequal taxation. *Demoville v. Davidson County,* 87 Tenn., 214, 10 S. W., 353.

Uniformity is not the theme of the section as interpreted by the majority. Special privilege is its essence. *Edgerton v. Hood,* 205 N. C., 816, 172 S. E., 481; *S. v. Harris,* 216 N. C., 746, at p. 753, 6 S. E. (2d), 854.

Under constitutions similar to ours, where there are provisions for equality and uniformity, as well as a requirement that all property be taxed, it has been held that acts releasing, abating or remitting delinquent taxes are void. *S. v. Armstrong,* 17 Utah, 166, 53 P., 981, 41 L. R. A., 407; *Sheppard v. Hidalgo County,* 83 S. W. (2d), 649 (rehearing granted on passage of later act. 126 Tex., 550).

Speaking to the identical question in *S. v. Butts,* 111 Fla., 630, 149 So., 746, 89 A. L. R., 946, *Davis, C. J.,* concurring, said: "It cannot well be denied that, when the proper tax officers have legally placed upon each individual his share of the public burden of taxation, the Legislature of the state has no right to lift it from him to the prejudice of other taxpayers, or to the detriment of the public credit, either in the form of an abatement before, or in the form of a gift after, collection, or by a return to the taxpayer unburden his forfeited property, for this being done, a deficiency results in the public revenues which must be supplied by the imposition of additional tax assessments and levies upon the non-favored class, thereby violating the fundamental constitutional requirement of all taxation, which is that it shall bear equally upon all, with special privileges to none."

Again, in *Simpson v. Warren,* 106 Fla., 688, 143 So., 602, it is said: "Where a statute which provides for the collection of a particular tax is valid, and taxes from some have been collected under it, the Legislature is without power to unconstitutionally discriminate against, and deny the equal protection of the laws to, the class of taxpayers who have already paid such tax while the statute was in force, by arbitrarily remitting or wiping out by repeal of the statute or otherwise the liability of those who have by their delinquency evaded or postponed payment for the time being."

Much of the cognate legislation in other states is reviewed in the case of *Steinacher v. Swanson,* 131 Neb., 439, 268 N. W., 317.

No authoritative decision has been found at variance with the views expressed in this dissent. The cases cited in the opinion of the majority do not sustain the opposite conclusion.

The suggestion that "the instant action is not to recover taxes from a delinquent taxpayer" finds support in neither brief, and departs from the

record. The prayer of the complaint is, that the plaintiff "recover for taxes due." In the agreement of the parties, it is stipulated that "this is a civil action . . . for the collection of 1925 and 1926 taxes, plus interest and costs."

BARNHILL and WINBORNE, JJ., concur in dissent.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1940

J. B. CALDWELL v. SOUTHERN RAILWAY COMPANY, JAMES S. EAGLE AND JONES DALE.

(Filed 18 September, 1940.)

1. Railroads § 9—In this action to recover for a crossing accident, plaintiff's evidence held not to establish contributory negligence as matter of law.

Plaintiff's car was struck by defendant's train at a grade crossing. Plaintiff's evidence tended to show that the crossing consisted of seven tracks, that the accident occurred on a foggy night, that three buildings, oil tanks, a coal shute and piles of coal were situate along the tracks on plaintiff's left, that before entering upon the crossing plaintiff stopped and looked both ways and did not hear or see any train approaching, that he crossed the first five tracks, that in the fifty feet between the fifth and sixth track he brought his car practically to a stop, that he then entered upon the sixth track and was struck by defendant's train, approaching from plaintiff's left, which he did not see until it was upon him, because of the atmospheric conditions, the obstructions, and the curvature of the track which threw the beam of the engine's headlight to the north of the track. *Held:* The evidence does not disclose contributory negligence as a matter of law, and defendant's motion for judgment as of nonsuit on this ground was properly overruled.

2. Trial § 22b—

On a motion to nonsuit, the evidence will be considered in the light most favorable to plaintiff.

3. Evidence § 26—

Where the visibility under the atmospheric conditions existing at the time of accident in suit is germane, testimony of witnesses as to the dis-

tance they were able to see at the place of the accident under similar atmospheric conditions is competent, but where the evidence shows that the night of the accident was foggy, testimony of the witnesses as to visibility at night in a misty rain or overcast sky does not disclose substantially similar conditions.

4. Appeal and Error § 39d—

The exclusion of testimony of two witnesses as to the visibility at the scene of the accident, even conceding their testimony discloses atmospheric conditions similar to those existing at the time of the accident, will not be held for prejudicial error when other witnesses testify without objection to substantially the same effect as the testimony excluded, and surveys, maps and photographs of the *locus in quo* and testimony of witnesses as to the location and surroundings at the scene of the accident, are admitted in evidence.

5. Railroads § 8—

Ordinarily, where no unusually dangerous or hazardous conditions exist at a grade crossing, timely signals by sounding the bell or blowing the whistle are sufficient warning of the approach of a train.

6. Same—Where crossing is unusually hazardous, railroad company may be under duty in exercise of due care to provide warning devices.

Where a railroad crossing is situate in a populous section and is much used by the public, and the crossing is obstructed by buildings or other objects proper in themselves, or by reason of the noise and confusion incident to business activity at the scene, the usual warnings by bell or whistle may be inadequate, it is for the jury to determine whether the crossing is peculiarly and unusually hazardous so as to require the railroad company, in the exercise of due care under the circumstances, to maintain a flagman or provide gates or gongs for the protection of the traveling public, and in this case, upon allegation and evidence that the crossing in suit, located in a populous section, was much used by the public, and that the view of travelers was obstructed by buildings, a coal chute and other objects along the right of way, the submission of the question to the jury is without error.

7. Same—Failure to provide signal devices at hazardous crossing does not in itself constitute negligence.

An instruction that if the jury should find that the crossing in suit was peculiarly and unusually hazardous and that the railroad company failed to maintain a flagman or any mechanical warning device, such failure would constitute negligence entitling plaintiff to recover if the proximate cause of the accident, is error as implying that upon proof that a crossing is unusually hazardous the failure to provide a flagman or mechanical signal device would in itself constitute negligence, while the correct rule is that proof that a crossing is unusually hazardous is merely evidence from which the jury may find that warning devices should be maintained in the exercise of ordinary care. In this case the error was rendered harmless by the fact that the correct principle of law was repeatedly stated in other portions of the charge, it being apparent that the jury was not misled by the inadvertence.

8. Appeal and Error § 6f—

The Supreme Court is not required to examine an excerpt from the charge for error in aspects not assigned as the ground for exception,

Rules of Practice in the Supreme Court No. 28 and 27½, but it may nevertheless do so in its discretion.

9. Appeal and Error § 39e—

Where the court repeatedly states the correct rule of law applicable, an excerpt containing an incomplete statement of the principle will not be held for reversible error when it is apparent that the jury was not misled thereby and that appellants were in no way prejudiced.

10. Appeal and Error § 39a—

A new trial will not be awarded for error which, upon consideration of all circumstances surrounding the trial, could not have misled the jury or prejudiced the parties.

11. Trial § 32—

Where requests for instructions, embodying applicable principles of law, are substantially given in the charge, it is sufficient.

12. Railroads § 9—

In an action to recover for a crossing accident, a requested instruction that plaintiff would be guilty of contributory negligence unless his view was obstructed by fog or mist is properly refused when plaintiff's evidence also tends to show that his view was obstructed by buildings and other objects along the tracks.

13. Appeal and Error § 39d—

An exception to the exclusion of the testimony of a witness as to the contents of his weather report for the night on which the accident in suit occurred, cannot be sustained when it appears that the weather report was admitted in evidence and that the witness testified as to the weather conditions existing at the time.

CLARKSON, J., concurring.

BARNHILL, J., dissenting.

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

APPEAL by defendant from *Gwyn, J.*, at November Term, 1939, of ROWAN. No error.

This was an action to recover damages for injury to person and property alleged to have been caused by the negligence of the defendants, growing out of a collision between plaintiff's automobile and one of defendant railway company's trains, then being operated by the individual defendants as engineer and fireman respectively. The injury occurred on the night of 7 December, 1937, at a grade crossing on North Lee Street, in the city of Salisbury, North Carolina.

Plaintiff alleged failure of the defendants to give timely warning of the approach of the train by whistle or bell, and also alleged negligent omission to maintain gates, flagmen or other adequate means of warning at the crossing.

The following paragraph of the plaintiff's complaint, admitted in the answer, was offered in evidence:

"That the City of Salisbury is a municipal corporation of approximately 18,000 inhabitants, adjoining the town of Spencer on the north with an approximate population of 4,000 inhabitants, and that in said City of Salisbury and on the north side of the right of way of the North Carolina Railroad there are two main arterial highways leading from the City of Salisbury, northwardly through the suburbs of said city and town to the Town of Spencer, said highways or streets being known as North Main Street and North Lee Street in said city, and that both of said streets cross at street levels the line of the Southern Railway Company formerly known as the Western North Carolina Railroad, leading from Salisbury to Asheville, North Carolina; that the North Lee Street crossing, consisting of seven tracks, is not equipped with gates, electric signals, watchmen or other device or appliance to warn the traveling public of the approach of said trains at said crossing."

There was also evidence that the North Lee Street crossing was a much traveled crossing in the business section of the city, in the locality of railroad station, mills and business houses.

The plaintiff testified that in proceeding north on North Lee Street, the direction in which he was driving his automobile at the time of the injury, seven railroad tracks are crossed at street level; that parallel with North Lee Street, to the west, some 350 feet distant, is Main Street, which is also crossed at grade by defendant railway company's tracks, the general direction of the tracks being east and west.

The plaintiff described the obstructions to the view looking west from the North Lee Street crossing toward Main Street, as follows: "Between the North Lee Street crossing and the Main Street crossing, there is a coal company chute that runs out to the railroad track and oil tanks are close to the track. There is another building on down close to the railroad track which faces Main Street. I think there are about three buildings, in addition to the oil tanks between Lee Street and Main Street, which look like they are up against the railroad track. The situation in this North Lee Street crossing is now like it was at the time of my injury. Going in a northerly direction there are seven tracks which I had to cross. They are almost in half circle, beginning east of the Vance mill crossing and going west toward the Main Street crossing. At the time of my injury, there was a boxcar on the sidetrack next to the Thomas & Howard building on my left. . . . On the afternoon prior to my injury, when I went over this crossing, going in a southerly direction, I observed on the left a pile of crossties between tracks 5 and 6. This was on my left going in a southerly direction. I also noticed a boxcar next to the Thomas & Howard building; on down the track there were several piles of coal and a coal car. There is a coal chute runs out against the railroad and there was a coal car there. When I came back

that night, going in a northerly direction, I could see this boxcar was still there next to Thomas & Howard. Down the track to my left I could not see as far as the Main Street crossing. I couldn't see distinctly what was down there, but it appeared like those obstacles were still there. In other words, obstacles were down there that prevented me from seeing down there. . . . Down there about where the coal car was there was a coal chute, several piles of coal and just beyond that the Texaco oil tanks and two buildings below that and Main Street."

Plaintiff testified that on the night of the injury, before entering upon the crossing at track 1, he stopped, looked both ways, and neither saw nor heard anything; that the left window of his automobile was down from the top an inch and a half. "It was a cold, cloudy, drizzly day. That night it was foggy and you couldn't see very far ahead of you from the automobile lights. . . . It was foggy, the headlights of my automobile did not throw a light over twenty-five feet. . . . To my left the track comes in almost half circle and the buildings I quoted made it impossible for me to see down to North Main Street." He testified that he proceeded carefully across tracks, 1, 2, 3, 4 and 5; that between tracks 5 and 6 there was a space of 50 feet; that halfway between these tracks he brought his car "almost to a complete stop between tracks 5 and 6." He said, "I came to practically a stop between fifth and sixth tracks. . . . The track curves and the headlight of the engine (on track 6) is thrown to the left of the track. When the train coming (comes) around that curve throwing a light the other way that car, coal piles and those buildings would obstruct your view. At a point 25 feet south of the sixth track I couldn't see a train approaching from the west more than 25 feet on that particular night because of the obstructions I have just described and the weather conditions combined."

Plaintiff testified that before starting to cross track 6 he looked in both directions and did not see or hear anything; that in traversing the short distance to track 6 he was traveling five to ten miles per hour; that he heard no whistle or bell; that he did not see the headlight or the train until it was within 8 feet of him. The front of his automobile was struck by the locomotive of the defendant railway's train coming from the west on track 6, causing injury to himself and to his automobile.

Defendant offered evidence tending to show that there were no obstructions to the view looking west to Main Street from a point 25 feet south of track 6, and that the night of 7 December, 1937, was clear and the weather cold.

Issues addressed to questions of negligence, contributory negligence and damage were submitted to the jury and answered in favor of plaintiff. From judgment predicated on the verdict, defendants appealed.

Hayden Clement, R. Lee Wright, and F. Grainger Pierce for plaintiff, appellee.

W. T. Joyner and Linn & Linn for defendants, appellants.

DEVIN, J. 1. Defendant's motion for judgment of nonsuit, on the ground that plaintiff's evidence conclusively showed contributory negligence on his part, was properly denied. From a careful consideration of the evidence in the record before us, viewed in the light most favorable to the plaintiff in accord with the accepted rule on motions of this kind, we are led to the conclusion that it was a case for the jury. *Meacham v. R. R.*, 213 N. C., 609, 197 S. E., 189; *Quinn v. R. R.*, 213 N. C., 48, 195 S. E., 85; *Cole v. Koonce*, 214 N. C., 188, 198 S. E., 637; *Williams v. Express Lines*, 198 N. C., 193, 151 S. E., 197; *Johnson v. R. R.*, 214 N. C., 484, 199 S. E., 704; *Coltrain v. R. R.*, 216 N. C., 263.

2. The defendants assign as error the ruling of the court below in sustaining plaintiff's objection to the testimony of two witnesses as to the result of observations made by them at the Lee Street crossing nearly two years after the injury. One of these witnesses would have testified that at the time of his observation, when the weather conditions were "cloudy but not raining," the headlight of a locomotive coming from the west to the Lee Street crossing could be seen for a distance of 350 feet from a point midway between tracks 5 and 6. The other witness would have testified at the time of his observation, when the weather conditions were "kind of misty," the headlight was visible 80 to 100 feet from the same point. Ordinarily, testimony of witnesses as to observations, under circumstances like those about which testimony has been given, would be considered competent. *S. v. Holland*, 216 N. C., 610. But here it appears that there was a material difference in the atmospheric conditions at the time these witnesses made their observations, in 1939, from the fog which plaintiff testified obscured his vision on the night of the injury in 1937. And it further appears that other witnesses, without objection, had testified to substantially the same effect as that proposed to be offered by these witnesses. There were surveys, maps, photographs and the testimony of several witnesses as to the location and surroundings. The exception to the ruling of the trial judge in excluding the testimony of the two witnesses may not be held for error. *Conrad v. Shuford*, 174 N. C., 719, 94 S. E., 424; *Cook v. Mebane*, 191 N. C., 1, 131 S. E., 407; *Willis v. New Bern*, 191 N. C., 507, 132 S. E., 286; *Wolfe v. Smith*, 215 N. C., 286, 1 S. E. (2d), 815; *Brown v. Montgomery Ward & Co.*, 217 N. C., 368; *S. v. Elder*, 217 N. C., 111; Wigmore on Ev. (2nd Ed.), sec. 442.

3. Defendants assign as error the admission by the trial court of evidence tending to show that the railroad crossing on Lee Street was

peculiarly and unusually hazardous to travelers, and they except to the action of the court in submitting to the jury the question whether under all the circumstances this crossing was unusually hazardous, so as to require the railway company, in the exercise of due care, to erect gates, maintain a flagman, or provide other warning devices at the crossing to avoid injury to those traversing it.

It is apparent that under the allegations in the complaint, and the testimony offered in support thereof, there was no error in submitting to the jury the evidence pertaining to this alleged element of negligent omission of duty on the part of the defendant railway company. *Dudley v. R. R.*, 180 N. C., 34, 103 S. E., 905; *Blum v. R. R.*, 187 N. C., 640, 122 S. E., 562; *Batchelor v. R. R.*, 196 N. C., 84, 144 S. E, 542; *Moseley v. R. R.*, 197 N. C., 628, 150 S. E., 184; *Eller v. R. R.*, 200 N. C., 527, 157 S. E., 800; *Nash v. R. R.*, 202 N. C., 30, 161 S. E., 857; *Harper v. R. R.*, 211 N. C., 398, 190 S. E., 750; *White v. R. R.*, 216 N. C., 79. It is well settled that where a railroad track crosses, at the same level, a public road or street, the law imposes upon the operator of the railroad the duty to give reasonable and timely warning of the approach of a train to the crossing. Ordinarily, at a grade crossing where no unusually dangerous or hazardous conditions exist, timely signals by sounding the bell or blowing the whistle are deemed adequate. But where there are circumstances of more than ordinary danger and where the surroundings are such as to render the crossing peculiarly and unusually hazardous to those who have a right to traverse it, a question of fact is raised for the determination of the jury whether under the circumstances the operator of the railroad has exercised due care in providing reasonable protection for those who use the crossing, and whether the degree of care which the operator of the railroad is required to exercise to avoid injury at grade crossings imposes the duty to provide safety devices at the crossing. It was said in *R. R. v. Ives*, 144 U. S., 408, quoted in *Batchelor v. R. R.*, 196 N. C., 84: "It seems, however, that before a jury will be warranted in saying, in the absence of any statutory direction to that effect, that a railroad company should keep a flagman or gates at a crossing, it must be first shown that such crossing is more than ordinarily hazardous; as, for instance, that it is a thickly populated portion of a town or city; or, that the view of the track is obstructed either by the company itself or by other objects proper in themselves; or, that the crossing is a much traveled one and the noise of approaching trains is rendered indistinct and the ordinary signals difficult to be heard by reason of bustle and confusion incident to railway or other business; or, by reason of some such like cause."

It is a question of due care under the circumstances. The railroad company must use such reasonable care and precaution as ordinary

prudence would indicate. *R. R. v. Kuhn,* 86 Ky., 578; 22 R. C. L., 990. Where the conditions existing at or about the crossing are such as to render the crossing dangerous and hazardous to the traveling public and tend to render the sounding of whistle or bell on the engine inadequate, evidence of such conditions is admissible to aid the jury in determining whether under all the circumstances the railroad company has exercised due care in giving reasonable and timely warning of the approach of the train, and it becomes a question for the jury whether the degree of care which the railroad company is required to exercise to avoid injuries at crossings imposes the duty to provide additional safety devices. *Moseley v. R. R., supra,* 60 A. L. R., 1096.

In *Moseley v. R. R., supra,* it was said: "Where the evidence shows a railroad crossing is for any reason peculiarly dangerous, it is a question for the jury whether the degree of care which a railroad company is required to exercise to avoid accidents at crossings imposes on the company the duty to provide safety devices at the crossing."

Upon this phase of the case the trial judge instructed the jury as follows: "Where a railroad crossing is not peculiarly and unusually dangerous, the exercise of due care on the part of the railroad company does not require it to provide gates, signal devices, watchman, or other such safety methods. However, the exercise of due care on the part of the railroad company may require the erection of gates or signal device or the maintenance of a watchman where the crossing is unusually and peculiarly hazardous. It is for the jury to say whether the crossing in question was, under all the circumstances, peculiarly and unusually hazardous so as to require the railroad in the exercise of due care to erect gates or signal devices or maintain a flagman or such other means of warning and safety. If it should appear that a crossing is a much-used one and situated in a populous area, those facts standing alone are not sufficient to constitute such crossing peculiarly and unusually hazardous so as to require the railroad, in the exercise of due care, to provide gates or signal devices or a watchman or such other means of warning. However, peculiar and particular hazard may arise where the crossing is in a populous community, where it is much used, where there are conditions such as to obstruct the traveler's view as he approaches and enters upon the crossing, where there is noise and confusion and other conditions reasonably calculated to distract the traveler's attention and prevent him from seeing and hearing an approaching train."

After stating the evidence pertaining to this phase of the case, and arraying the contentions of both plaintiff and defendants thereon, the court charged the jury as follows: "The court charges you that if the plaintiff has satisfied you by the greater weight of the evidence, the burden being upon the plaintiff, that the crossing in question, referred

to as North Lee Street crossing, was peculiarly and unusually hazardous, and that the railway company failed to provide gates or signal devices or a flagman or other such means of warning, then the court charges you that such failure on the part of the defendant railway company would constitute negligence, and if you further find from the evidence and by its greater weight that such negligence was the proximate cause of the plaintiff's injury and damage, it would be your duty to answer the first issue, yes." . . .

The defendants excepted to that portion of the charge last quoted. In their brief they challenge the correctness of this instruction on the ground that there was no evidence that the crossing was peculiarly hazardous, so as to justify the submission to the jury of the question of absence of gates, or flagman as an element of negligence. It is apparent that the reason assigned in the brief for bringing forward this exception is insufficient and not borne out by the evidence. Hence, consideration of other aspects of this excerpt from the charge might be deemed not required on this record. (Supreme Court Rules 28 and 27½.) However, appellants' exception duly noted should doubtless warrant us in examining the instruction further, and taking note of the omission of reference to due care in the sentence objected to. This clause standing alone would be erroneous, in that it would seem to imply that, upon proof of the unusual hazard of a crossing, the failure to provide gates, signal devices or flagman would itself constitute negligence upon the part of the railroad company, rather than furnishing evidence from which the jury might find the railway company had failed to exercise due care with respect to the use of reasonable and timely warning devices. *R. R. v. Perkins,* 125 Ill., 127; *R. R. v. Ives, supra.*

But an examination of the entire charge on this point in which the correct rule was repeatedly stated, in connection with other portions of a clear and accurate charge on the law of negligence and contributory negligence applicable to the evidence in this case, leads us to the conclusion that the jury was not misled or the defendants in any way prejudiced thereby. The appellants in their brief do not contend that the result was influenced by the omission herein pointed out. The point of their objection is that the judge erred in referring to the matter at all, rather than in any omission in the language in which his instructions were couched.

An appellate court, by careful examination, may not infrequently find errors in language used or omitted by the trial judge in his instructions to the jury upon issues of fact, but in accord with a less technical and more liberal conception of the power to review, the court may also, upon due consideration of all the circumstances surrounding the trial and in the light of the matter under investigation, perceive that the errors com-

plained of neither misled the jury nor affected the impartiality of the trial.

"Verdicts and judgments are not to be set aside for harmless error, or for mere error and no more. To accomplish this result, it must be made to appear not only that the ruling complained of is erroneous, but also that it is material and prejudicial, amounting to a denial of some substantial right." *Wilson v. Lumber Co.*, 186 N. C., 56, 118 S. E., 797; *Collins v. Lamb*, 215 N. C., 719, 2 S. E. (2d), 863.

4. We have examined the other exceptions noted and find in them no prejudicial error. The defendants' requests for instructions, embodying applicable principles of law, were substantially given in the general charge on the law of negligence and contributory negligence. *Carter v. R. R.*, 165 N. C., 244, 81 S. E., 321. Those containing requests for peremptory instructions were properly refused. The request that the court instruct the jury to answer the issue of contributory negligence in favor of defendants, unless the jury found the vision of plaintiff was obstructed by fog or mist, ignored the relevancy of the testimony of plaintiff as to other obstructions. The exception to the exclusion of the proffered testimony of a witness as to the contents of his weather report for 7 December, 1937, cannot be sustained. The weather report was admitted in evidence and the witness testified the weather on the 7th and 8th was clear.

After a careful examination of the record in this case, we conclude that the issues of fact raised by the pleadings were fairly submitted to the jury, and that in the trial there was no error which should warrant us in setting aside the verdict and judgment of the Superior Court.

No error.

CLARKSON, J., concurring: I concur in the logical and well-written opinion of *Justice Devin*. As I have read with care the record, I set forth the evidence fully and the law applicable to the facts. The dissenting opinion, I think, is meager of facts and deals in technicalities and generalities. I also give much of the charge of the court below—in my opinion perhaps few cases have been tried more ably and carefully.

This is an action for actionable negligence alleging damage, brought by plaintiff against defendant, for injuries sustained at a railroad crossing of defendant company in the city of Salisbury, N. C.

It is well settled that an exception to a motion to nonsuit in a civil action taken after the close of plaintiff's evidence, and renewed by defendant after the introduction of his own evidence, does not confine the appeal to the plaintiff's evidence alone, and a verdict will be sustained under the second exception if there is any evidence on the whole record of the defendant's negligence. The evidence favorable alone to

the plaintiff is considered—defendants' evidence is discarded. The competency, admissibility and sufficiency of evidence is for the court to determine, the weight, effect and credibility is for the jury.

The plaintiff testified, in part: "I have been living in Salisbury since 1932. In going from the freight depot in Salisbury, North Lee Street is used. The freight depot of the Southern Railway Company is about 200 yards from this crossing. In going to the warehouse, North Lee Street is used. In going from Salisbury to the Cartex Cotton Mill and to this warehouse, North Lee Street crossing is used. The Thomas & Howard building adjoins this crossing on the west side. This is a brick building about 30 feet tall and approximately 100 feet long. This building goes up within a few feet of one of the spur tracks. This building runs parallel with the railroad tracks in a westerly direction for a distance of approximately 100 feet. Between the North Lee Street crossing and the Main Street crossing, there is a coal company chute that runs out to the railroad track and oil tanks are close to the track. There is another building on down close to the railroad track which faces Main Street. I think there are about three buildings, in addition to the oil tanks between Lee Street and Main Street, which look like they are up against the railroad track. The situation at this North Lee Street crossing is now like it was at the time of my injury. Going in a northerly direction there are seven tracks which I had to cross. They are almost in a half circle, beginning east of the Vance mill crossing and going west toward the Main Street crossing. . . . I came to the railroad crossing at Thomas & Howard's. There was a boxcar to my left on the Thomas & Howard sidetrack. I had to come to a complete stop because you couldn't see anywhere ahead of you. On my right and next to the railroad was a big truck. *I looked both ways, to the left and right. It was a cold, cloudy, drizzly day. That night it was foggy and you couldn't see very far ahead of you from your automobile lights. I stopped within ten feet of the railroad crossing, looked both ways, didn't see or hear anything and drove on across the tracks. I stopped for several seconds before starting across the track. You could not see anywhere to my left and towards the west, from the point at which I stopped because the building obstructed my view and the boxcar was next to it.* I started across the tracks with my car in low gear, driving slowly and looking both to the right and left. There is a space of approximately 50 feet between the fifth and the sixth tracks. I drove about halfway of that distance and *brought my car almost to a complete stop and looked to the west and also towards my right. I didn't see or hear anything. I did not hear any whistle or bell ringing.* On the right-hand side of the space which I have described, up against the track and beside a telephone pole was a stack of crossties, 8 or 10 feet high. To my left the

track comes in almost half circle and the buildings I quoted a minute ago made it impossible for me to see down to the North Main Street crossing. I brought my car almost to a complete stop in the space which I have described. It was in low gear, pulled the car up there and slowed it down. *It was foggy and you couldn't see but a few feet ahead of you and when I didn't see anything, looking in both directions, I shoved the car in second gear and proceeded across the tracks. When my automobile got about halfway across track No. 6, the train was within 6 feet of me, because it hit me just as I saw it.*

"I could not see over 25 feet that night on account of the condition of the weather. *It was foggy, the headlights of my automobile did not throw a light over 25 feet and the train was coming from the west. Because of the curvature of the track, the engine headlight is thrown to the north of the track.* When I started to cross the last two tracks the speed of my car was between 5 and 10 miles an hour. *After I crossed the fifth track I could not see far enough down to my left to see anything. I didn't see anything after I crossed the fifth track and I was looking. I was hurt on the sixth track, which is a good little piece from the fifth track. The engine struck my automobile at the left door on the driver's side and carried me down the track 50 or 60 feet.* The train went at least that much farther. I would say that the train was running 30 or 35 miles an hour when it struck me because it was about 8 feet of me when I saw it and it hit me like that. (Witness snaps finger.) When I was between tracks 5 and 6 looking to the west, *there was something that hindered me from seeing very far down the track. I don't know whether it was a coal car, pile of coal at the chute, or an oil tank at the Texaco service place, and the condition of the weather too.* . . .

"On the afternoon prior to my injury, when I went over this crossing, going in a southerly direction, I observed on the left a pile of crossties between track 5 and 6. This was on my left going in a southerly direction. I also noticed a boxcar next to the Thomas & Howard building; on down the track there were several piles of coal and a coal car. There is a coal chute runs out against the railroad and there was a coal car there. When I came back that night, going in a northerly direction, I could see this boxcar was still there next to Thomas & Howard. Down the track to my left I could not see as far as the Main Street crossing. I couldn't see distinctly what was down there, but it appeared like those obstacles were still there. I could not say the boxcar was still there. *In other words, obstacles were down there that prevented me from seeing down there.* . . . *When the train coming around that curve throwing a light the other way that car, coal piles and those buildings would obstruct your view.* At a point 25 feet south of the sixth track I

couldn't see a train approaching from the west more than 25 feet on that particular night because of the obstructions I have just described, and the weather conditions combined. If there hadn't been any fog, I couldn't say how far I could have seen. On that night I couldn't see the headlight of the engine or the lighted cars more than 25 feet. . . . I didn't see any light, didn't hear any noise and didn't know anything about the train being on the track until it was within 8 feet of me."

At the request of counsel for the defendants, concurred in by counsel for plaintiff, *the jury was allowed to review the crossing in question.* Accompanied only by the sheriff of the county and the judge presiding, the jury viewed the premises in accordance with an order of the court, agreed to by the parties to the action.

C. Y. Kirk testified, in part: "I don't remember hearing any whistle or bell before the crash. . . . It was a misty night. . . . I was in position to hear the whistle or bell rung on that train. I did not hear any. *Where I was working was about 75 feet from the crossing.*"

Henry Fox testified, in part: "It had been raining and was foglike. I remember that because the top of the truck was wet. I had not seen or heard the train before the collision. *I was in about 75 feet of the crossing and was in position to hear the train whistle or bell. I did not hear the whistle or bell or any other sound.* I did not see Mr. Caldwell before the collision. I ran down to the train with Cleophus Kirk. Somebody helped me get Mr. Caldwell out of the car. He was taken to the hospital."

B. E. Altman testified, in part: "I remember the weather on the night of December 7, 1937. It was somewhat foggy and misty."

Homer Lingle testified, in part: "I reside in Salisbury. I saw Mr. Caldwell's car at the Salisbury Motor Company the day following the collision. It was damaged on the left side between the door and the hood, where the driver sits. The front of the car was not damaged. I am familiar with Lee Street crossing in Salisbury. *In my opinion 300 or 400 cars cross over it a day. That estimate is based on my use of the crossing.*"

C. V. Kirkman, a witness for defendants, testified, in part: "Track No. 1, as shown on the blueprint, is used as a storage track for Thomas & Howard. Track No. 2 serves the Texaco Oil Company and the Henderlite Coal Company. Track No. 3 is used to operate train on. It is a 'Y' track. Tracks 4 and 5 are team tracks used for the loading and unloading of freight at the freight depot. *Track No. 6 carries eastbound traffic and Track No. 7 westbound traffic. Track No. 3* is kept open for the operation of trains. *We operate three passenger trains over it a day between Salisbury and Asheville.* That was true in 1937 as well as today. (Cross-examination.) *Five passenger trains* are

operated over Tracks 6 and 7 every 24 hours. *Six or seven freight trains are operated over Tracks 6 and 7 a day.* Track No. 1 also serves an oil company, as well as Thomas & Howard. *Lee Street crossing is constantly used by the public day and night.* (Q.) Please state whether or not on the 7th day of December, 1937, the Lee Street crossing was equipped with any electric gong, signal, night watchman or gates, or any other device to warn the traveling public of the approach of trains? Ans.: *There was no device at the crossing. There was no stationary device or night watchman.*"

J. E. Alexander testified, in part (on cross-examination): "*Lee Street crossing is constantly and habitually used by the public as a thoroughfare day and night.*"

The court below charged the jury: "Negligence, gentlemen of the jury, *is the doing of some act which a man of ordinary care and prudence would not do under the same or similar circumstances. It is or may be the failure to do some act which a man of ordinary care and prudence would do under the same or similar circumstances.* But every negligent act, gentlemen of the jury, is not a ground for recovery of damages. Before a negligent act may be a ground for the recovery of damages it must be what the law terms actionable negligence, that is to say, it must be the proximate cause of the injury and damage. Now by proximate cause is meant what that term implies, the real cause, the efficient cause, the cause, unbroken by any intervening agent, produces the result in continuous and natural sequence, the cause without which the injury would not have happened or occurred, and one from which a person of ordinary prudence could reasonably foresee that injury would result. *You will bear that definition in mind, gentlemen of the jury, throughout the trial.*" Contributory negligence was also correctly defined in the charge.

The court below further charged the jury: "Where a railroad track crosses a public highway both a traveler and a train operated upon the railroad have equal rights to cross. But the traveler must yield the right of way to the train in the ordinary course of the operation of trains. While the train has the right of way at a crossing, it is the duty of the engineer and those in charge of its operation to exercise due care in keeping a proper lookout for danger and to give timely signals and warning in approaching such crossing. When approaching a public crossing the employees in charge of a train and a traveler upon a highway are charged with the mutual and reciprocal duty of exercising due care to avoid inflicting or receiving injury, due care being such as a prudent person would exercise under the circumstances at the particular time and place. Both parties are charged with the mutual duty of keeping a careful lookout for danger, and the degree of diligence to be used

on either side is such as a prudent man would exercise under the circumstances of the case in endeavoring to perform his duty. On reaching the crossing and before attempting to go upon it, the traveler must use his sense of sight and hearing—must look and listen for approaching trains, if not prevented from doing so by fault of the railway company; and this he should do before entering the zone of danger. A traveler has the right to expect timely warning, but the failure to give such warning will not justify the traveler in relying solely upon such failure or in assuming that no train is approaching. It is still his duty to exercise due care for his own safety by keeping a proper lookout. A traveler on the highway, before crossing a railroad track, as a general rule, is required to look and listen to ascertain whether a train is approaching, and the mere omission of the train to give signal by bell or whistle will not relieve him of this duty. A railroad track is a place of danger and a traveler entering upon such track at a crossing does so with knowledge of its danger. *Where crossing danger is increased because of atmospheric conditions, such as fog or mist, such increase of hazard requires increased attention on the part of the traveler,* and also requires increased effort and attention on the part of operators of the train in giving warning. The standard of care required of both remains the same, that is, the care which a reasonably prudent person would have exercised under the same circumstances, but the increased attention and effort required of the traveler in keeping a proper lookout for his own safety and the increased effort and attention required of the railroad in giving timely warning, are commensurate with the increase of the hazard. Where a railroad crossing is not peculiarly and unusually dangerous, the exercise of due care on the part of a railroad company does not require it to provide gates, signal devices, watchman, or other such safety methods. *However, the exercise of due care* on the part of the railroad company may require the erection of gates or signal device or the maintenance of a watchman where the crossing is unusually and peculiarly hazardous. (A) It is for the jury to say whether the crossing in question was, under all the circumstances, peculiarly and unusually hazardous *so as to require the railroad in the exercise of due care, to erect gates or signal devices or maintain a flagman or such other means* of warning and safety. (B)—(To the foregoing portion of his Honor's charge embraced between the letters (A) and (B) the defendants except and assign error.) *If it should appear that a crossing is a much-used one and situated in a populous area, those facts standing alone are not sufficient to constitute such crossing peculiarly and unusually hazardous so as to require the railroad, in the exercise of due care,* to provide gates or signal devices or a watchman or such other means of warning. *However, a peculiar and particular hazard may arise* where the crossing is in

a populous community, where it is much used, where there are conditions such as to obstruct the traveler's view as he approaches and enters upon the crossing, where there is noise and confusion and other conditions reasonably calculated to distract the traveler's attention and prevent him from seeing and hearing an approaching train. *Gentlemen of the jury, you will bear those definitions and those rules in mind throughout the trial and apply the evidence to those principles of law.*"

After giving the contentions of both sides carefully and accurately, to which no objection was made, the court below further charged the jury: "Now, gentlemen of the jury, you will consider the contentions of both sides and the evidence of both sides, and apply the evidence to the rules of law, holding in mind the contentions made by counsel and any contentions which reasonably arise upon the evidence. If the plaintiff has satisfied you, gentlemen of the jury, by the greater weight of the evidence, the burden being upon the plaintiff, that the defendants, in the operation of Southern Train No. 12 on the occasion referred to, December 7, 1937, *failed to exercise due care* in giving adequate and timely warning of the approach of the train to the crossing on North Lee Street, and if the jury shall further find from the evidence and by its greater weight that such failure was the proximate cause of the plaintiff's injury and damage, then, upon such findings by the greater weight of the evidence, the burden being upon the plaintiff, the court charges you that it would be your duty to answer the first issue 'Yes.' If you fail to so find (nothing else appearing), it would be your duty to answer the first issue 'No.' The first issue being, 'Was the plaintiff injured and damaged by the negligence of the defendants, as alleged in the complaint?' The plaintiff further contends, gentlemen of the jury, that the defendants were negligent, in that the plaintiff says and contends that North Lee Street crossing was peculiarly hazardous and unusually dangerous and that *the exercise of due care on the part of the defendants required the erection and maintenance of some warning device, such as signals, gates or a watchman.* The plaintiff says and contends that the street is a much-used street, that it is one of the main arteries of traffic, that it is one of the thoroughfares in the city, and that Salisbury is a city of considerable size. Plaintiff says and contends that traffic is upon the street day and night and that it is of a continuous nature, and that several hundred cars pass over the street during the day and night; that the street crossing is in close proximity to the freight depot and to a certain cotton mill, and to other sections of the town requiring traffic. *The plaintiff says and contends that the street crossing is over seven tracks; that buildings are in close proximity to the tracks, and that the tracks to the left, that is, in a westerly direction, are not straight, but that they are curved, and that, because of the curve and because of*

certain physical structures there, the approach of a train cannot be seen in close proximity to the crossing, and that it is unusually dangerous and particularly hazardous because of the curves, because of the obstructed vision, and because of certain noise which generally prevails there. The plaintiff says and contends that you should be satisfied by the greater weight of the evidence that, on account of the conditions there, the traveler's opportunity to see and hear an approaching train is interfered with, and interfered with to such an extent that it is peculiarly hazardous. *The defendants say and contend to the contrary. The defendants say and contend that it is not a peculiarly and unusually hazardous crossing.* Defendants say and contend that a limited number of trains pass over the crossing from day to day, and that the crossing is of sufficient width to take care of the traffic, and that there is sufficient distance in approaching the main lines, both from the north and south, to enable one to stop, look and listen, without going on, irrespective of other tracks, and that the tracks are straight, or practically straight, and that the headlight could be seen a considerable distance; that there is no congestion, that the area is not sufficiently populous, and there are no sufficient noises to constitute a peculiar hazard. Now, gentlemen of the jury, it is a matter for you to say from the evidence as to what the truth is, and you will bear in mind all the evidence, the contentions of the parties made, and any contention which may arise upon the testimony. (C) The court charges you that if the plaintiff has satisfied you by the greater weight of the evidence, the burden being upon the plaintiff, that the crossing in question referred to as North Lee Street crossing, was peculiarly and unusually hazardous, and that the railroad company failed to provide gates or signal devices or a flagman or other such means of warning, then the court charges you that such failure on the part of the defendant railway company would constitute negligence, and if you further find from the evidence and by its greater weight that such negligence was the proximate cause of the plaintiff's injury and damage, it would be your duty to answer the first issue 'Yes.' (D)—(To the foregoing portion of his Honor's charge embraced between the letters (C) and (D), the defendants except and assign error.) If you fail to so find (nothing else appearing), it would be your duty to answer the first issue 'No.' Upon that issue as it relates to the question of signals or question of gates, the plaintiff says and contends that you should be satisfied by the greater weight of the evidence, first, that there were no gates or warning devices there, in the nature of gates or signal devices, and that if such gates or warning devices had been erected there, that he would not have received his injury. He says and contends that you should be satisfied by the greater weight of the evidence that such failure was, first negligence on the part of the defendant railway company, and that

such negligence was the proximate cause of his injury. Defendants say and contend, gentlemen of the jury, that you should not be so satisfied. Defendants say and contend, in the first place, that the crossing was not peculiarly hazardous and that, not being peculiarly hazardous, it was under no obligation to place gates or signals or station a watchman there; that it was open where the train could be seen going and coming in both directions, and that the plaintiff was in a position to see and know of the approach of the train, by the exercise of due care. Defendants say and contend that it committed no breach of duty and was not negligent in any respect, and say and contend that you should answer the first issue 'No.' You will bear in mind all the contentions and all the evidence as it relates to the issue."

As to whether it was negligence of defendant Southern Railway Company to fail to provide gates or signal devices or a flagman under the conditions prevailing at the crossing, the court below charged the rule of due care: (1) In the definition of "negligence," "ordinary care and prudence," and "proximate cause," and charged, "You will bear that definition in mind, gentlemen of the jury, *throughout the trial.*" (2) "Where a railroad crossing is not peculiarly and unusually dangerous, *the exercise of due care on the part of a railroad company does not require it to provide gates, signal devices, watchmen, or other such safety methods. However, the exercise of due care* on the part of the railroad company may require the erection of gates or signal device or the maintenance of a watchman where the crossing is unusually and peculiarly hazardous." (3) "It is for the jury to say whether the crossing in question was, under all the circumstances, *peculiarly and unusually hazardous so as to require the railroad in the exercise of due care,* to erect gates or signal devices or maintain a flagman or such other means of warning and safety." (4) "It would appear that the crossing is a much-used one and situated in a populous area, those facts standing alone are not sufficient to constitute such crossing peculiarly and unusually hazardous so as to require the railroad, *in the exercise of due care, to provide gates or signal devices or a watchman or such other means of warning.* However, peculiar and particular hazard may arise," etc. (5) "The plaintiff further contends, gentlemen of the jury, that the defendants were negligent in that the plaintiff says and contends that North Lee Street crossing was peculiarly hazardous and unusually dangerous, *and that the exercise of due care on the part of the defendant required the erection* and maintenance of some warning device, such as signals, gates or a watchman."

I give the charge fully. The court below defined negligence and instructed the jury that *they should bear the definition in mind throughout the trial.* Four other times the court below used the words "in the

exercise of due care" in reference to gates, signal devices and watchman. There was no conflict anywhere in the charge, and the matter complained of was the omission to repeat what had been previously charged many times.

The general principles applicable are thus stated: Instructions must be considered as a whole, and if, as a whole, they state the law correctly, there is no reversible error, *although a part of the instructions considered alone may be erroneous.* Portions of a charge, which considered alone, are objectionable, *are not erroneous,* if, when construed with the whole charge, the objections are not apparent. The instructions must be *considered as a whole,* and, if it appears that the jury was *fairly and fully instructed* on all the law applicable to the case, the judgment will not be reversed because the particular instruction *taken alone may not have embodied all the law applicable.* 32 N. C., and S. E. Digest, p. 640, secs. 295 (2) and 295 (3).

The dissenting opinion says: "This charge as given constitutes a statement that it is negligence *per se* for a railroad company to fail to maintain gates or signaling devices or a flagman at a crossing which is peculiarly and unusually dangerous, without regard to the principle of due care and without reference to whether an adequate and timely signal has been given by bell and whistle." The record does not bear out this statement. The court below did not charge it was negligence *per se.* After charging *five times* the rule of due care, it omitted it in the portion set forth in the dissenting opinion. *Nowhere in the brief of defendant* is the position taken that is set forth above in the dissenting opinion. We find it only in the dissenting opinion. The dissenting opinion takes exception to that which defendants did not. The exception of defendants, as set forth in the charge, was as follows: *"Defendants say and contend, gentlemen of the jury, that you should not be so satisfied. Defendants say and contend, in the first place, that the crossing was not peculiarly hazardous and that, not being peculiarly hazardous, it was under no obligation to place gates or signals or station a watchman there;* that it was open where the train could be seen going and coming in both directions, and that the plaintiff was in a position to see and know of the approach of the train, by the exercise of due care. Defendants say and contend that it committed no breach of duty and was not negligent in any respect, and say and contend that you should answer the first issue 'No.' You will bear in mind all the contentions and all the evidence as it relates to the issue."

In the defendants' brief is the following: "III. Did the court erroneously admit evidence as to the absence of gongs, gates or watchmen at the crossing, and in permitting the jury to consider the absence thereof on the first issue?" The brief says: "We respectfully argue that the

crossing in question is not a peculiarly hazardous one and is such an intersection as is commonly to be found in any growing community."

In the dissenting opinion we find: "On this phase of the first issue it is that part of the charge expressly required by statute, C. S., 564—the discretion and explanation of the law arising on the evidence—and constitutes the chart the jury was required to follow in arriving at its verdict."

Here we have no exception or assignment of error to the charge made by defendants, but C. S., 564, which is as follows (*ex mero motu* is taken to base a dissent on): "No judge, in giving a charge to the petit jury, either in a civil or criminal action, shall give an opinion whether a fact is fully and sufficiently proven, that being the true office and province of the jury; but he shall state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon."

The policy of the State differs from the Federal rule and the rule in most states, and the section has been the subject of much criticism.

In the present action, a long trial, the charge is so free from error and carefully given that defendants made no exception or assignment of error to same, except that the court below should not have left it to the jury on the question of negligence as to not providing gates, signal devices, watchman or other such safety methods. Usually a litigant who can find no prejudicial or reversible error cries out C. S., 564. Madame Roland, a famous French lady during the French Revolution, when on the scaffold, looking at the statute to Liberty which stood there, said bitterly, "Oh, liberty, what crimes are committed in thy name." I might paraphrase this quotation by saying: "Oh, C. S., 564, what injustice, by technical, attenuated and cloistered reasoning, is committed in thy name." A court should be slow to "pick up" C. S., 564, to overthrow a verdict of a jury—the "palladium of our civil rights," the rock on which free and orderly government is founded.

In *Dudley v. R. R.*, 180 N. C., 34 (36), it is said: "It was not error for the court to permit the plaintiffs to offer evidence that there was no automatic alarm, or gates, at the crossing, and the court properly left it to the jury to say, upon all the attendant circumstances, whether the railroad company was negligent in not erecting gates. It was incumbent upon the defendant to take such reasonable precautions as were necessary to the safety of travelers at public crossings. 22 R. C. L., 988. This was a question of fact for the jury."

In *Blum v. R. R.*, 187 N. C., 649-650, is the following: "Upon careful examination, we find no error in the instructions to this matter, which is fully discussed in *R. R. v. Ives*, 114 U. S., 408, where it is said that the general rule is 'well stated' in *R. R. v. King*, 86 Ky., 589, as follows: 'The doctrine with reference to injuries to those crossing the track of a

railway, where the right to cross exists, is that the company must use such reasonable care and precaution as ordinary prudence would indicate.' It also quotes *R. R. v. Perkins,* 125 Ill., 127, where it was held that 'the fact that a statute provides certain precautions will not relieve a railway company from adopting such other measures as public safety and common prudence dictate. And in *Thompson v. R. R.,* 110 N. Y., 636, where it was held that giving the signals required by law by a railroad train approaching a street crossing does not, under all circumstances, render the railway company free from negligence,' citing also, *R. R. v. Commonwealth,* 13 Bush., 388; *Weber v. R. R.,* 58 N. Y., 451, and concludes as follows: 'The reason for such ruling is found in the principle of the common law that every one must so conduct himself and use his own property as that, under ordinary circumstances, he will not injure another in any way. As a general rule, it may be said that, whether ordinary care or reasonable prudence requires a railroad company to keep a flagman stationed at a crossing that is especially dangerous, is a question of fact for the jury to determine, under all the circumstances of the case, and that the omission to station a flagman at a dangerous crossing may be taken into account as evidence of negligence,' adding that where the crossing is a much-traveled one, and the noise of approaching trains is rendered indistinct and the ordinary signals difficult to be heard, by reason of the bustle and confusion incident to railway or other business, or by reason of some such like cause, a jury would be warranted in saying that the railway company should maintain these extra precautions at ordinary crossings in the country, citing numerous authorities. That case has been cited and approved on this point by numerous cases since, which held 'a railroad is not excused for negligence by mere compliance with statute; it must take necessary precautions.' 15 Rose's Notes, 1213, and cases there cited; and *R. R. v. Dandridge, supra* (171 Fed., 74 [U. S. C. C. A.]), and cases citing the same. Indeed, upon the evidence in this case, it would seem that the jury could have had no doubt, if the matter had not been withdrawn from their consideration, that if an automatic gong had been installed at this place it would have given such notice to the plaintiff's testator and his companion that it would have prevented this accident; at least, they would have been justified in drawing the inference that the failure to do so was negligence on the part of the defendants."

In *Nash v. R. R.,* 202 N. C., 30 (32), it is written: "Much evidence was offered by the plaintiff to the effect that the crossing was a populous and much used crossing, and that the defendant had maintained no watchman, gate or other signal device for the protection of the public. . . . (p. 33) The evidence of plaintiff and the inference which such evidence warrants, classify this case in the line of decisions represented

by *Moseley v. R. R.*, 197 N. C., 628; *Thurston v. R. R.*, 199 N. C., 496; and *Butner v. R. R.*, 199 N. C., 695."

In *Moseley v. R. R.*, 197 N. C., 628 (637), it is said: "The mere absence of a statute requiring a flagman or watchman at crossings will not, however, of itself relieve the railroad company from the duty to maintain one, and where a crossing is so peculiarly dangerous that the reasonable safety of the traveling public requires the presence of a flagman or other extraordinary means to signal the approach of the trains, it is incumbent upon the railroad company to employ such means. It is for the jury to say whether under all the circumstances of a particular case the railroad has been guilty of negligence in not maintaining a flagman or watchman at a particular crossing."

The principle in the above authorities is approved in the recent case of *Harper v. R. R.*, 211 N. C., 398. The law on this subject is so well settled in the interest of life and limb, why unsettle it on a supposed technicality—as is attempted in the dissenting opinion?

In Elliott on Railroads, 3rd Ed., part sec. 1584, p. 408, is the following: "Crossings are sometimes safeguarded by means of bells which are caused to sound by a current of electricity set in motion by approaching trains when within a given distance of the crossing. *This method is regarded as effective for the purpose and is likely to come into general use.*" (Italics mine.)

The railroad companies are to be commended that since the building of our great system of hard-surfaced and dependable highways in the State, almost everywhere they have installed electric signals at dangerous crossings with the words "stop on red signal" on them.

In the above cited cases the law is well settled in this State.

On the second issue the dissenting opinion holds it error that the following instruction was not given: "The court charges the jury that the jury should answer the second issue 'Yes,' unless the jury finds that the vision of the plaintiff was obstructed by fog or mist." The evidence of plaintiff was: "I could not see over 25 feet that night *on account of the condition of the weather. It was foggy, the headlights on my automobile did not throw a light over 25 feet and the train was coming from the west. Because of the curvature of the track, the engine headlight is thrown to the north of the track.* When I started to cross the last two tracks the speed of my car was between 5 and 10 miles an hour. After I crossed the fifth track I could not see far enough down to my left to see anything. I didn't see anything after I crossed the fifth track and I was looking. I was hurt on the sixth track, which is a good little piece from the fifth track. . . . When I was between the 5 and 6 track *looking to the west there was something that hindered me from seeing very far down the track. I don't know whether it was a coal car,*

pile of coal at the chute, or an oil tank at the Texaco service place, and the condition of the weather, too."

The instruction was substantially given and correct from plaintiff's testimony, as follows: "A railroad track is a place of danger and a traveler entering upon such track at a crossing does so with knowledge of its danger. *Where crossing danger is increased because of atmospheric conditions, such as fog and mist, such increase of hazard requires increased attention on the part of the traveler, and also requires increased effort and attention on the part of operators of the train in giving warning.* The standard of care required of both remains the same, that is, the care which a reasonably prudent person would have exercised under the same circumstances, but the increased attention and effort required of the traveler in keeping a proper lookout for his own safety and the increased effort and attention required of the railroad in giving timely warning, are commensurate with the increase of the hazard."

In the dissenting opinion it is said: "The court excluded certain evidence of experiments made by witnesses to ascertain whether an approaching train could have been seen in the nighttime by a person between tracks 5 and 6 under atmospheric conditions similar to those testified to by witnesses." This statement "under atmospheric conditions similar to those testified to by witnesses" is incorrect. There is no evidence in the record showing similarity of atmospheric conditions. Defendants introduced F. S. Cline, and his testimony excluded was: "The night was cloudy but it was not raining." J. W. Carpenter's testimony was excluded: "It was a kind of misty rain." The plaintiff's evidence was that "The night was foggy"; "It had been raining and was fog-like," and "It was somewhat foggy and misty."

In 1 Wigmore on Evidence, 2nd Ed., p. 782, the rule is thus succinctly stated: "The similarity that is required is, in short, a similarity in essential circumstances, or, as it is usually expressed, a *substantial similarity, i.e.,* a similarity in *such circumstances or conditions as might supposedly affect the result in question."*

The question of a "foggy night" is vastly different from a "cloudy night" or "misty night." It is a matter of common knowledge that automobiles are now equipped, when desired, with special "fog lights."

An appellate court, by careful examination, may not infrequently find errors in language used or omitted by the trial judge in his instructions to the jury, upon pure issues of fact, but in accord with a less technical and more liberal conception of the power to review, the court may also, upon due consideration of all the circumstances surrounding the trial and the light of the matter under investigation, perceive that the errors complained of neither misled the jury nor affected the impartiality and fairness of the trial.

In *In re Ross,* 182 N. C., 477 (478), is the following: "Our system of appeals, providing for a review of the trial court on questions of law, is founded upon sound public policy, and appellate courts will not encourage litigation by reversing judgments for slight error, or for stated objections, which could not have prejudiced the rights of appellant in any material way. *Burris v. Litaker,* 181 N. C., 376; *In re Eden's Will, ante,* 398, and cases there cited. Again, error will not be presumed; it must be affirmatively established. The appellant is required to show error, and he must make it appear plainly, as the presumption is against him. *In re Smith's Will,* 163 N. C., 464; *Lumber Co. v. Buhmann,* 160 N. C., 385; *Albertson v. Terry,* 108 N. C., 75. See, also, 1 Michie Digest, 695, and cases there cited under title 'Burden of Showing Error.'"

The court below tried the case with unusual care and ability and applied the law applicable to the facts. After an extensive and thorough investigation of the law and facts, I can see no prejudicial or reversible error and think the judgment of the court below should be sustained, and I concur in the main opinion.

BARNHILL, J., dissenting: In considering the evidence of the plaintiff as to obstructions existing as he approached the crossing where the accident occurred it is necessary to bear in mind that he was speaking as of the time he approached the first track. This is clearly demonstrated by his own evidence.

Viewing these seven tracks from a northerly to a southerly direction they spread out fan-like so that at the Lee Street crossing there is a space of more than 131 feet from track No. 1 to track No. 7. The distance from the center of track No. 5 to the center of track No. 6 is more than 68 feet and the plaintiff admitted that the distance between the two tracks was at least 50 feet.

Plaintiff testified that there was nothing on tracks Nos. 2, 3, 4, or 5 and nothing in the space between tracks 5 and 6 except a pole with a crossarm warning sign; that in the daytime a person between tracks 5 and 6 could see at least 400 feet to the north from whence the train came. That this is true is demonstrated by the map and the photographs which appear as exhibits in the case. The correctness of these is not challenged by the plaintiff. We should likewise bear in mind that tracks 6 and 7 to the north are practically straight.

The train which struck the plaintiff stopped at the Main Street crossing and was required to stop at the first crossing east of Lee Street, and there is no evidence of excessive speed of the train at the time of the collision. In fact, the plaintiff admitted that after the collision the train stopped within 50 or 60 feet.

The court excluded certain evidence of experiments made by witnesses to ascertain whether an approaching train could have been seen in the nighttime by a person between tracks 5 and 6 under atmospheric conditions similar to those testified to by witnesses. This evidence was competent and should have been admitted. Its exclusion was error. *Arrowood v. R. R.,* 126 N. C., 632; *S. v. Young,* 187 N. C., 698, 122 S. E., 667; *Willis v. New Bern,* 191 N. C., 507, 132 S. E., 286; 22 C. J., 755. It is true that other evidence of observations was admitted. This "other evidence" came from the plaintiff. He was permitted to testify that he went back to the crossing 12 or 15 times to make observations and without first describing the weather conditions at the time the observations were made. He testified that "looking toward Main Street crossing you couldn't see the head of the engine until it got at least halfway between the North Main Street crossing and this (Lee) crossing." The error of the court in excluding this testimony tendered by the defendant is emphasized by the fact that it permitted the plaintiff to testify to such experiments under these conditions. The court might just as well have said to the jury, "The plaintiff has testified as to experiments made in the nighttime to determine whether an approaching train could be seen. The court will not permit this testimony to be contradicted."

But, even if the "other evidence" had come from witnesses for the defendant—and the record does not so disclose—the exclusion of this evidence was erroneous.

The rule applies when the same witness gave substantially the same testimony without objection in other portions of his examination, *Baynes v. Harris,* 160 N. C., 307, 76 S. E., 230; *Eaves v. Coxe,* 203 N. C., 173, 165 S. E., 345; *S. v. Dickey,* 206 N. C., 417, 174 S. E., 316. As said by *Brogden, J.,* speaking for the Court in the *Eaves case, supra:* "Obviously if a party offers the competent testimony of a given number of witnesses, but the court excludes the testimony of one, even though the testimony of the others is admitted without objection, notwithstanding the offering party is entitled to the credibility and weight of testimony of the excluded witness. Otherwise the total weight and credibility of the testimony would be reduced for the reason that a jury might have believed the testimony of witness whose evidence was excluded and for one reason or another might not believe testimony of the witnesses whose testimony was received without objection. Hence it cannot be said as a matter of law that the exclusion of such testimony was harmless error." Approved in *S. v. Dickey, supra.*

The majority concedes the competency of the evidence. The authorities are to the effect that its exclusion was harmful.

The plaintiff, having admitted that there was no obstruction between tracks 5 and 6, testified, "I could not see over 25 feet that night on

account of the condition of the weather, it was foggy, the headlights of my automobile did not throw a light over 25 feet and the train was coming from the west . . . in that space of 50 feet, as you say, from track 5 to track 6 all the way up to your left, the direction from which the train was coming, there was no obstruction except a railroad crossing signal . . . I don't know what kept me from seeing. There was some obstruction of some kind. It was cloudy all day, it rained some that day and it was foggy that night. In the open area within 25 feet from this to the left there wasn't anything. When I was within 25 feet of the track there was nothing but the fog . . . at that time I was going 5 or 10 miles per hour and could have stopped my car in 10 feet. . . . I don't know what kept me from seeing it (the headlight). I didn't see it. I never did see the headlight." He also admitted that he told defendant's agent that fog obstructed his view.

On the second issue, as to the contributory negligence of the plaintiff, the defendant, basing its request upon the foregoing evidence and like evidence offered by the defendant, prayed the court to instruct the jury as follows:

"The court charges the jury that the jury should answer the second issue 'Yes,' unless the jury finds that the vision of the plaintiff was obstructed by fog or mist."

The substance of the instruction should have been given. On the plaintiff's own evidence, if there was no fog to obstruct his vision, he admittedly drove in front of an oncoming train which, by the exercise of ordinary care, he could have seen but for the atmospheric conditions about which he complains. *Meacham v. R. R.*, 213 N. C., 609, 197 S. E., 189. This view of the defendant's defense the court wholly failed to present to the jury. Its failure to do so was error substantially harmful to the defendant.

In this connection it may be well to note that plaintiff testified that with the benefit of the lights of his automobile, which were in good condition, looking forward he could not see more than 25 feet. How then could he have seen an obstruction to the left without the aid of any light? When a witness makes a statement of fact which is obviously impossible it does not rise to the dignity of evidence.

On the first issue as to the negligence of the defendant the court first charged the jury:

"If the plaintiff has satisfied you, gentlemen of the jury, by the greater weight of the evidence, the burden being upon the plaintiff, that the defendants, in the operation of Southern Train No. 12 on the occasion referred to, December 7, 1937, failed to exercise due care in giving adequate and timely warning of the approach of the train to the crossing on North Lee Street, and if the jury shall further find from the evidence

and by its greater weight that such failure was the proximate cause of the plaintiff's injury and damage, then, upon such findings by the greater weight of the evidence, the burden being upon the plaintiff, the court charges you that it would be your duty to answer the first issue 'Yes.' If you fail to so find (nothing else appearing), it would be your duty to answer the first issue 'No.' The first issue being, 'Was the plaintiff injured and damaged by the negligence of the defendants, as alleged in the complaint?' "

But, after stating the contentions in respect thereto, the court instructed the jury further:

"The court charges you that if the plaintiff has satisfied you by the greater weight of the evidence, the burden being upon the plaintiff, that the crossing in question, referred to as North Lee Street crossing, was peculiarly and unusually hazardous, and that the railway company failed to provide gates or signal devices or a flagman or other such means of warning, then the court charges you that such failure on the part of the defendant railway company would constitute negligence, and if you further find from the evidence and by its greater weight that such negligence was the proximate cause of the plaintiff's injury and damage, it would be your duty to answer the first issue 'Yes.' "

This latter instruction is erroneous and harmful in several respects. For convenience in discussion the two excerpts will be referred to as charge No. 1 and charge No. 2.

On the evidence in this case as it appears in the record before us the jury might well have found that the defendant gave an adequate and timely warning of the approach of its train and, therefore, in that respect there was no negligence, and could then have found, under the second charge, that the Lee Street crossing was peculiarly and unusually hazardous and the defendant had failed to maintain at the crossing any gates or other signaling device, constituting negligence under the instruction of the court. We cannot assume that this was not the conclusion of the jury. Thus in this respect the charge was conflicting and erroneous.

What constitutes an unusually dangerous and hazardous crossing is a question of law. It is unusually and peculiarly hazardous within the law so as to require the railroad to maintain some signaling device when and only when the surrounding conditions are such as to render a timely signal by bell and whistle inadequate to warn a traveler approaching the track. Whether the evidence in the case brings the crossing within the definition is for the jury.

The court did not define what constitutes an unusually hazardous crossing. It did tell the jury that the mere fact that a crossing is a much-used one and situated in a populous area does not of itself constitute it an unusually hazardous one, but in that connection he instructed

the jury that "it is for the jury to say whether the crossing in question was, under all the circumstances, peculiarly and unusually hazardous so as to require the railroad in the exercise of due care, to erect gates or signaling devices or maintain a flagman or such other means of warning and safety." Its failure to instruct the jury as to what constitutes an unusually hazardous and dangerous crossing and its action in leaving this question of law for the determination of the jury was error. If this procedure is to be approved then it will be left to each succeeding jury to decide crossing accident cases according to its own particular view or understanding of what constitutes a hazardous crossing.

This charge as given constitutes a statement that it is negligence *per se* for a railroad company to fail to maintain gates or signaling devices or a flagman at a crossing which is peculiarly and unusually hazardous, without regard to the principle of due care and without reference to whether an adequate and timely signal had been given by bell and whistle.

On this phase of the first issue it is that part of the charge expressly required by statute, C. S., 564—the declaration and explanation of the law arising on the evidence—and constitutes the chart the jury was required to follow in arriving at its verdict. The defendant's exception thereto should be sustained.

The general rule is that, in the absence of a statutory requirement, a railroad company is under no duty to provide gates, gongs, or other safety devices at public crossings, and that, therefore, the failure to do so at any particular crossing is not negligence *per se*. *Grand Trunk R. Co. v. Ives,* 144 U. S., 408, 36 L. Ed., 485, 16 A. L. R., 1273 (note), and cases cited; 60 A. L. R., 1096 (note), and cases cited.

The absolute duty of posting a flagman or placing gates or other obstructions or of giving special or personal notice to travelers at railway crossings can only be imposed by the Legislature. Courts and juries, whatever may be thought by them of the convenience or necessity of such or other like precautions at a particular crossing, cannot hold the company to provide them under the penalty of being charged with negligence for the omission. *Weber v. New York C. & H. R. Co.,* 58 N. Y., 451; *Case v. New York, C. & H. R. Co.,* 27 N. Y. Supp., 496; *Kulp Transp. Lines v. Erie R. Co.,* 23 N. Y. Supp., 490.

Nevertheless, evidence of the failure of the railroad company to provide a watchman, gates or gongs, is sometimes admissible on the issue of negligence to enable the jury to determine whether under all the circumstances the defendant has exercised due care and has taken such reasonable precautions as are necessary to give travelers adequate and timely warning of the approach of its train for the protection and safety of those using the crossing. *Blum v. R. R.,* 187 N. C., 640, 122 S. E., 562;

Dudley v. R. R., 180 N. C., 34, 103 S. E., 905; *Batchelor v. R. R.*, 196 N. C., 84, 144 S. E., 542.

On this issue the questions are: (1) Did the railroad company give warning of the approach of its train? and, (2) If so, was such warning both adequate and timely—such that a traveler approaching the particular crossing and exercising ordinary care for his own safety, could and would have heard the signal in time to stop before entering the zone of danger? A breach of this duty to give such warning constitutes negligence.

It is incumbent on a railroad company to take such reasonable precautions as are necessary to the safety of travelers who exercise ordinary care for their own safety at public crossings. *Batchelor v. R. R., supra.* The settled rule is that if a person of ordinary prudence, under all the circumstances, would have maintained a flagman or watchman at the crossing where the plaintiff was injured, then the failure on the part of the railroad company to keep such flagman or watchman constitutes negligence. *Texas Midland R. Co. v. Wiggins*, 166 S. W., 441. Whenever, in the exercise of due care and caution in running its trains it becomes reasonably necessary, considering the nature, location and surroundings of a railroad and a public highway or street, that a watchman should be placed at such crossing or other warning device should be adopted to give notice to travelers of approaching danger and to signal to them when it will be reasonably safe for them to make such crossing, it is the duty of such railroad corporation, independent of any statute or ordinance in that behalf, to place a flagman at such dangerous crossing to perform such duty or to provide some other adequate mode of warning. *Pittsburgh C. C. & St. L. R. Co. v. Tatman*, 122 N. E., 357 (Ind.).

Under ordinary circumstances the warning required of a railroad company is given by the ringing of a bell and the blowing of a whistle. *Blum v. R. R., supra; Batchelor v. R. R., supra.* However, conditions may exist at a particular crossing which renders such type of warning inadequate or it may not be timely given. In determining whether a warning by bell and whistle is inadequate and the failure to give some additional warning (by watchman, gong, gates or the like) constitutes negligence, the circumstances existing at the time—such as the frequency with which trains are passing, the amount of travel, the number of tracks, the obstruction of view, the opportunities or want of opportunities for travelers to observe the approach of trains and to hear the signals ordinarily given and the speed of the train—may be considered. See 16 A. L. R.

Before a jury will be warranted in saying, in the absence of any statutory directions to that effect, that a railroad company should keep

a flagman or gates at a crossing it must be first shown that such crossing is more than ordinarily hazardous; as, for instance, that it is in a thickly populated portion of a town or city, and that the view of the track is obstructed either by the company itself or by other obstructions proper in themselves; or that the crossing is a much traveled one and the noise of approaching trains is rendered indistinct and the ordinary signals difficult to be heard by reason of the bustle and confusion incident to railway or other business, or by reason of some like cause. *Grand Trunk R. Co. v. Ives, supra; Tisdale v. Panhandle & S. F. R. Co.,* 16 A. L. R., 1264 (Tex.). Thus in the *Grand Trunk R. Co. case, supra,* the following charge was approved:

"So, if you find that because of the special circumstances existing in this case, such as that this was a crossing in the city much used and necessarily frequently presenting a point of danger, where several tracks run side by side, and there is consequent noise and confusion and increased danger; that owing to the near situation of houses, barns, fences, trees, bushes or other natural objects which afforded less than ordinary opportunity for observation of an approaching train, and other like circumstances of a special nature it was reasonable that the railroad should provide special safeguards to persons using the crossing in a prudent and cautious manner, the law authorizes you to infer negligence on its part for any failure to adopt such safeguard as would have given warning," etc.

The question to be submitted to the jury is not whether in their judgment due care required the railroad company to keep a flagman at the crossing to give warning; not whether that was a suitable mode of giving notice of the approach of a train; not "what signal would be sufficient" to give such notice. But the question is, whether, under the actual circumstances of the case, the company exercised reasonable care and prudence in what it did in undertaking to give adequate and timely notice of the approach of its train, and whether its negligence in failing so to do caused the injuries complained of. *Grippen v. New York C. R. Co.,* 40 N. Y., 46. See also *Beisiegel v. New York C. R. Co.,* 40 N. Y., 9; *Weber v. New York C. & H. R. Co.,* 58 N. Y., 451; *McGrath v. New York C. & H. R. Co.,* 63 N. Y., 522; *Heddles v. Chicago & N. W. R. Co.,* 74 Wis., 239, 42 N. W., 237.

Before it can be said that it was negligence for a railroad company to fail to station a flagman at a crossing "it should be made to appear that the danger was altogether exceptional; that there was something in the case which rendered ordinary care on the part of the traveler an insufficient protection against injury, and, therefore, made assumption of this burden on the part of the railroad company of the employment of a flagman a matter of common duty for the safety of others." *Hass*

v. Grand Rapids & I. R. Co., 47 Mich., 401, 11 N. W., 216. Also see *Grand Trunk R. Co. v. Ives, supra.*

Thus, from the authorities in this and other jurisdictions it may be adduced that:

1. There is no general duty, as such, on the part of a railroad company to place a watchman or flagman at grade crossings of public roads or highways and its failure so to do is not negligence *per se.*

2. It is the duty of a railroad company to give adequate and timely warning of the approach of its trains to a grade crossing.

3. Ordinarily, at grade crossings when no unusually dangerous and hazardous conditions exist, timely signals by ringing the bell and blowing the whistle is deemed to be adequate.

4. When the conditions existing at or about the crossing are such as to render the crossing dangerous and hazardous to the traveling public and tend to render the blowing of a whistle and the ringing of a bell inadequate, evidence of such conditions is admissible to aid the jury in determining whether under all the circumstances the railroad company has exercised ordinary prudence in giving an adequate and timely warning of the danger created by the approach of its train;

5. In every instance, the rule of due care applies, and if a person of ordinary prudence, under all the circumstances, would have maintained a flagman or watchman or other signaling device at the crossing where the plaintiff was injured, then the failure on the part of the railroad company to furnish such additional warning constitutes negligence; and,

6. Where the evidence shows that a railroad crossing is for any reason peculiarly dangerous and the existing conditions tend to render warning by whistle and bell inadequate, it is a question for the jury whether the degree of care which the company is required to exercise to avoid accidents at the crossing imposes on the company the duty to provide additional safety devices.

The subject is fully annotated and the cases cited in 12 A. L. R., 1273, and 60 A. L. R., 1096.

The indicated error is not rendered harmless by the prior correct statement of general principles of law as to the duty of the defendant to exercise due care or by the preceding instructions of the court as to the duty of defendant to give adequate and timely warning of the approach of its train for, from a consideration of the charge as a whole, it appears that the court below conceived that, as to crossings which are unusually dangerous and hazardous, the defendant owes the traveling public a twofold duty: (1) To give adequate and timely warning; and, (2) To provide a watchman or maintain gongs or some other similar safety device. If, however, we construe the charge on the first issue as relating only to the one duty to give adequate and timely warning, then there

is a material conflict in the instructions. *Templeton v. Kelley,* 217 N. C., 164, and cases cited.

For the reasons stated I am unable to join in the majority opinion, but must vote for a new trial.

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

MRS. ADA LONG (WIDOW), LOUISE LONG KERLIN AND G. L. KERLIN v. HAZEL MELTON.

(Filed 18 September, 1940.)

1. **Highways § 18—Upon relocation of State highway, owner of land abutting old road has right of ingress and egress over old road to the new road as against owner of fee in the old road.**

The dividing line between the tracts of land owned by plaintiffs and defendant, respectively, was the center of a State highway, the land owned by plaintiffs lying south of the highway. The highway was relocated to the north and the rights of way of the new and old highways overlapped, so that plaintiffs' land touched the new highway on the northeastern end of their property, while to the north in front of buildings erected by their predecessor in title, the northern half of the old road and right of way, the fee of which was owned by defendant at the time of the action, lay between plaintiffs' land and the new highway. *Held:* Plaintiffs are entitled to an easement for ingress and egress over the old road and right of way to the new highway in front of their property, notwithstanding the existence of a less satisfactory and less valuable means of egress and ingress to the new road at the eastern end of their property, and judgment as of nonsuit was improperly entered in their action to restrain defendant from obstructing the old highway.

2. **Same—**

Where a State highway is relocated so that the rights of way of the old and new highway overlap, a person purchasing the fee in property which theretofore constituted the old highway and right of way takes same subject to the rights of property owners abutting the old highway to ingress and egress over the old highway to the new highway.

3. **Highways § 12—**

The burden is upon the party asserting the discontinuance, abandonment or vacation of a public highway to prove the asserted discontinuance, abandonment or vacation of the highway, the presumption being in favor of the continuance of the highway with the principles and incidental rights attached to it.

4. **Highways § 18—In an action to enjoin owner of fee from obstructing highway, burden is upon defendant owner asserting that highway had been abandoned to prove such defense.**

Evidence on the part of defendant that the State Highway Commission had relocated a State highway and after the said relocation discontinued

upkeep of the old highway does not establish the abandonment of the old road as a public road, since the proof does not negative the continuation of the old road under county maintenance or under private maintenance with the approval of the county authorities, and upon such proof a judgment as of nonsuit in plaintiffs' action to restrain defendant from obstructing the old highway is error.

5. Actions § 4—

In plaintiffs' action to establish right of ingress and egress over defendant's land from plaintiffs' business property to a public highway, allegations that plaintiffs were using their property for an unlawful purpose or that the operation of plaintiffs' business constituted a nuisance against public morals, do not constitute a defense to plaintiffs' action to establish their property rights, since the rights of the public may be protected by invoking the provisions of the criminal law or by proceedings to abate the maintenance of a nuisance.

DEVIN, J., concurring.

BARNHILL, J., dissents.

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

APPEAL by plaintiffs from *Grady, Emergency Judge,* at 27 November, 1939, Extra Civil Term, of MECKLENBURG. Reversed.

This is an action for damages by plaintiffs against defendant, and also "that plaintiffs be granted an injunction enjoining and restraining the defendant, her servants, agents and employees, from obstructing said highway or interfering with the free use thereof by plaintiffs, their tenants and the public generally, seeking access to the lands of the plaintiffs; that plaintiffs recover the costs of this action to be taxed by the clerk, and have such other and further relief as to the court may seem just and proper."

The defendant in her answer, after denying plaintiffs' right to damages, prays: "That the plaintiffs recover nothing of her; that the plaintiffs do not have the relief or any part thereof prayed for in the complaint; that no restraining order, either temporary or permanent, be issued against her; that she go without day and recover her costs of the plaintiffs and their bondsmen; that she be awarded such affirmative relief to which she may be entitled in the premises both at law and in equity."

The facts: Louis Long died in February, 1937, seized and possessed of a tract of land fronting on and lying south of the Old Dowd Road in Mecklenburg County, N. C., and extending out in the Catawba River on the westerly side. That the line of said land extended to the center of the Old Dowd Road and adjoined the lands of S. A. Berryhill. Louis Long died, leaving a widow, Ada Long, and one child, Louise Long Kerlin, and that said Louise Long Kerlin is the owner of said lands mentioned in the complaint, subject to a dower interest of Ada Long. The Old Dowd Road was the main State highway between Charlotte

and Gastonia. That upon construction of the new concrete bridge over the Catawba River the said main State highway between Charlotte and Gastonia was moved northerly and known as the New Wilkinson Boulevard. The right of way of the State highway at the place in controversy at the Old Dowd Road is 60 feet in width; the right of way of the New Wilkinson Boulevard is 100 feet in width; the Old Dowd Road has a paving of a width of 40 feet, and the New Wilkinson Boulevard has a paving of the width of 40 feet. Louis Long and the plaintiffs herein and their tenants have openly, adversely and notoriously used the Old Dowd Road, of a width of 60 feet, for a period of more than 20 years, and without obstruction or interference from anyone, or a dispute of the lawful right to use the same until the construction by the defendant of the obstruction on said Old Dowd Road, and that said highway has been not only used by Louis Long and the plaintiffs herein, and their tenants, but by the public generally for a period of more than 20 years, openly, adversely and notoriously, and without objection on the part of anyone until the construction by the defendant of the obstructions mentioned in the complaint. Louis Long built a filling station, dance pavilion and barbecue stand on his land near the Catawba River, facing on the Old Dowd Road, which was used for ingress and egress to his property. The defendant, at the commissioners' sale of S. A. Berryhill's estate, purchased 71/100 of an acre of land which practically covered a part of the right of way of the Old Dowd Road and the New Wilkinson Boulevard. The northern line extended about 499 feet with the center of the New Wilkinson Boulevard and ran on the east side 35 feet south to a stake in the Old Dowd Road, thence N. 73 W., 475 toward the Catawba River to a stake in the Old Road, thence N. 33 E., 85 feet to a point in the center of the New Wilkinson Boulevard—containing 71/100 acres. Posts with "No Trespassing" signs on same have been put up by defendant to stop plaintiffs from ingress and egress to their property over the New Wilkinson Boulevard and the Old Dowd Road opposite their property. The defendant contends that at the commissioners' sale, she purchased the fee simple in the land and had a right to close the road. That by going some 500 feet in an easterly direction from where the buildings are located, plaintiffs can enter the New Wilkinson Boulevard and can travel on one-half (30 feet) of the Old Dowd Road, and thus have ingress and egress to their property.

A temporary injunction was granted for plaintiffs and continued to the hearing. On the hearing, "Upon the close of plaintiffs' evidence, defendant demurred to the evidence and moved for judgment as of nonsuit, motion allowed." To the allowance of said motion of nonsuit plaintiffs in apt time excepted, assigned error and appealed to the Supreme Court.

The assignment of error and other necessary facts will be set forth in the opinion.

H. L. Taylor for plaintiffs.
J. Laurence Jones and Stewart & Moore for defendant.

CLARKSON, J. Did the court err in signing the judgment as in case of nonsuit, C. S., 567? We think so, under the facts and circumstances of this case.

The New Wilkinson Boulevard is 100 feet wide and paved 40 feet in the center. The Old Dowd Road is 60 feet wide and paved 40 feet in the center. The right of way of the New Wilkinson Boulevard on the south is on the Old Dowd Road right of way. The 60-foot right of way of the Old Dowd Road overlaps for some distance on the 100-foot right of way of the New Wilkinson Boulevard. There is no question that plaintiffs had a right to the Old Dowd Road for ingress and egress to their land. The New Wilkinson Boulevard was built on the north of the Old Dowd Road, and part of the 100-foot right of way, on the right of way of the Old Dowd Road. Plaintiffs' predecessor in title built on the Old Dowd Road and had ingress and egress over same before the New Wilkinson Boulevard was built. We see no good or valid reason why plaintiffs' successor in title should not have a right of way or easement over the Old Dowd Road onto the New Wilkinson Boulevard, which overlaps same. Under the facts and circumstances of this case, we think there was evidence to support plaintiffs' claim to use the full width (60 feet) right of way of the Old Dowd Road for ingress and egress to the New Wilkinson Boulevard.

The fact that the Old Dowd Road was a State highway, 60 feet wide, maintained by the State and used by the public for years, is not disputed. The fee to the strip of land between the paved portion of the two highways was vested in the Berryhill estate and the defendant purchased this strip and sought to obstruct the old highway by placing posts with wire attached thereto, so as to prevent travel from the new highway to plaintiffs' land. The obstructions were located within the 60-foot right of way of the old road, and the approach used to plaintiffs' lands was entirely within the right of way of the two highways comprising a strip 160 feet wide.

In *S. v. Hewell,* 90 N. C., 705 (706-7), we find the following: "The fact that a public road is laid off on a man's land does not deprive him of the freehold of the land covered by the road. His title continues in the soil, and the public acquires only an easement, that is, the right of passing and repassing along it. *S. v. Davis,* 80 N. C., 351; *Dovaston v. Payne,* 2 Smith, L. C., 90."

The defendant, who purchased at the commissioners' sale 71/100 of an acre of the Berryhill land, acquired the fee simple. She knew the Old Dowd Public Road was there and plaintiffs and their predecessors in title were using it for ingress and egress to their land. She purchased it *cum onere.*

We think *Davis v. Alexander,* 202 N. C., 130, is similar to the present action. At p. 131-2, it is said: "The law applicable to this action is well stated in 2 Elliott, Roads and Streets (4th Ed.), part sec. 1172, at p. 1668: 'Once a highway always a highway,' is an old maxim of the common law to which we have often referred, and so far as concerns the rights of abutters, or others occupying a similar position, who have lawfully and in good faith invested money or obtained property interests in the just expectation of the continued existence of the highway, the maxim still holds good. Not even the Legislature can take away such rights without compensation. Such, at least, is the rule which seems to us to be supported by the better reason and the weight of authority, although there is much apparent conflict as to the doctrine when applied to the vacation of highways' (citing authorities) . . . (p. 135). In 1 Lewis on 'Eminent Domain,' pp. 368-9, the matter is stated thus: 'But it would seem that both the public and those claiming the fee should be estopped from denying the existence of a private right of access and of light and air, as to those who have purchased or improved abutting property on the faith of the advantage offered by the street or highway and that this private right of access should be held to include an outlet in both directions to the general systems of streets. Many cases hold that these private rights exist in favor of every abutting owner without considering how the street was established or how such owner obtained title to his property.' "

Plaintiffs' position here is squarely supported by *Davis v. Alexander, supra.* There, as here, when a highway was relocated, the owner of the fee beneath the old road attempted to take complete possession of it and close it. Plaintiff, who had built on the old road and was thus shut off from the new road, except by a longer route than the one closed, sought a mandatory injunction preventing the closing of the former road. This Court, in reversing the lower court, upheld the right of the plaintiff to a permanent injunction against the closing of the old road. The law of the *Davis case, supra,* is clear: When the State Highway Commission relocates a road, any abutting owner on the old road, as against any owner in fee of land beneath the old road, may demand that the entire width of the old roadway be kept open to the end that a reasonable means of egress and ingress be provided to his property; and this principle prevails even where (as here and in the *Davis case, supra*) a less satisfactory and less valuable means of egress and ingress would remain even if

the contested portion of the old road were closed. This decision was the act of a unanimous Court, and, during the nine years since it was rendered, it has been cited with approval by this Court on three occasions; nor has the opinion in that case been modified or reversed by more recent decisions of this Court. See *Reed v. Highway Com.*, 209 N. C., 648 (653); *Grady v. Grady*, 209 N. C., 749 (750); *Cahoon v. Roughton*, 215 N. C., 116. In the last cited case, *Barnhill, J.*, speaking for the Court, expressly affirmed the authority of the *Davis case, supra*, in the following words: "The plaintiffs have failed to bring themselves within the decision in *Davis v. Alexander*, 202 N. C., 130, 162 S. E., 372." In the *Davis case, supra*, the plaintiff asserted his right to have the entire width of the old road from his home to the public road leading into the new road kept open by mandatory injunction, and this right was sustained by this Court. The application of the rule of the *Davis case, supra*, to the facts of the instant case is determinative.

Much of the argument of defendant is predicated upon the assumption that the old road in controversy has been completely abandoned as a public highway. It does not so appear from the record. The State Highway Engineer for the district in which the road in controversy is located testified, on cross-examination by the defendant, "I do not know of any proceedings taken to abandon the old highway. When I stated that the road had been abandoned, I meant that the State Highway Commission does not keep it up now. . . . When we release a highway or abandon it, it reverts to the jurisdiction of the county commissioners." This is the strongest evidence relative to an abandonment of the old highway revealed upon a careful reading of this record. Certainly the evidence on the instant record does not negative the continuation of the old road under county maintenance or under private maintenance with the approval of the county authorities. As has been well said, "The maxim ('once a highway always a highway') exists in support of the position that when it is shown that a highway was once laid out pursuant to law, or created by dedication, the burden of showing discontinuance, abandonment or vacation, is upon the party who asserts that the public and the abutting owners have lost or surrendered their rights. In the absence of satisfactory evidence of discontinuance, vacation or abandonment, the presumption is in favor of the continuance of the highway with the principal and incidental rights attached to it." See 2 Elliott, Roads and Streets, 4th Ed., p. 166, *et seq.* Here the defendant undertook to assert rights predicated upon an actual and complete abandonment of the old highway and, accordingly, assumed the burden of showing such abandonment. Defendant also relied upon certain allegations with reference to plaintiffs' use of the old highway for unlawful parking and in furtherance of plaintiffs' roadhouse business alleged to

be unlawful; such allegations, even if sufficiently proved, would not forfeit plaintiffs' property right to use the old road in traveling to and from plaintiffs' land. If the rights of the public are being violated by plaintiff in the unlawful parking near plaintiffs' place of business, the strong arm of the criminal law may be invoked with speedy effect; if the public sense of morals and decency is being violated by plaintiffs in the maintenance of a nuisance, the equally rigorous remedies of padlocking and orders of abatement are in easy reach of any citizen wishing to invoke them. On this record plaintiffs, as individuals, assert recognized property rights against defendant, as an individual, and the law as heretofore written in this jurisdiction sustains plaintiffs' position.

The judgment of nonsuit is reversed. The cause is remanded for further proceedings not inconsistent with this opinion.

Reversed.

DEVIN, J., concurring: The evidence as it appears of record is insufficient to show affirmatively a complete abandonment of the Old Dowd Road as a public road, and hence nonsuit of plaintiffs' action to restrain obstruction thereof was improvidently granted. C. S., 3761; Public Laws 1927, ch. 46, sec. 4; Public Laws 1931, ch. 145, sec. 12; Public Laws 1931, ch. 448; Public Laws 1933, ch. 302. *In re Edwards,* 206 N. C., 549.

Whether the obstructions placed in the road by defendant interfere with the reasonable exercise of plaintiffs' right of ingress and egress, under the circumstances of this case, as shown by plaintiffs' evidence, was a matter for the consideration of the jury under proper instructions from the court.

BARNHILL, J., dissenting. The defendant owns property on both sides of the boulevard. That portion of her property which lies on the south side thereof is triangular in shape, contains .71 of an acre and is composed partly of land formerly subjected to the easement of the right of way of the Old Dowd Road, and partly of land outside of the bounds of the right of way of either road. The land claimed by the plaintiffs is to the south of this tract and extends to the center of the right of way of the old road and also extends to and is bounded by the new boulevard to the east.

The plaintiffs do not allege, and there is no evidence tending to show, the ownership by adverse possession of the property claimed by the plaintiffs. Nor could the plaintiffs assert ownership by adverse possession where their use of the property admittedly was as a member of the public in exercising their right to travel upon a public road. Furthermore, the old boulevard as located in front of plaintiffs' property was in existence less than twenty years.

While it is established in this jurisdiction that where a public road is discontinued the owners of property abutting on the public road prior to its abandonment are entitled to a private way of ingress and egress over the old road, this rule exists in behalf of those whose property is, by the abandonment or relocation of the road, completely cut off from and deprived of any other access to the new road. The plaintiffs have failed to establish any right under this principle of law. They not only have access to the new boulevard over one-half of the land formerly subjected to the easement of the old road but their land borders upon the new road. In any event, they would be entitled only to a reasonable means of ingress and egress. This Court has not held, and I am of the opinion that we should not now hold, that such abutting property owner is "entitled to use the full width (60 ft.) right of way" of the old road "for ingress and egress."

Here the plaintiffs have 30 feet of the old right of way located on their property, of this 30 feet two-thirds is paved. Therefore, they are not deprived of the right of ingress and egress and they should not be permitted to take the land of the defendant, which reverted free of the easement when the old road was abandoned, so that they may have a 60-foot right of way. The statement in the opinion of the majority that "there was evidence to support plaintiffs' claim to use the full width (60 ft.) right of way of the Old Dowd Road for ingress and egress to the New Wilkinson Boulevard" is not supported by any reference to the supposed evidence in support of this claim and a careful perusal of the record fails to disclose it. Moreover, the stipulations of the parties as to "the true dividing line between the lands of the plaintiffs and defendant" is entirely ignored by the majority. Admissions made in open court have heretofore been regarded as binding on the parties. *Turner v. Livestock Co.*, 179 N. C., 457, 102 S. E., 849. The trial court acted on this admission and it should be considered here.

The old maxim, "Once a highway always a highway," does not mean that road officials, under proper legislative authority, may not abandon a public road. This maxim, as quoted in *Davis v. Alexander,* 202 N. C., 130, 164 S. E., 617, and in the majority opinion, was taken from 2 Elliott, Roads & Streets, (4d). Standing alone and unqualified it does not constitute a correct statement of the law, as the complete text clearly shows. The right of the State, in the exercise of its plenary power, to abandon or discontinue a public road is recognized in the *Davis case, supra.* County officials were vested with this right many years ago. C. S., 3750 and 3751. And the Legislature, by ch. II, sec. 7, Public Laws 1921, conferred this authority upon the State Highway Commission. *Road Com. v. State Highway Com.,* 185 N. C., 56, 115 S. E., 886. See also *Cameron v. State Highway Com.,* 188 N. C., 84, 123 S. E., 465.

This power was again conferred upon the State Highway Commission by ch. 46, sec. 1, Public Laws 1927, which authorized this Commission "to change, alter, add to, or abandon, and substitute new sections for, any portion of the State highway system, as now or hereafter, taken over, maintained and established."

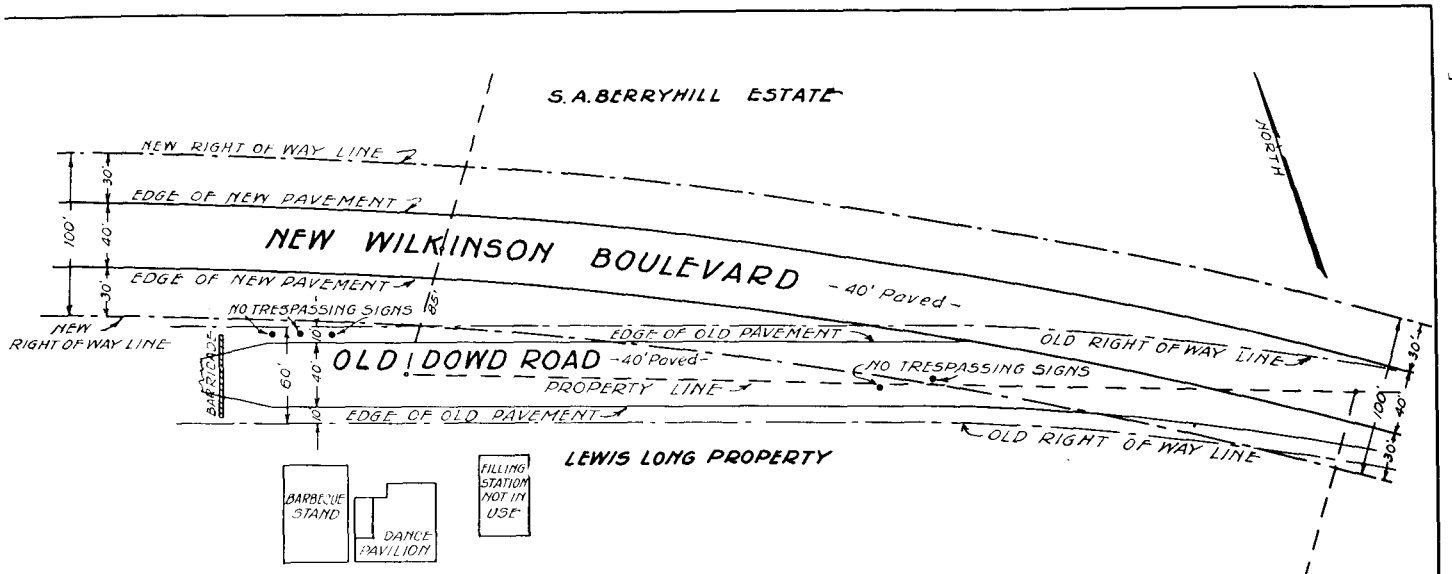
The maxim as quoted exists only in support of the position that when it is shown that a highway was once laid out pursuant to law or created by dedication the burden of showing discontinuance, abandonment or vacation is upon the party who asserts it. It merely means that when it is shown that a public way has been established the law presumes that it continues as such until the contrary is shown. See *Parker v. Highway Com.*, 195 N. C., 783, 143 S. E., 871. If "Once a highway always a highway" is a doctrine of the common law, except as I have indicated, it has been expressly repealed by statute and no longer prevails in this State.

(See map on opposite page.)

It is expressly alleged in the complaint that the State Highway authorities moved or relocated the Wilkinson Boulevard (the section of the road in controversy being part of the old boulevard). The State Highway Commission had a right so to do and to abandon that section of the road plaintiffs now seek to keep open as a public highway.

As a general rule, after a highway is vacated or abandoned it is the same as if it had never existed and can again be brought into existence only in the same manner as an entirely new highway; the public easement is extinguished and the road authorities relieved of the duty to keep it in repair. 2 Elliott, Roads & Streets (4d), p. 1690, and cases cited in notes. The general public loses all rights in the road abandoned. Nevertheless, the abutting owners whose property is deprived of road frontage by the relocation are entitled to the right of ingress and egress over the old road. This right to ingress and egress over and along the abandoned road applies when and only when, by the discontinuance of the road, such abutting owners are deprived of an outlet. But, so far as I have been able to find, there is no case which has interpreted this rule to mean that they may demand the use of the full width of the old road. Their rights are dependent upon the rule of reason.

The *Davis case, supra,* cited and relied upon in the majority opinion does not hold that the plaintiff therein was entitled to the full width of the old road. Furthermore, the facts are distinctly different and the case is not in point except upon the alleged right of the plaintiff to ingress and egress. There the defendant owned a tract of land lying on both sides of the old road and between the property owned by the plaintiff and the new road. The shift in the location of the road had deprived the plaintiff of any outlet except over the old road. The defendant



MAP SHOWING LOCATION OF
NEW WILKINSON BOULEVARD & OLD DOWD ROAD
LOCATED ADJACENT TO & EAST OF CATAWBA RIVER BRIDGE
BERRYHILL TOWNSHIP
MECKLENBURG COUNTY, N. C.
Scale 1" = 20' July - 1939
By: J. W. Spratt
County Surveyor
For Mecklenburg County, N.C.

This Map Redrown Sept. 1940
To Scale Of 1" = 60'

sought to close that part of the old road which intersected his land. The Court held that he could not do so to the extent of depriving the plaintiff of his right of ingress and egress. This is the full force and effect of that decision.

But the record discloses the following stipulation and admission: "It is admitted by the plaintiffs and the defendant that the true dividing line between the lands owned by the plaintiffs, Ada Long *et al.*, and the lands owned by the defendant, runs down the center of what is known in the pleadings as the old Wilkinson Boulevard, formerly the public highway extending from Charlotte to Gastonia." This stipulation entered into by the plaintiffs constitutes a twofold admission: (1) That the area now in controversy known as the Old Wilkinson Boulevard is a part of an abandoned public highway; and, (2) That the defendant is the owner of such land to the admitted true dividing line which runs down the center of the old road. Having admitted that the defendant owns the property which they now claim and over which they are attempting to assert the right of possession the plaintiffs may not now contend to the contrary. The admission is binding on them.

In view of the admission of discontinuance and considering that the bridge over the river near plaintiffs' property, which constituted a part of the old boulevard has been torn away and a barricade erected and that the State Highway Commission no longer maintains the old boulevard and the plaintiffs in their brief treat the old road as a part of an abandoned highway, it would seem to be beside the question to contend now that this is not an abandoned highway. Furthermore, it affirmatively appears from the evidence of the plaintiffs that when this tract of land was sold at public auction and purchased by defendant the plaintiffs, through their representative, appeared at the sale and bid $990.00, thus recognizing its private ownership.

But in maintaining its position that the record does not disclose the abandonment of the Old Wilkinson Road reliance is placed on the statement of the district engineer who said that when the Highway Commission abandoned a road it reverts to the jurisdiction of the county commissioners. This witness had theretofore testified that "the State of North Carolina has abandoned that old road at the point to which I referred near the Wilkinson Boulevard. The State nor the county do any work on it." The engineer's statement that jurisdiction over the road reverted to the county commissioners was an erroneous statement of law. The Legislature, by ch. 145, sec. 7, Public Laws 1931, vested "the exclusive control and management and responsibility for all public roads in the several counties" in the State Highway Commission and abolished "all county, district and township, highway or road commissioners by whatever name designated." No jurisdiction of the county existed to which control of the road could revert.

Appeal is from the judgment of nonsuit. So the case comes to this: "In an action for trespass judgment of nonsuit is granted at the close of the plaintiffs' evidence on solemn admission in open court that the defendant owns the property in which the plaintiffs seek to assert an easement and has not encroached on their land. Yet the judgment of nonsuit is reversed. This is done notwithstanding the admission that the old road was abandoned and the plaintiffs sought to purchase the very land in controversy."

It is apparent from the record that the plaintiffs are seeking to compel the defendant to leave unobstructed all of the original roadbed of the Dowd Road—not for the purpose of enabling them to traverse the road in the ordinary course of traffic but so that they may use the easement as a direct outlet to the new road. This is to be accomplished by going across the easement rather than along it as traffic would ordinarily pass. That this is the purpose of the suit seems to be conceded in the majority opinion. If this is done it will enable the plaintiffs to subject to an easement, without compensation, a part of defendant's land which is not now and has never been subjected to the easement of either the old or the new road, for the triangular strip of land owned by the defendant is composed partly of land within and partly of land outside the easement.

If the majority opinion prevails the plaintiffs, whose land borders upon the new road and who already have a 20-foot paved road to the public highway, will be allowed to impose upon the defendant's land a 30-foot easement for their further convenience and enrichment when defendant's land is now already subjected to the 100-foot right of way of the new road. In my opinion this position cannot be sustained in the name of justice and is not supported either by law or by reason.

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

J. D. BECK v. CARLTON C. HOOKS, COLUMBUS C. HOOKS AND JOHN L. ROTHROCK, TRADING UNDER THE STYLE OR FIRM NAME OF HOOKS MOTOR LINES, AND L. W. SEWARD.

(Filed 18 September, 1940.)

1. Appeal and Error § 41—Where it is determined that nonsuit should have been granted on issue of contributory negligence, whether there is sufficient evidence of negligence need not be determined.

The evidence tended to show that a car overturned on the highway blocking the road 75 feet in front of defendants' truck, that the driver of the truck pulled to the right and stopped the truck partly on the hard

surface and partly on the shoulder of the road two feet from the overturned car, that the driver of the truck and his helper then went to the aid of the occupants of the car whose cries of distress they heard, that the driver then helped to move the disabled car from the highway while his helper returned to the truck to get flares to place on the highway, that within two to five minutes after the truck stopped, plaintiff's car traveling along the highway headed in the same direction as the truck, struck the rear of the truck, and further that the shoulders of the road were soft so that it would have taken time to have driven the heavily loaded truck all the way on the shoulders of the road. *Held:* Whether the stopping the truck on the highway under the circumstances constituted parking on the highway within the meaning of section 24, chapter 148, Public Laws of 1927, Michie's Code, section 2621 (66), or violated the provisions of the statute need not be decided, since it is determined that defendants' motion for judgment as of nonsuit should have been granted on the ground of contributory negligence.

2. Negligence § 11—

It is not required that contributory negligence be the sole proximate cause of injury in order to bar recovery, it being sufficient if it is one of the proximate causes.

3. Negligence § 19b—

When contributory negligence appears from plaintiff's evidence, a motion for nonsuit is properly granted, but not when such evidence is from defendant.

4. Automobiles § 12a—

The driver of a car must not drive at a speed in excess of that at which he can stop the car in time to avoid hitting an obstruction within the range of his lights, and when his vision is lessened by the glare of lights from a car approaching from the opposite direction, he must slacken his speed so that he can stop immediately or within the reduced range of his vision, and if completely blinded must then stop completely.

5. Automobiles § 18c—Plaintiff's evidence held to disclose contributory negligence as a matter of law in striking truck parked on the highway.

Plaintiff's evidence tended to show that his car struck the rear of a truck which was standing partly on and partly off the hard surface on plaintiff's right-hand side of the highway, that the portion of the highway traveled by plaintiff before striking the truck was straight for a distance of 200 yards or 600 feet, that plaintiff was traveling 40 miles an hour, that the range of his headlights was 50 feet, that his brakes were in good condition, but that plaintiff and his driver were blinded by the lights of a car approaching from the opposite direction which passed them about 14 feet before plaintiff's car reached the truck, so that, according to plaintiff's testimony, he did not see the truck until it was 12 or 14 feet away, and, according to the testimony of the driver, he did not see the truck until it was about 67 feet away, that the driver slackened his speed when blinded by the on-coming lights, but did not see the truck in time to stop, and hit it while going 15 or 20 miles an hour. *Held:* The evidence discloses contributory negligence barring recovery as a matter of law, since the driver was required to keep a proper lookout and avoid hitting any obstruction which he could have seen in the exercise of due care in keeping a proper lookout, or, if he could not have seen the truck in time to

avoid hitting it, he was negligent in failing to reduce his speed so that he could have stopped within the range of his lights, and the evidence further discloses that such negligent failure was a proximate cause of the injury.

6. Automobiles § 23—

Where a car in which the owner is riding is driven at the owner's request and under his direction by his nephew, the negligence of the driver is imputable to the owner.

CLARKSON, J., dissenting.

DEVIN and SEAWELL, JJ., concur in dissent.

APPEAL by defendants from *Harris, J.,* at February Term, 1940, of GRANVILLE.

Civil action to recover damages for personal injury resulting from alleged actionable negligence. Defendants denied allegation of negligence, and pleaded contributory negligence.

On the night of 6 November, 1938, plaintiff's automobile, driven by his nephew, Alvis Beck, at his request and under his direction, and in which he was riding, traveling north on U. S. Highway No. 15, from Durham toward Oxford, ran into and collided with the rear end of a trailer truck of defendants, loaded with furniture, and likewise headed north, standing partly on and partly off the paved portion of the highway on the east or right side thereof, at a point in Granville County, North Carolina, about one mile north of Harris' filling station and three miles south of the town of Creedmoor and near the foot of a slight down grade, resulting in serious personal injury to plaintiff. At the point of collision the paved portion of the highway was eighteen feet wide. The shoulder on the right side there was four or five feet wide. Southward, the highway was slightly upgrade and straight, or practically straight, for two hundred yards to one thousand feet, and northward it curved slightly to the left.

Plaintiff's evidence tended to show these facts: When the plaintiff's automobile and defendants' truck came to rest after the collision they were both partly on and partly off the paved portion of the highway, and on the east or right side standing twenty to thirty feet apart. One tail light, a dim light, was burning. Lights on one side, the clearance lights, were burning. The dim tail light was on the body of the truck, and "two or three were mashed up over there where it was torn up." There was clearance of ten or twelve feet to the left of the truck according to the testimony of the chief of police when he arrived about thirty minutes after the wreck occurred.

Plaintiff and Alvis Beck were the only witnesses for plaintiff with respect to the operation of plaintiff's automobile immediately preceding the collision.

Narratively stated, plaintiff testified: "We were coming down the right . . . just over the crest of a hill and was meeting an automobile and when the automobile passed our light flashed on the truck, or I guess it was a truck—it was a bulky something in the road. That is the last thing I remember. . . . At the time I first observed the object . . . there was one light visible on the right side, a little bitty dim red light. . . . I detected the light pretty much as soon as I saw the object in the road. I was keeping a lookout along the road in front of me . . ." Then on cross-examination he testified: ". . . I should judge that from where I come over the crest of the hill . . . to where I struck this truck is somewhere around 150 yards. When I come over the crest of the hill and traveling at the rate of forty miles an hour there was nothing in between me and what was there . . . my lights . . . showed as far as from the witness chair to the back end of the courthouse. (Admitted to be 67 feet.) I don't know how far my lights were showing that night at the rate of forty miles an hour. I imagine it was around fifty feet . . . approximately fifty feet. . . . The brakes were in perfect condition. . . . going forty miles an hour . . . according to my testimony it would take me the full distance of my light beam to come to a stop. At the time I come over the crest of this hill and started down there was an unobstructed view of 150 yards. I looked down the road. I didn't see anything. I imagine you could see down to the foot of the hill. When I came to the crest I looked as far down as I could see. I continued to look all the way down. . . . The lights of that automobile that I was meeting looked to be reasonably bright. . . . What kept me or the driver from seeing that parked object in the highway was that you can't see as far down the highway when you are meeting an automobile. The curve beyond where the truck was parked was just a little bit of curve, not very much, bearing a little bit to the left. I know the lights were bright, and I saw the automobile before I hit the truck. . . . I do know that I was looking straight ahead to see if anything was in the road. I always do. Alvis seemed to be looking straight ahead. . . . When I finally met this automobile, or passed it, it might have been 14 feet from the truck . . . somewhere around that. I saw one light on the truck, a red light. When I saw that light I said or did nothing. . . . I felt him put on brakes. There was nothing else I could do. . . . When I first saw the truck I would say I was as much as 12 or 14 feet from the truck. Another automobile was coming that kept us from cutting between that 14-foot gap and missing that truck. . . . I admit it took me and my agent somewhere around 50 feet to stop. . . . There was an automobile meeting us and it passed us beyond the truck, and when that passed, another light flashed up and that is the

last thing I remember. I didn't see any 14-foot gap. I don't know what kept us from going around it."

Alvis Beck, testifying for plaintiff, said: "After we left Harris' filling station, we hit a truck. They said it was a truck. I couldn't tell what it was that night. . . . I drove just ordinary speed, I reckon around 40 miles an hour. . . . I was keeping a lookout along the highway in front of me. . . . After I passed the automobile I saw the object in front of me, whatever it was, a great big something in the road. . . . I was something like as far as from the witness chair to the back side of the building when I first discerned it. After seeing the truck I tried to stop. I knocked it out of gear, and put on brakes, pushed in the clutch. I was not able to stop it. I didn't see any light or lights on the object which I saw in front of me there on the highway. I was looking along the highway in front of me. The front end of the car I was in struck the object which was in the road. . . ." Then on cross-examination the witness testified: "I had driven this car before, several times. I am familiar with the speed. . . . I knew approximately how long it would take to stop a car with the brakes I had. . . . I have driven over that road many times. . . . When you come to the top of the hill you can see down there if there is no car coming to blind you, if there was nothing between you, you could see that far. I don't know how fast I was going when I ran into the truck, I reckon about 15 or 20 miles an hour. . . . An automobile passed us. When I was coming over the grade, the car was coming to meet me. I don't know how far away I was from the automobile that I said blinded me when I saw it. As far as from here across the street maybe. Those lights blinded me. I took my foot off the gas then. I started slowing down because the oncoming lights blinded me. The lights were blinding me, keeping me from seeing the truck in front of my lights. I couldn't look down the road. I did not drive blinded at 40 miles an hour when I couldn't even see. I could see some. They blinded me, but I seen the truck before I hit it. I drove according to my testimony, as far as from here across the street, with the lights blinding me. I slackened up then. . . . I don't know whether I was as far as from the witness chair to the back end of the courthouse before I saw it or not. I said it was something like that. I don't know why I didn't stop when I saw it, it excited me or something. . . . I just couldn't stop when I saw it. I reckon the reason I didn't I was so close to it. . . . When I saw the truck I did not see any lights on the truck. I did not see a red light. If the truck had any lights on it I did not see it. Just as I passed the automobile, whose lights I testified blinded me, after I got past it, I seen the truck. Some more lights were coming that kept me from going through the gap and going around the truck. . . . I

didn't see a wrecked automobile to the left. I didn't see the man there. I don't remember seeing any of these five people there that night."

On the other hand, evidence of defendants tends to show these facts: The truck was properly equipped with lights, both in front and on the rear, six lights on the back of the truck, including clearance lights and arrow signal light containing tail light. The lights were inspected in Durham, and as the truck was driven by James Mellis, from Durham toward Oxford, a Plymouth automobile in which two men, two women and a baby were riding, passed the truck at a point about a half-mile south of the point of the collision between plaintiff's automobile and the truck, at which time the lights on the truck were burning. The Plymouth continued to travel about seventy-five feet in front of the defendants' truck over the crest of the hill and down the grade for approximately 150 yards or more, when its left rear wheel came off causing it to wreck and overturn, upside down, diagonally across the highway, so that the truck could not pass on either side. The truck driver pulled the truck to the right, partly off the pavement, and stopped there within 18 inches or two feet of the rear bumper of the upturned car, when he heard the cries of a woman and a baby. Whereupon, he aroused L. W. Seward, who was sleeping in the truck, and they both, Seward in his bare feet, went to the overturned car to assist the passengers in getting out. Then James Mellis, with the two men who were in the Plymouth, turned it upright and practically off the left side of the highway. A truck traveling north then came along and passed through between defendants' truck and the Plymouth. Then the sound of the plaintiff's automobile was heard coming at a terrific rate of speed at the top of the hill and it came into sight at least 200 yards away, running at an estimated speed of 60 miles an hour, until it collided with the truck. In the meantime, after helping passengers get out of the Plymouth, Seward went back to the cab of the truck and got flares and started to the rear of it to place them upon the highway, but before he could get them lighted and placed the plaintiff's automobile came into collision with the truck. Seward undertook to flag plaintiff by waving his arms. From two to five minutes elapsed between the time the truck stopped on the right side of the road when the Plymouth overturned, and the time of said collision. During that interval no motor vehicle of any kind, traveling south, passed the point of collision and none was passing at the time of the collision.

The case was submitted to the jury upon issues of negligence, contributory negligence and damage. From judgment on adverse verdict, defendants appeal to Supreme Court, and assign error.

T. G. Stem and B. S. Royster, Jr., for plaintiff, appellee.
Gholson & Gholson for defendants, appellants.

WINBORNE, J. Appellants stress for error the refusal of the court below to grant their motion for judgment as of nonsuit at the close of all the evidence—they having reserved exception to refusal to allow such motion at close of plaintiff's evidence—upon two grounds: (1) Lack of sufficient evidence to take the case to the jury on the issue of negligence, in support of which they rely upon *Hughes v. Luther,* 189 N. C., 841, 128 S. E., 145; *Stallings v. Transport Co.,* 210 N. C., 201, 185 S. E., 643. (2) Contributory negligence of plaintiff—in support of which they invoke the principles enunciated in the main in *Weston v. R. R.,* 194 N. C., 210, 139 S. E., 237; *Lee v. R. R.,* 212 N. C., 340, 193 S. E., 395. See, also, *Elder v. R. R.,* 194 N. C., 617, 140 S. E., 298, and *Eller v. R. R.,* 200 N. C., 527, 157 S. E., 800.

(1) The principal charge of negligence made against the defendants is parking the truck upon the highway in violation of the provisions of section 24 of chapter 148 of Public Laws 1927, Michie's Code of 1935, section 2621, subsection 66. In this connection one who is required to act in the face of an emergency is not held by the law to the wisest choice of conduct, but only to such choice as a person of ordinary care and prudence, similarly situated, would have made. *Ingle v. Cassady,* 208 N. C., 497, 181 S. E., 562; *Poplin v. Adickes,* 203 N. C., 726, 166 S. E., 908.

Plaintiff's witness, the chief of police, expressed doubt whether there was room on the dirt shoulder on the right side for the truck to have pulled entirely off the paved surface, loaded as it was. He said: "A man could get off if he had plenty of time. He would not, if he didn't. At that time the condition of the shoulders was soft." Furthermore, the Plymouth car of a third party wrecked when seventy-five feet ahead of the truck and blocked the highway. But defendant's driver, by good fortune, was able to pull the truck partly off the paved surface and to bring it to a stop before striking the disabled car in the road—stopping in eighteen inches or two feet of it. His first act then was to answer the cry of those in distress. His fellow operator, aroused from his sleep, did likewise. Then the driver set about to help remove the disabled car from the road, while his fellow worker returned to the truck to get flares to be placed on the highway. Before this could be done the collision occurred. All this happened in the short space of from two to five minutes, according to uncontradicted estimates of several witnesses. Will the law impute such conduct for negligence? Whether the stopping of the truck partly on the highway under the circumstances and for the length of time shown by the uncontradicted evidence of the defendants constitutes parking on the highway within the meaning and is violative of provisions of section 24 of chapter 148, Public Laws 1927, Michie's Code, 1935, sec. 2621, subsection 66, or whether there is sufficient evi-

dence of negligence in any other respect alleged, to take the case to the jury, it is, in the view we take of the case, unnecessary to decide. (2) But if it be conceded that defendants were negligent in the respects alleged, we are of opinion and hold that upon plaintiff's evidence the driver of plaintiff's automobile was guilty of contributory negligence as a matter of law, and that this negligence was the proximate cause, or one of the proximate causes, of the injury to plaintiff.

In *Weston v. R. R., supra,* speaking to a factual situation somewhat similar to that here, this Court said: "The general rule under such circumstances is thus stated in Huddy on Automobiles, 7 Ed., 1924, sec. 296. '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.'" This principle has been brought forward and applied in *Lee v. R. R., supra,* and held applicable to factual situation in *Clarke v. Martin,* 217 N. C., 440, 8 S. E. (2d), 230.

It is sufficient to defeat recovery if plaintiff's negligence is one of the proximate causes of the injury, it need not be the sole proximate cause. *Construction Co. v. R. R.,* 184 N. C., 179, 113 S. E., 672; *Lunsford v. Mfg. Co.,* 196 N. C., 510, 146 S. E., 129; *Davis v. Jeffreys,* 197 N. C., 712, 150 S. E., 488; *Lee v. R. R., supra.*

When contributory negligence appears from the plaintiff's evidence, a nonsuit is properly granted, but not when such evidence is from the defendant. *Battle v. Cleave,* 179 N. C., 112, 101 S. E., 555; *Nowell v. Basnight,* 185 N. C., 142, 116 S. E., 87; *Lunsford v. Mfg. Co., supra.*

Applying these principles to the evidence for plaintiff, it affirmatively appears: From the crest of the hill northward to the point of collision the highway is straight, or practically straight, for at least two hundred yards or six hundred feet. From the top of the hill "You can see down there if there is no car coming to blind you." When plaintiff's automobile was coming over the grade, a car was coming. Plaintiff's automobile met and passed that car: (1) According to plaintiff's testimony, fourteen feet from the truck—for he said he saw the truck as soon as the car passed, and when he "first saw the truck" he was as much as twelve or fourteen feet from it; and (2) According to testimony of Alvis Beck,

he saw the truck before he hit it, something like as far as from the witness chair to the back end of the courtroom—that is, he was something like 67 feet from it. Plaintiff's automobile was traveling at rate of forty miles per hour when it came over the hill, and when it hit the truck it was going at the rate of fifteen or twenty miles per hour. The driver was blinded by the lights of oncoming car. He testified, "The lights were blinding me, keeping me from seeing the truck in front of my lights. . . . I drove, according to my testimony, as far as from here across the street with the lights blinding me. I slackened then. . . . I don't know why I didn't stop when I saw it, it excited me or something. I just couldn't stop when I saw it. I reckon the reason I didn't I was so close to it." Plaintiff stated that when he first saw the light on the truck, "I felt him (the driver) put on the brakes." Plaintiff also makes this significant statement, "What kept me or the driver from seeing that parked object in the highway was that you can't see as far down the highway when you are meeting an automobile."

It is not enough that the driver of plaintiff's automobile be able to begin to stop within the range of his lights, or that he exercise due diligence after seeing defendants' truck on the highway. He should have so driven that he could and would discover it, perform the manual acts necessary to stop, and bring the automobile to a complete stop within the range of his lights. When blinded by the lights of the oncoming car so that he could not see the required distance ahead, it was the duty of the driver within such distance from the point of blinding to bring his automobile to such control that he could stop immediately, and if he could not then see, he should have stopped. In failing to so drive he was guilty of negligence which patently caused or contributed to the collision with defendant's truck, resulting in injury to plaintiff. And the negligence of the driver, under the relationship here disclosed, is imputable to the plaintiff.

This case is distinguishable from these cases relied upon by plaintiff: *Williams v. Express Lines,* 198 N. C., 193, 151 S. E., 197; *Smithwick v. Pine Co.,* 200 N. C., 519, 157 S. E., 612; *Pender v. Trucking Co.,* 206 N. C., 266, 173 S. E., 336; *Cole v. Koonce,* 214 N. C., 188, 198 S. E., 637; *Clarke v. Martin, supra; Page v. McLamb,* 215 N. C., 789, 3 S. E. (2d), 275.

The judgment below is

Reversed.

CLARKSON, J., dissenting: I think the decision in this case involves considerations with which the jury alone has the right to deal. In its rationale it disregards the rules established for the consideration of questions of nonsuit in an appellate court, designed to prevent just that result.

In considering whether the evidence discloses negligence on the part of the defendants, the main opinion frankly takes note of the evidence of the defendants, and the explanation given by them, as supporting the conclusion that there was no negligence. That is, of course, contrary to the rule, and "invades the province of the jury," since this Court is not a judge of the credibility of the evidence. *Lassiter v. R. R.,* 171 N. C., 283, 88 S. E., 335; *Hill v. R. R.,* 195 N. C., 605, 143 S. E., 129; *Dickerson v. Reynolds,* 205 N. C., 770, 172 S. E., 402. Specifically, two circumstances or conditions as to which the evidence is said to be "uncontradicted" are taken from the defendants' evidence and made to serve as alleviating the *prima facie* negligence of defendants in parking partly upon the concrete of the highway and relaxing their duty to the public and to the plaintiff in this regard: First, that they were confronted with an emergency; second, that they were engaged on a mission of mercy. And, perhaps, a third reason is suggested: That they were following the car which overturned so closely that they had no opportunity to observe the statute.

But the plaintiff's evidence simply reveals that the defendants' truck was parked partly upon the concrete highway, and that it had a "little bitty dim red light" on one side of the rear end. Plaintiff's witness riding in the car, although he kept a lookout down the hill in the direction of travel, did not see the light at all. There is nothing in plaintiff's evidence about any emergency affecting the conduct of defendants. *Hendrix v. R. R.,* 198 N. C., 142, 150 S. E., 873; *Ford v. R. R.,* 209 N. C., 108, 182 S. E., 717; *Gower v. Davidian,* 212 N. C., 172, 193 S. E., 28.

It was a violation of law to park in this way on the highway, and the statute was made in the interest of public safety. Chapter 407, section 123, Public Laws of 1937; *Burke v. Coach Co.,* 198 N. C., 8. It should be self-evident that a defendant cannot exonerate himself in this Court from *prima facie* negligence or negligence of which there is any evidence, by his own evidence.

A doubt is expressed in the opinion (which necessarily must be based upon defendants' evidence), whether the act of the defendants in leaving the truck in this position on the highway constitutes parking within the purview of the statute. I cannot authoritatively define "parking" in a dissenting opinion, but it seems to me clear that a car is parked when those in charge stop it upon a highway and intentionally leave it upon the concrete to pursue some activity other than that concerned with the car and its operation, however commendable it may be. This, however, is hardly worth considering, since the statute itself contains the definition sufficient to make it an offense to leave a car thus standing. In so far as this plaintiff and his rights are concerned, the car was parked, showing only "a little bitty dim red light" on the end of it. This was the

measure of the defendants' compliance with one of the most important safety statutes on the books.

If the liberality with which the defendants' conduct is treated is so outstanding, the rigidity of the view taken of plaintiff's behavior in this unfortunate and complicated occurrence is equally unwarranted. The conclusion that plaintiff, as a matter of law, was contributorily negligent is not well founded.

The conclusion is based principally upon two things: First, that plaintiff was driving at a rate of speed that would carry him beyond the effective range of his lights before he could have stopped. This is contrary to plaintiff's evidence. "My lights showed as far as from the witness chair to the back of the courtroom. (Admitted to be 67 feet.) I don't know how far my lights were showing that night—I imagine it was around fifty feet. Approximately fifty feet. According to my testimony it would take me the full distance of my light beam to stop." This occurs in the cross-examination. Whether we take fifty feet or sixty-seven feet as the effective range of the light beam, he said he could have stopped the car in this distance. *But the Court requires him, as a matter of law, to apply the brakes as soon as the parked truck could have been seen, whether he saw it or not,* holding him to the rigid necessity of seeing it at that time, without reference to any conditions which might have qualified or affected that duty. That is not the proper interpretation of the excerpt from Huddy on Automobiles, relaying from *Weston v. R. R.,* 194 N. C., 210, 139 S. E., 237, quoted in the opinion. It was not the intention of the Court that this case should depart from the rule of reasonable prudence and substitute for it a mathematical form, or to require an instant recognition of danger when, through the exercise of the highest degree of diligence and alertness, it might have been seen. If so, it is the duty of this Court to disavow such a theory at once.

There were plenty of qualifying conditions. Amongst them the approach of another car, with glaring lights, from the direction of the parked truck. Here, again, the opinion takes that view of the evidence most unfavorable to the plaintiff and holds him negligent for not stopping when "blinded by the glare of the approaching car." It does not accept his reasonable explanation of what he meant by "blinded," that is, that he could see some, and ignores the fact that he did slow to fifteen or twenty miles.

It is true that some parts of the plaintiff's evidence may be less favorable to him than others, but the rule that this evidence must be taken in the most favorable light to the plaintiff applies as much to the plaintiff's testimony as it does to that of the testimony of any other witness, and even where it is contradictory that part of it which is most favorable to the plaintiff must prevail. *Dozier v. Wood,* 208 N. C., 414, 181 S. E.,

336; *Matthews v. Cheatham,* 210 N. C., 592, 188 S. E., 87; *Gunn v. Taxi Co.,* 212 N. C., 540, 193 S. E., 747; *Mulford v. Hotel Co.,* 213 N. C., 603, 197 S. E., 169. The practice of making out a case against the plaintiff on his evidence, taken as a whole, is unwarranted in an appellate court, necessarily involving a consideration of the weight of testimony. *Matthews v. Cheatham, supra; Mulford v. Hotel Co., supra.* For the same reason it is even worse to make out a case against him upon the defendants' evidence, however uncontradicted.

A broadside consideration of the whole evidence upon the question of nonsuit must be careful to consider the whole of the plaintiff's evidence, including his own testimony, in the light most favorable to him, and to exclude all of the defendants' evidence except that which is favorable to the plaintiff, since the purpose of the investigation is to find out whether there is any evidence at all supporting plaintiff's contention.

The result of the trial should not be disturbed.

DEVIN and SEAWELL, JJ., concur in dissent.

LOUISE BUTLER, ADMINISTRATRIX OF THE ESTATE OF WILLIAM BUTLER, DECEASED, v. CAROLINA POWER & LIGHT COMPANY.

(Filed 18 September, 1940.)

1. Evidence § 42b—

The evidence disclosed that intestate was sawing limbs from a tree through which ran high powered wires from which the insulation had been worn, and that sparks of electricity were seen in the branches near plaintiff. *Held:* Warnings called out to intestate by bystanders are competent as being within the *res gestæ.*

2. Nuisance § 1—

While a nuisance may exist irrespective of any act of negligence, and a party injured thereby may recover the damages sustained, where the condition complained of arises solely by reason of alleged negligence, the gravamen of the action is negligence and the failure to submit an issue as to the existence of a nuisance is not error.

3. Electricity § 7—In this action to recover for death of intestate caused by electrocution, refusal to submit issue of nuisance was not error.

The evidence tended to show that defendant power company maintained high tension wires through a tree in proximity to the house in which intestate lived, that the wires rubbed against limbs of the tree so that the insulation had been worn off, and that for a long period before the accident in suit sparks of electricity were seen in and about the branches of the tree, that intestate climbed the tree to saw off limbs which were rubbing against the house, and was electrocuted. *Held:* The refusal of

the trial court to submit an issue tendered by plaintiff as to defendant's operation and maintenance of a nuisance is without error, and the judgment for defendant, entered upon the jury's negative finding to the issue of negligence, is upheld.

4. Actions § 5—

The distinction between forms of actions has been abolished, and the right to recovery will be determined in accordance with the factual situation established by the evidence, and not by the technical label applied by plaintiff to the cause alleged.

APPEAL by plaintiff from *Warlick, J.*, at June Term, 1940, of BUNCOMBE. No error.

This appeal is for recovery of damages for the negligent injury and death of William Butler, intestate husband of the plaintiff administratrix.

The plaintiff complained that the defendant company, a producer of electric current for power and light, operated a series of electric circuits along and over a certain street in the city of Asheville, and, in the operation and conduct of its business, maintained wires carrying currents of high voltage and great strength; that the defendant company had carried several high tension wires from pole to pole through a tree in or near the home of plaintiff's intestate; that these wires were not properly insulated and had become interlaced with the growing limbs and foliage of a tree adjacent to the home of said intestate to such an extent that at times the wires contacted the limbs of the tree and the current of electricity was diverted from the wire containing it through the limbs and foliage.

The wrongful conduct of the defendant is set up in two ways in the complaint: (a) "That the defendant company constructed and maintained its said electric circuits along and over Grail Street and negligently allowed its conductor or wires, without being properly protected, to be and remain in contact with the limbs of a maple tree at the home of plaintiff's intestate, the said wires being high tension or primary wires carrying 4,400 volts of electric current, which was sufficient to cause instant death to a person coming in contact therewith." The allegations of negligence are pleaded and repeated in several similar paragraphs. (b) That the defendant company negligently constructed and maintained its high voltage primary electric current and operated the same along and over Grail Street, through a thickly populated section of the city, traveled by many people, in such a way "as to constitute said wires a public or private nuisance"; and that, by reason of carelessly permitting the circuit to become grounded in the maple tree and through its limbs in contact with the residence of plaintiff's intestate, the company had created and maintained "a veritable death trap and nuisance,

which was the source of great potential danger to life and property"; but that the defendant "gave its assurance that the condition in and around said tree entailed no danger."

It is further alleged that on 3 May, 1938, plaintiff's intestate, in attempting to remove the nuisance created by the limbs of the said maple tree, which were growing and rubbing against the house, climbed up the tree, sawed off many of the offending limbs on the side of the tree next the house; that he was unaware of the presence of the "subtle and invisible deadly energy of 4,400 volts of primary electrical current" which said defendant had negligently, carelessly, and without any warning, permitted to remain against the limbs of said tree, with the result that plaintiff's intestate came in contact with the said current and was instantly "electrocuted and killed."

The defendant denied the principal allegations of the complaint, and pleaded contributory negligence.

The evidence of the plaintiff disclosed the death of William Butler after he had climbed the tree through which the wires passed, and had been there some time, first in the morning and again in the afternoon, sawing off and removing limbs from the tree on the side next the house.

One witness for the plaintiff testified that she saw William in the tree "and he was on fire when I saw him. A light was all around him flashing sparkles and roaring. A few minutes after that he fell. . . . I saw him in the tree with the sparks and light about a minute or two before he fell out. He didn't stay in there long. . . . I had observed peculiar things going on in that tree before Butler got killed, even before he moved I saw sparkles. . . . I observed the tree sparkling from time to time. It would sparkle more when it was damp and the wind would blow than any other time. . . . That condition had been going on there the summer before he got killed." This witness stated that Butler occupied a front room of her house near the tree, and had gotten permission from her to climb the tree and cut the limbs. She described the condition in the tree as a nuisance.

One witness for the plaintiff described the burned condition of the body. Another witness for the plaintiff described the operation of Butler in the tree and the manner of his death. She saw him standing in the forks of the maple tree and stated that he had been cutting off the limb that was rubbing against the house. She did not see him as he fell, but did see him as a flash of electricity came down the wire and caught him.

There was further expert evidence on the part of the plaintiff with regard to the manner in which the wires were strung through the trees, in noncompliance with the setup required in certain codes and ordinances of the city of Asheville, and with safety provisions provided by the National Board of Fire Underwriters, and departure of the methods

used from those demanded by considerations of safety and good practice.

The defendant introduced evidence relating to the circumstances attending the electrocution of the plaintiff's intestate while attempting to abate the so-called nuisance.

Eva Lewis testified, amongst other things, that she was sitting in a position where she could see the tree and Bill (Butler) sitting in it. She said that he had a hatchet in his hand and she "hollered" to him, advising him that it was getting dark and that he had better come down. He said, "I will in a few minutes." She called to Adolphus Clownie, who was on the other side, to get his grandchild from under those wires as she noticed them shaking terribly; that it was about five minutes before the flash occurred. Butler hollered to the child: "Get out from under those wires before you get killed." Witness ran down the street, got the child and brought him up on her porch. As she reached the porch she heard a noise and looked back and saw Butler "all inflamed."

Nathaniel McHaffey, witness for the defendant, testified that he saw William Butler up in the tree cutting a limb and about that time saw a spark of electricity. The witness hollered to Butler and told him that he had better come down, "that he wasn't a electricity man." . . . "Just then a spark of electricity came. He blew at it with his breath. It went out. He hollered back, 'Who said I wasn't a electricity man?' " This witness testified that Ray Lyles also hollered at Butler. Shortly after there were flames all around his elbow and shoulder, and he fell out of the tree.

Ray Lyles testified that McHaffey hollered up in the tree and told Butler he had better come down. "When Nathaniel hollered at him and told him he better come down, electricity was sparkling in the tree, and he started blowing at it with his breath. It went out, then he hollered back and said, 'Who say I wasn't a electricity man.' Then I saw a spark again. . . . I hollered then to him and told him he better come down out of the tree."

Adolphus Clownie also testified that he said to Butler: "The wires have begin to spit fire, you don't know what the danger is up there." Bill replied: "That's all right. I haven't got but a little more; I can get it down." "When the fire began to sparkle where the trunk of the tree goes up, I told him to come down, the tree was dangerous." This witness also testified that at that time twenty-five or thirty children, some on the school hill, some on the church hill, kept hollering and said: "Mr. Bill, you come down out of that tree, you are going to get killed." But "he chopped right on, said, 'No, no, I am not going to get killed.' " This witness testified that the limb upon which Butler was at work had not been quite sawed through and that Butler had begun to prize at the limb with a board which had been handed to him, one foot placed against

the trunk of the tree and the other against a large limb on the other side, and that he got overbalanced; that he threw his arm up and his left elbow got caught in the wires. At the time he was striking where the wires were coming through the trees; that he pressed the wires up against the tree, striking where the trunk of the tree goes up, sparkling fire there, and then the witness saw fire flame from where he was. This fire was close to him, about two feet or 18 inches.

There was much more evidence of the same sort, which it would be tedious to recount.

The defendant made a motion for judgment as of nonsuit at the conclusion of the plaintiff's evidence, which motion was declined.

The plaintiff tendered the following issues: "(1) Was the plaintiff's intestate, William Butler, injured and killed by the negligence of the defendant, as alleged in the complaint? Answer: .....

"(2) Did the plaintiff's intestate, William Butler, by his own negligence, contribute to his injury and death, as alleged in the answer? Answer: .....

"(3) Did the defendant, Carolina Power & Light Company, equip or maintain and operate its electric wires in the vicinity where plaintiff's intestate was injured and killed in such a manner as to constitute a nuisance? Answer: .....

"(4) What damage, if any, is the plaintiff entitled to recover of the defendant? Answer: ....."

The court declined to submit the issues as tendered and submitted the following issues:

"1. Was the plaintiff's intestate, William Butler, injured and killed by the negligence of the defendant, as alleged in the complaint? Answer: .....

"2. Did the plaintiff's intestate, William Butler, by his own negligence, contribute to his injury and death, as alleged in the answer? Answer: .....

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

The first issue as to negligence was answered in favor of the defendant. From the judgment thereupon rendered by the judge of the county court trying the case plaintiff appealed to the Superior Court of Buncombe County. There the matter was heard before Judge Warlick, who overruled the objections and exceptions of the plaintiff and affirmed the judgment of the county court. From this judgment the plaintiff appealed to this Court, assigning errors.

George F. Meadows and John C. Cheesborough for plaintiff, appellant.

A. Y. Arledge, R. F. Phillips, and Harkins, Van Winkle & Walton for defendant, appellee.

SEAWELL, J. We pretermit discussion of the objections and exceptions to the admission and exclusion of evidence, since they do not disclose reversible error. Mostly, they relate to warnings which were given to the plaintiff's intestate while he was in the tree and are, therefore, within the *res gestæ*. *Harrill v. R. R.*, 132 N. C., 655, 44 S. E., 109.

But the plaintiff contends strongly that the trial court—the general county court of Buncombe County—committed error in declining to submit the tendered issue as to the creation and maintenance of a dangerous nuisance, by reason of which, it is contended, plaintiff's intestate lost his life. Counsel on that side say that the evidence supports the theory advanced in the pleading that there existed such a nuisance separate and apart from any mere question of negligence; and the issue confining the investigation to the negligence of the defendant did not lead to an affirmance or a disaffirmance of the wrongful conduct of defendant in the creation and maintenance of the nuisance, from which it is contended the death of plaintiff's intestate resulted.

Admittedly there may be nuisances which do not involve negligence and which may be the cause of actionable injury and damage; 45 C. J., 634; 46 C. J., 663. Distinctions involving a recognition of this principle are the subject of discussion in *Swinson v. Realty Co.*, 200 N. C., 276, 156 S. E., 545, and *Godfrey v. Power Co.*, 190 N. C., 24, 128 S. E., 485, and numerous cases which may be cited from other courts. The philosophic discussion of the matter in these authorities must serve to supplement our want of further analysis here. We desire only to say that the recognition of a nuisance, *sans* negligence, does not mean that the conduct and conditions brought to our attention in the instant case must necessarily be so classed. Indeed, taking the evidence according to its reasonable inferences, the nuisance, if it may be called such, was negligence-born, and must, in the legal sense, make obeisance to its parentage.

Doctrinal distinctions may not be pressed too far. To be helpful in administration and to lend themselves in aid of justice, they must be kept close to the realities. After all, it is the factual situation out of which the legal consequences flow, not the formal aspect, or the technical label which we conveniently apply.

Under the facts of this case, we see no transmutation of negligence into nuisance which would prevent the rights and liabilities of the parties from being properly probed by the issues submitted to the jury. As adequately expressing the opinion of this Court upon the matter, we quote from an opinion written by *Chief Judge Cardozo* of the New York Court of Appeals, subsequently renowned Associate Justice of the United States Supreme Court, in *McFarland v. City of Niagara Falls*, 57 A. L. R., 1, 247 N. Y., 340, 160 N. E., 391: "Not a little confusion runs through

the reports as to the effect of contributory negligence upon liability for nuisance. Statements appropriate enough in the application to nuisance of one class have been thoughtlessly transferred to nuisance of another. There has been forgetfulness at times that the forms of actions have been abolished and that liability is dependent upon the facts and not upon the name. Confining ourselves now to the necessities of the case before us, we hold that whenever a nuisance has its origin in negligence one may not avert the consequences of his own contributory negligence by affixing to the negligence of the wrongdoer the label of nuisance."

Whether plaintiff's intestate might not be independently negligent, so as to bar his recovery, by reason of his attempt to abate a nuisance of the character described, and in the manner of his attack, might have been a question on defendant's motion as to judgment of nonsuit upon any aspect of the case. The rule of the prudent man might dictate that he leave the nuisance alone when it showed no present disposition to molest him. *Hendrix v. R. R.*, 198 N. C., 142, 150 S. E., 873; *McFarland v. City of Niagara Falls, supra.*

Had the defendant been compelled to bring up the refusal of its motion for review here, it is difficult to see how that relief could have been denied on the plaintiff's evidence.

We are unable to help the plaintiff upon the outcome of the first issue, and the second was not reached.

We find

No error.

JAMES H. BARNES v. NELLO TEER, TRADING AND DOING BUSINESS AS THE NELLO TEER CONSTRUCTION COMPANY.

(Filed 18 September, 1940.)

1. Trial § 22b—

Upon a motion to nonsuit, the evidence tending to establish plaintiff's cause of action is to be considered in the light most favorable to plaintiff, and he is entitled to the benefit of every reasonable intendment thereon and every reasonable inference therefrom. C. S., 567.

2. Appeal and Error § 1—

Only matters of law or legal inference are reviewable by the Supreme Court upon appeal. Constitution of North Carolina, Art. IV, sec. 8.

3. Trial § 19—

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

4. Automobiles § 18c—Evidence held not to disclose contributory negligence as matter of law on the part of plaintiff struck by truck approaching from opposite direction on its left side of highway.

Plaintiff's evidence tended to show that the highway at the place of the accident was covered with loose stone, but was open to travel by the general public, that all ruts in the stone made by traffic were on plaintiff's right-hand side of the highway, that plaintiff's car was equipped with good brakes and tires, that plaintiff sounded his horn before rounding a sharp curve at a speed of about 15 miles per hour, that as he rounded the curve he saw defendant's truck 30 feet distant, loaded with crushed gravel, approaching from the opposite direction on its left side of the highway, that plaintiff, in an effort to avoid a collision, pulled over on the shoulders of the road to his right, but that the back end of the truck collided with the front end of plaintiff's car, causing it to overturn and resulting in the injuries in suit. *Held:* Defendant's motions for judgment as of nonsuit were properly overruled.

5. Automobiles § 18f—

Evidence that defendant was driving his car at the rate of 40 miles per hour three or four miles away from the scene of the accident and from fifteen to 45 minutes prior thereto, without evidence tending to show the condition of the highway at those places, is incompetent to show that defendant was driving at an excessive speed under the conditions prevailing at the scene of the accident.

6. Same—

Testimony that plaintiff on other occasions was seen operating his car dangerously, recklessly and fast is incompetent to show that plaintiff was traveling at an excessive speed at the time of the accident in suit.

7. Automobiles § 18h—Charge of the court on the questions of negligence, contributory negligence and proximate cause held without error in this case.

In this action to recover damages sustained by plaintiff in a collision between his car and defendant's truck which was being driven on its left side of the highway, the charge of the court *is held* to have correctly placed the burden of proof upon the issues, and to have correctly instructed the jury upon the questions of negligence, contributory negligence, and proximate cause, and to have properly stated the rule requiring cars traveling in opposite directions to pass on the right, and the right of a motorist to assume that the driver of a car approaching from the opposite direction on his left side of the highway will observe the rule and turn to his right, and further the charge *is held* to state the evidence in a plain and concise manner and apply the law applicable thereto and to instruct the jury on every substantial and essential feature of the case. C. S., 564.

8. Trial § 33—

A misstatement of the contentions of the parties must be brought to the court's attention in apt time.

BARNHILL, J., dissents.

APPEAL by defendant from *Nettles, J.*, at July, 1940, Civil Term, of BUNCOMBE. Affirmed.

This was an action for actionable negligence, alleging damage, brought by plaintiff against the defendant. The action was tried in the general county court of Buncombe County, before Kitchin, J. The issues submitted to the jury and their answers thereto, were as follows:

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

"2. Was the plaintiff guilty of contributory negligence, as alleged in the defendant's answer? Ans.: 'No.'

"3. What damages, if any, is the plaintiff entitled to recover of the defendant? Ans.: '$5,000.00.' "

Judgment was rendered on the verdict. The defendant made numerous exceptions and assignments of error and appealed to the Superior Court. The Superior Court overruled the exceptions and assignments of error of defendant, who appealed to the Supreme Court.

The plaintiff testified in part, that he was 35 years of age and was on 21 January, 1939, riding on the California Creek Road, in Madison County, North Carolina, driving an old 1930 model Ford. It had good brakes, tires and horn on it. The car was in good condition. The general public was using the highway, which was open to traffic. Miss Floy Ballard was in the car with him. Gravel was being spread on the highway, he was coming down the road on the right-hand side, going south; he rounded a sharp turn and as he rounded the curve, square over on the same side of the road, he met defendant's truck coming north, loaded with crushed gravel. Before he rounded the curve he blew his horn. He had to pull sharply over to the right, being forced over on the shoulder of the road, in an effort to avoid a collision. Just as he passed the truck the rear end of the truck struck his car—hit the front of his car as the driver of the truck made an effort to get on his side of the road, he was crossways the road and had it blocked. From that time he remembered nothing until he woke up in the Mission Hospital in Asheville. After the truck hit his car he remembered the car going over, he remembered the car did not hit the truck, but the front end of his car came in contact with the truck on the back end. He was knocked off the road. He did not go over on the shoulder until he was forced over there. When he came around the curve he saw the truck on his side of the road and pulled over in an effort to avoid a collision. When the truck hit his car it seemed that he had been on the shoulder about 30 feet. He knew that he turned over when the truck hit him, he immediately went over. There were ruts in the gravel, loose stone on the road. The tracks looked like all the traffic had been practically going on the left-hand side of the road coming up. The ruts were on his side of the road as he went down. He was in those ruts because they were on his side of the road as he came down. When he saw the truck some 30 feet

from him, he pulled sharply to the right to try to avoid a collision. He put on his brakes when he saw the truck and was going about 15 miles per hour. He did not have time to determine how fast the truck was traveling as it came around the curve. It was speeding and driving in a reckless manner. It was a pretty steep grade. There was not room between the truck and the side of the road on which plaintiff was driving to pass, because the truck was on the same side of the road, all but the shoulder. There might have been a foot of gravel between the truck and the shoulder. The accident occurred between 4:30 and 5:15 or 5:30. The only thing he could remember after the accident was that the truck struck the front of his car, he was forced off the road and turned over. He did not recall where they took him after the accident, but only knew that he woke up in Mission Hospital. He received two broken jawbones; a cut on his chin, cut over his right eye and was operated on once to have a wire put in to hold his jawbone together and again to have the wire removed. He had to have a dentist wire his teeth together. He did not sleep very much while in the hospital and was only able to take liquid foods for 12 weeks. He was confined to the bed after leaving the hospital and has not been able to work since the injury. His jaw from the center around on the left lower jaw as it lies does not have any feeling in it whatsoever and has not had since the jawbone was broken, there is a dead place on the outside of the flesh. He cannot open his mouth or jaws full length.

Miss Floy Ballard testified, in part: "I went out with him over into Madison County that afternoon. To his grandfather's. . . . I came back in the car with Mr. Barnes. Going up there on this road, as soon as we entered the stone road, I told him not to drive fast, he was not driving fast on the stone road at all. We came back; I looked at the watch and it was 5:15 just before we came to this truck, passed about three other trucks on the road or two other trucks, then we came around this turn, just that way around the turn, and met the truck on the wrong side of the road; when we saw the truck Jim put on brakes, blew the horn, tried to stop. We were so close on the truck he couldn't stop. He took the shoulder of the road and the back of the truck hit the front of our car and knocked us over. I was in the car when it turned over. I helped get him out. . . . I don't think he made more than 25 miles an hour at any time; I would say coming back he put on the brakes as he started around the curve and saw the truck, I would say he was making around 15 miles an hour. We had not been going over 25 miles an hour. Then he slowed down a little as he went around the curve. I noticed ruts in the gravel, ruts on the left side going up; they were on the left-hand side. I am sure about that. There was only one set of ruts going up. When we passed the truck our car went over on the shoulder,

before we got to the truck; when the truck hit us we turned over. I think we turned right then. Well, we got on the shoulder just before we got to the truck; he was trying to miss the truck; before we got to the truck he took the shoulder; he saw the truck was not going to get out of the way; when he blew at the truck it moved over trying to get out of the road, and the back of the truck hit the car and we turned over. When we met the truck we were still on the edge of the curve; the truck knocked us over on the bank. We were on the shoulder before we met the truck; when we met the truck it knocked us over."

Dr. Farrar Parker corroborated plaintiff as to his injuries, and testified: "I treated Mr. Barnes over a period of six months from January through July and during that time I saw him sufficient number of times, with these three operations, and my bill was $450.00 for the total services. He has paid me $25.00 at intervals when he was able to, when he was financially able to. I think Mr. Barnes was one of the most cooperative patients I ever had. That night he had, as I said, his jaw hanging loose. We were able to push it back in place without an anaesthetic. On subsequent operations these were done under novocaine; he stood the pain and extremely well put up with it, so that he showed and I think he was coöperative in every sense."

Mr. Greene testified, in part: "There were ruts on the left side of the road going up. I didn't see ruts on the right-hand side of the road going up."

Several witnesses testified as to the general reputation of the plaintiff being good. The driver of the defendant's truck denied that the collision occurred as testified to by plaintiff, as did other witnesses.

The defendant made numerous exceptions and assignments of error and appealed to the Supreme Court. The necessary facts and assignments of error will be considered in the opinion.

Sale, Pennell & Pennell for plaintiff.
Heazel, Shuford & Hartshorn for defendant.

CLARKSON, J. At the close of plaintiff's evidence and at the close of all the evidence, the defendant in the general county court for Buncombe County, made motions for judgment as in case of nonsuit. C. S., 567. The court overruled these motions and on appeal to the Superior Court the rulings were sustained. In this we can see no error. The often repeated rule is that the evidence which makes for plaintiff's claim, or tends to support his cause of action, on a motion to nonsuit, 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.

This Court has nothing to do with the findings of fact by the jury and on appeal defendant's evidence is not to be considered.

N. C. Const., Art. IV, sec. 8: "The Supreme Court shall have jurisdiction to review, upon appeal, any decision of the courts below, upon any matter of law or legal inference," etc. On appeal to the Supreme Court, only error as to the law or legal inference are reviewable upon the record in the case. *Bank v. Howard,* 188 N. C., 543. The competency, admissibility and sufficiency of the evidence is for the court, the weight, effect and credibility is for the jury, and on appeal the Supreme Court can review only matters of law or legal inference. *S. v. Casey,* 201 N. C., 185; *Debnam v. Rouse,* 201 N. C., 459; *Carter v. Mullinax,* 201 N. C., 783; *Bakery v. Ins. Co.,* 201 N. C., 816; *S. v. Harrell,* 203 N. C., 210; *S. v. Whiteside,* 204 N. C., 710.

The only question we now have to consider: Was there any prejudicial or reversible error on the exclusion of certain evidence and charge of the court? We think not.

The evidence tended to show that plaintiff was driving his car on the right side of a State Highway, open and carrying normal traffic. The defendant's truck was hauling gravel to be spread on the road across the mountain 5 or 6 miles from where the wreck occurred and the truck was on the left-hand side of the road, square over on the left-hand side with the wheels in a rut on said side. Defendant's truck struck plaintiff's car and seriously injured him. The plaintiff received permanent injuries, having both jawbones broken, cuts in chin and over an eye. He was operated on three times and is now suffering from permanent injuries, embracing a partial paralysis of the face, and is restricted in opening his mouth from ¼ to ¾ of an inch less than an average male. The plaintiff's car was in good condition, with good tires, brakes and horn. He was going south around a curve, running about 15 miles an hour, sounding his horn, and on the right-hand side of the road. The defendant's truck was coming up the road on the left-hand side of the road, square over on the left-hand side with the wheels in the rut on said side, right in the face of plaintiff's car. The rear end of defendant's truck struck plaintiff's car. Plaintiff was on the right side of the road, defendant's truck was on the wrong side. Plaintiff was permanently injured.

In *Hancock v. Wilson,* 211 N. C., 129 (134), we find: "When the driver of one of the automobiles is not observing the rule of this section (Laws 1927, ch. 148, sec. 11), as the automobiles approach each other, the other may assume that before the automobiles meet, the driver of the approaching automobile will turn to his right, so that the two automobiles may pass each other in safety."

Certain assignments of error made by defendant cannot be sustained. The evidence sought to be admitted was with reference to the speed of the plaintiff's car 3 or 4 miles away, at a time varying from 15 to 45 minutes from the hour of the accident, the witness would have testified that plaintiff's speed was approximately 40 miles an hour. No evidence was offered or attempted to be offered which showed conditions on the highway at that place. The evidence as to speed 3 or 4 miles at 5:00 o'clock, when the wreck occurred some time between 5:00 and 5:30, and that the speed at that distance and time was 45 miles an hour. By the same witness appellee (defendant) undertook to show that he had seen plaintiff on other occasions operating his car dangerously and recklessly and fast. We do not think this evidence of any probative force. It is merely surmise and guess. The competent evidence as to the collision was the speed of the automobile at or about the time of the collision. The driving at other places is too remote. The cases of *Hicks v. Love,* 201 N. C., 773, and *Charnock v. Refrigerating Co.,* 202 N. C., 105, are not contrary. There are a great many circumstances to be considered as to prior speed. "If immediately before the collision," as in the *Hicks case, supra,* it is competent.

The judge of the general county court charged the jury: "Now, gentlemen of the jury, in order to establish actionable negligence, the plaintiff is required to satisfy you, first, that the defendant has failed to exercise due care in the performance of some legal duty which the defendant owed to the plaintiff under the circumstances in which they were placed, and, second, that such failure on the part of the defendant was the proximate cause of the collision. Due care is the care which a person of ordinary prudence should use under the same or similar circumstances when charged with a like duty; the failure to exercise due care when it becomes the proximate cause of a collision or injury, if such failure was negligence, then if it becomes the proximate cause of the collision, it becomes actionable negligence."

The court then gave a correct charge taken as a whole as to the meaning of proximate cause. This exception and assignment of error cannot be sustained. The court charged: "The law requires that every person operating an automobile on the public highways shall operate it in a manner which is prudent and reasonable under the circumstances and in the light of the attending circumstances, both as to speed and the manner of operation. Defendant owed the plaintiff the duty on this occasion to exercise due care in operating his automobile in a manner which was prudent and reasonable in the light of the attending circumstances. Drivers of vehicles proceeding in opposite directions shall pass each other to the right, each giving to the other at least one-half of the

main traveled portion of the right of way as nearly as possible, so defendant owed the plaintiff the duty to drive its truck on the right-hand side of the road and to yield to the plaintiff at least one-half of the main traveled portion of the highway." The charge continues, giving the rule of law in road cases applicable to the facts in this case. Another exception and assignment of error was made to the charge which upon careful reading was in the nature of a contention. If inaccurate, the attention of the court should have been called to it. We see nothing prejudicial in the charge. In fact, in some 15 pages, to which no exception was taken, the court placed the burden of the issues properly, defined correctly greater weight of the evidence, negligence, contributory negligence and damage; giving the contentions *pro* and *con* of the litigants in a fair and impartial way.

The court did not impinge C. S., 564; it charged every substantial and essential feature of the case.

We have examined all the exceptions and assignments of error with care, and see no error.

In *Davis v. Long,* 189 N. C., 129 (137), it is written: "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. The jury has found all the issues in favor of plaintiff, and we find no error."

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

Affirmed.

BARNHILL, J., dissents.

G. H. HARDING AND THE EDENTON HOTEL COMPANY v. SOUTHERN LOAN & INSURANCE COMPANY, L. A. PERRY, MRS. JULIA E. WOOD, W. P. WOOD, NELLIE W. MOORE, MARY WOOD COOKE, JULIA WOOD SKINNER, JOHN E. WOOD, HELEN W. BEAL, OLIVE WOOD WARD, STEWART WOOD, C. M. WEST AND SOUTHERN LOAN & INSURANCE COMPANY, TRUSTEE.

(Filed 18 September, 1940.)

1. Fraud § 5—Elements of actionable fraud.

The essential elements of actionable fraud are a definite and specific representation, which is materially false, made with knowledge of its falsity or in culpable ignorance of its truth, with fraudulent intent, which is reasonably relied on by the other party to his deception and damage.

2. Same: Vendor and Purchaser § 25—

The purchaser of real estate cannot maintain an action for fraud for misrepresentations concerning the value of the property or its condition and adaptability to particular uses when the purchaser has an opportunity to make full investigation and is not induced to forego investigation by artifice or fraud on the part of the seller.

3. Fraud § 9—

Where the purchaser of real estate relies upon misrepresentations as to the value of the property or its condition and adaptability to particular uses, he must plead want of opportunity to make investigation or artifice on the part of the seller inducing him not to do so.

4. Same—Evidence held to show that purchaser of real estate had full opportunity to investigate condition of property, and nonsuit should have been entered in absence of evidence of artifice inducing him not to do so.

Plaintiff, who had purchased certain hotel property from defendants, instituted this action to recover for alleged misrepresentations in regard to the water, heating and plumbing systems in the said building, the condition of its roof, etc., which plaintiff alleged could not be discovered upon an inspection of the property but only in the operation of the hotel. Plaintiff's evidence disclosed that plaintiff knew that defendants' agent, whom he alleged had made the misrepresentations, had no knowledge of the condition of the building other than that given him by others, that plaintiff made an inspection of the property and had full opportunity to talk with the defendants' hotel lessee and his clerk and had full opportunity to make any inquiry of them as to the water, heating and plumbing systems, the roof and other conditions of the hotel which could not be readily ascertained by observation, but failed to do so, and there was no evidence that defendants' agent did anything to prevent or induce him not to make full investigation. *Held:* The representations amounted to nothing more than the expression of opinion, and are insufficient to support an action in deceit, and defendants' motion for judgment as of nonsuit at the close of all of the evidence should have been granted.

5. Fraud § 4: Vendor and Purchaser § 25—

Where the evidence discloses that the agent of vendors had no actual knowledge of the condition of the building, but was relying, to the knowledge of the purchaser, upon information furnished him by a third person, without evidence that the agent had reason to doubt the reliability of his informant or that his statement was made without a *bona fide* examination of the building, is insufficient to show that representations as to the condition of the building were made with knowledge of their falsity or in culpable ignorance of their truth.

6. Election of Remedies § 3—

An exception to the refusal of the court to require plaintiff to elect between an action in contract for breach of warranty and in tort for deceit cannot be sustained when it appears that the action was tried solely upon the theory of fraud or deceit.

7. Election of Remedies § 7—

Judgment in an action tried solely upon the theory of fraud or deceit will not bar plaintiff from thereafter pursuing his alternate remedy *ex contractu*, if any he has, for breach of warranty.

APPEAL by plaintiff and by defendants from *Johnston, Special Judge*, at April-May Special Term, 1940, of CHOWAN. Reversed.

Civil action to recover damages for fraud and to restrain foreclosure of a deed of trust.

The defendants, being the owners of the capital stock and of the mortgage bonds of the Edenton Hotel Company, a corporation, listed the same with one Lucas, a real estate broker of Washington, D. C., who apparently specialized in hotel property. Lucas made contact with the individual plaintiff who is engaged in the hotel business. As a result, Harding entered into negotiations with the defendant Gaither, president of the corporate defendant and alleged representative of the other stockholders, for the acquisition of the hotel property through the purchase of the outstanding stock.

After making inquiry as to the property and after an inspection thereof in company with Gaither, Harding declined to accept the proposition made by Gaither, but made a counter proposition to purchase upon terms subsequently reduced to writing. Gaither informed plaintiff that he was not authorized to accept the counter proposition but that it would have to be submitted to the other defendants. Upon submission thereof to the stockholders the proposition of plaintiff was accepted and the agreement in respect thereto was reduced to writing.

Plaintiff alleges that the defendants through Gaither, their agent, "warranted and represented to the plaintiff Harding that, with certain minor exceptions not herein referred to or complained of, the said hotel building, including its water, heating and plumbing system, were in excellent condition and adequate and sufficient for the purposes for which the same were designed and intended." In an amended complaint he alleges that Gaither further warranted and represented to the plaintiff "that the tenant then leasing the hotel property from the defendants was promptly paying $500 per month as rent." In connection therewith plaintiff makes the necessary allegations of falsity, materiality, intent and reliance thereon.

In their answer defendants deny the allegations of fraud and by way of counterclaim allege default in the payment of installments due and accrued interest, pray judgment for the amount of the defaulted principal and interest and for the foreclosure of the mortgage securing the indebtedness assumed by plaintiff.

Issues were submitted to and answered by the jury as follows:

"1. Did the defendants through their agent represent and warrant the condition of the hotel, as alleged in the complaint? Answer: 'Yes.'

"2. Did the defendants through their agent make the representations as alleged in the complaint in order to induce plaintiff Harding to enter into the contract of sale, as alleged in the complaint? Answer: 'Yes.'

"3. If so, were said warranties or representations untrue? Answer: 'Yes.'

"4. If untrue, did the defendants' agent know them to be untrue or was he consciously and culpably ignorant as to whether they were true or not? Answer: 'Yes.'

"5. Were said representations material and did the plaintiff Harding reasonably rely on said representations in entering into the contract and was he thereby induced to enter into said contract? Answer: 'Yes.'

"6. What damages, if any, is plaintiff Harding entitled to recover? Answer: '$9,900.00.' "

The defendants excepted to judgment thereon and appealed. The plaintiff excepted to so much of the judgment as directed that the recovery by plaintiff be applied to the installments of principal and interest due on the purchase price and appealed.

Herbert Leary and W. D. Pruden for plaintiff, appellant.
R. C. Dozier and McMullan & McMullan for defendants, appellants.

BARNHILL, J. The corporate plaintiff seeks and was awarded no relief. It is a necessary party only by reason of the prayer for relief by defendants who seek a foreclosure of the mortgage upon the real property belonging to the corporation. The appeal of the individual plaintiff must turn necessarily upon the disposition made of defendants' appeal. Therefore, the question he seeks to present for decision requires no discussion.

On 8 October, 1938, plaintiff, an experienced hotel man, went to Edenton and inspected the real property known as the Joseph Hewes Hotel owned by the corporation, the capital stock of which he later purchased from the defendants. On 19 October he wrote Lucas "was in Edenton yesterday looked over the property with Mr. Gaither. It is in terrible shape and Mr. Gaither was not a little surprised as he had not made a thorough inspection for some time. However, it has possibilities and I made them an offer."

In respect to the transaction made plaintiff testified: "I made an inspection of the hotel before I bought it. That was in the early part of October. I bought it October 25th, and the inspection was made by me about two weeks prior to that time. Mr. Horton (the lessee), and Mr. Gaither were with me." Being asked "what, if anything, did Mr.

Gaither say to you with reference to the hotel and its heating and water and roof, etc.," he replied: "I had been told all these conditions about the heating plant, hot water and roof especially. I saw this letter written by the contractor, and, of course, I went down to the engine room. I didn't take a bath, I did go up on the roof, a pretty sunshiny day, just as today and I asked Mr. Gaither about the roof. He said they had had it repainted and had had it fixed. I asked him about the hot water, and he said they had put in a water softener and it was in perfect condition. And about the heating. I had heard that the west wing of the hotel could not be heated properly. He said that had been remedied and they could get heat in the west wing of the hotel. That was a couple of weeks before I bought it." He testified further: "Both Mr. Gaither and myself knew on the day I came down to inspect the hotel that it was in terrible shape. . . . I first took up the proposition of purchasing this hotel with Mr. Lucas. I saw a copy of Mr. Perry's letter in Mr. Lucas' office and later saw the original in Mr. Gaither's office. I came down to Edenton for the purpose of inspecting the hotel. Mr. Gaither came with me. From my general conversation I assumed that Mr. Gaither was not an experienced hotel man and that all his life he had been engaged in other undertakings, the banking business. The only way to discover the defects of which I have complained was in the course of operation and I knew Mr. Gaither had never operated a hotel. I knew he had complaints from the operators. I knew that the only knowledge he could possibly have about the condition of the hotel came from what somebody else had told him. I came down here two weeks before the contract was signed. I went into the hotel, on every floor of it. I went up on the roof. I went down to where the heating plant was. I made an examination of everything to be seen.

"We arrived just before lunch and spent three or four hours there. Mr. Horton (the lessee) was there at the time and Mr. Kavanaugh (the hotel clerk) also. I had an opportunity to talk with Mr. Horton or Mr. Kavanaugh if I chose. Mr. Gaither did nothing to prevent me talking with these men. I directed all my questions to Mr. Gaither."

In addition to the foregoing testimony of the plaintiff Harding, he offered in evidence a letter from L. B. Perry, a contractor, addressed to the defendant Gaither, dated 21 September, 1938, as follows:

"As per your request I went to Edenton today and examined the Joseph Hewes Hotel. I found the hotel in excellent condition, with the exception of some minor repairs, which can be made at a very low cost.

"First, the foundation is in perfect shape, all walls are perfect, not a crack in any of the brick work. Plastering needs a little repair. This can be done at a cost not to exceed $100.00.

"The doors have been somewhat neglected and some of them need adjusting. This would only require the work of a good carpenter for a few days.

"The windows are a little loose, this can be remedied by moving the stops in a little. This had not had any attention since the hotel was built.

"I found the plastering on the outside wall on top of the fourth floor slightly damaged due to water seeping through the brick work from parapet walls. This trouble with the parapet walls has recently been attended to by an application of asphalt, which should prevent further seepage. I found an excellent job was done. The damage to the plaster is only slight and this work is included in my estimate of $100.00 for putting all of the plastering in good condition.

"In my opinion, some painting is needed in the banquet room, lobby and halls. If this were done, I believe it would greatly improve the property. The roof seems to me to be in splendid condition.

Respectfully,

L. B. PERRY."

Plaintiff likewise offered evidence tending to show the falsity of the statements made in respect to the water, heating and plumbing systems and the roofing and testified as to other defects in the building and as to his reliance upon the representations made.

This is the substance of the evidence as to the false representations relied upon by plaintiff. Is it sufficient to sustain a recovery in an action cast in tort upon allegations of fraud and deceit? We must answer in the negative.

The essential elements of actionable fraud or deceit are the representation, its falsity, scienter, deception and injury. The representation must be definite and specific; it must be materially false; it must be made with knowledge of its falsity or in culpable ignorance of its truth; it must be made with fraudulent intent; it must be reasonably relied on by the other party; and he must be deceived and caused to suffer loss. Our decisions are uniformly to this effect. *Electric Co. v. Morrison,* 194 N. C., 316, 139 S. E., 455; *Peyton v. Griffin,* 195 N. C., 685, 143 S. E., 525.

Representations concerning the value of real property or its condition and the adaptation to particular uses will not support an action in deceit unless the purchaser has been fraudulently induced to forbear inquiries which he would otherwise have made, and if fraud of this latter description is relied on as an additional ground of action, it must be specifically set forth in the declaration. *Parker v. Moulton,* 14 Mass., 99; 19 Am. Rep., 315.

"It is generally held that one has no right to rely on representations as to the condition, quality or character of property, or its adaptability to certain uses, where the parties stand on an equal footing and have equal means of knowing the truth. The contrary is true, however, where the parties have not equal knowledge and he to whom the representation is made has no opportunity to examine the property or by fraud is prevented from making an examination." 12 R. C. L., 384. When the parties deal at arms length and the purchaser has full opportunity to make inquiry but neglects to do so and the seller resorted to no artifice which was reasonably calculated to induce the purchaser to forego investigation action in deceit will not lie. *Cash Register Co. v. Townsend,* 137 N. C., 652; *May v. Loomis,* 140 N. C., 350; *Frey v. Lumber Co.,* 144 N. C., 759; *Tarault v. Seip,* 158 N. C., 369; 23 A. J., 981.

The plaintiff admits that he knew that Gaither was not speaking of his own knowledge when he made the alleged representations and that he was not qualified to know but had to rely upon information from others. He, the plaintiff, made an investigation of the property and had full opportunity to talk with the hotel lessee and his clerk and to ascertain such additional information as he might require or desire concerning the water, heating and plumbing systems, the roof and the other conditions of the hotel which could not be readily ascertained by observation. Gaither did nothing to prevent him from so doing. While there is a suggestion in the record that Horton might not have disclosed the information had the plaintiff requested it, there is nothing to substantiate the suggestion. If the plaintiff had inquired of Horton and he had refused to answer or had given false information the plaintiff would have a more substantial cause for complaint.

As the plaintiff knew Gaither was not an experienced hotel man and that he had no personal knowledge as to the condition of the hotel but was relying upon statements made to him by a contractor and others, the representations as to the condition of the equipment of the hotel amounts to nothing more than the expression of an opinion and will not support an action in deceit. *Williamson v. Holt,* 147 N. C., 520; *Cash Register Co. v. Townsend, supra;* 12 R. C. L., 379, sec. 131; 23 Am. Jur., 975, sec. 165; *Conly v. Coffin,* 115 N. C., 563.

There is no sufficient evidence that the representation, if made, was made with knowledge of its falsity or in culpable ignorance of its truth. Plaintiff knew that Gaither was speaking "second-hand" and was relying on information received from others. There is no evidence that the contractor was not reliable or that he, to the knowledge of Gaither, made the statements contained in his letter without a *bona fide* and adequate examination of the building. And the plaintiff himself, after operating

the hotel through the winter of 1938-39, on 15 March, 1939, wrote Lucas "the building is in fine shape now and no great outlay of cash will have to be spent on it in some time." The statement of expenditures by him in repairing the building up to the date of this letter was not in excess of the $5,000.00 which he in his contract agreed to expend.

We have examined the record in respect to plaintiff's allegations and contentions in connection with the alleged representations as to the rental of the property. We find nothing in connection therewith sufficient to vary our conclusion.

The apprehension of the defendants that plaintiff's action is cast both in contract for breach of warranty and in tort for deceit is not well founded. The complaint might be so interpreted and the court did not rule on the motion of the defendants to require the plaintiff to elect. But it is clear that the court conceived that the action was in tort and the case was tried on that theory. In the beginning of its charge it stated to the jury: "The suit is brought in deceit—because of the conduct of the defendants or their agents, as alleged by the plaintiff, which amounts in law to fraud." In its charge on the issue of damages the court gave the measure of damages applicable in a tort action, specifically using the terms "tort-feasor" and "wrongdoer," and from a careful examination of the evidence and the charge it is made to appear that the words "warrant" and "warranties" as used in the issues were used as terms synonymous with the words "representation" and "representations." If the plaintiff has any cause of action for breach of warranty (about which we express no opinion) this action does not constitute *res judicata* in respect thereto.

We are of the opinion that the motion of the defendant for judgment of nonsuit duly renewed at the conclusion of all the evidence should have been allowed. Judgment will be entered accordingly.

On defendant's appeal—Reversed.

Plaintiff's appeal—Dismissed.

IN THE MATTER OF THE ADOPTION OF ELLEN LOUISE HOLDER, NOW CALLED DOROTHY RICHARDSON BULLOCK.

(Filed 18 September, 1940.)

1. Adoption §§ 3, 4—

The mother of an illegitimate child must be made a party to proceedings for the adoption of the child, and her consent to the adoption or proof of abandonment of the child in the statutory or legal sense, must be made to appear as a jurisdictional matter.

2. Same—Parent's consent to adoption must be shown within record and must relate to particular persons seeking to adopt the child.

In this proceeding to have an order of adoption declared void, respondents' evidence tended to show that the mother of the child signed application for the admission of the child into a children's home, which application contained an agreement that the home might procure the adoption of the child by such person or persons as it might choose without further notice to the mother, and that the said home agreed to the adoption of the child by respondents. *Held:* The evidence does not show consent of the parent to the adoption required by law, since the parent's consent must be shown within the record and must relate to the particular proceeding culminating in adoption, the identity of the adoptive parents being a necessary basis for the consent contemplated and required by the statute as a jurisdictional matter in adoption proceedings.

3. Adoption § 4—

Since the laws of inheritance and distribution of property are directly involved in an adoption proceeding, and since the proceeding is in derogation of the common law, it must be strictly construed.

4. Adoption § 8—Evidence held insufficient to sustain finding that decree of adoption was actually made or entered.

Evidence that the persons seeking to adopt the child in question resided in another state and forwarded by mail an application for adoption, consent to the adoption of the children's home to which the child had been committed, and an unsigned order or decree of adoption, to the clerk and order or decree of adoption were duly recorded but that the order was not signed, although the name of the clerk appeared on the record, and certified copies of the order with the rubber stamp signature of the clerk were mailed to the said children's home, is insufficient to support a finding that any order of adoption was actually either made or entered.

5. Judgments § 18—

Where the evidence is insufficient to support a finding that an unsigned order or decree of adoption was actually made or entered by the clerk, the signing of the order *nunc pro tunc* is error.

6. Adoption § 4—Evidence held to disclose that child was never within jurisdiction of court in which adoption proceedings were instituted.

The evidence disclosed that the child in question was brought by its mother into the juvenile court of the county of their residence charged with being a dependent child, that the court committed it to the custody of a children's home society having its home office in another county of the State, but that the child was immediately taken by the persons seeking to adopt it to their residence in another State. *Held:* The child never resided in the county in which is located the home office of the Children's Home Society, its mere commitment to the children's home not having the effect of making the child's constructive residence there, and adoption proceedings in that county are void since the child was never within its jurisdiction.

APPEAL by petitioner from *Clement, J.*, at 2 October, 1939, Civil Term, of GUILFORD. Reversed.

On 11 August, 1923, Bessie Holder, the unmarried mother of Ellen Louise Holder, the latter being the child referred to in the proceedings in this cause, made application to the Children's Home Society of North Carolina, Inc., for the admission of the said child into the Home, and signed a paper which, besides commitments with respect to the custody of the child, contained the following clause: "Furthermore, I hereby agree that said Society, if it so desires, may obtain for said child a legal adoption by such person or persons as may be chosen by said Society or its authorized agents without further notice to me."

On 13 August, 1923—the day the child is said to have been received into the custody of the Society—she was brought into the juvenile court of Forsyth County by the mother, charged with being a dependent child, and, under an order of that court, was formally committed to the custody of the Children's Home Society of North Carolina, Inc., to remain in such custody for an indeterminate period, and was presently delivered to the custody of Mrs. M. J. Bullock, one of the respondents in this case, who took the child from Winston-Salem directly to Horry County, South Carolina, where Mrs. Bullock resided, and where the child has since remained. Actually the child was not an inmate, at any time, of any home established by the Society, which acted only as an intermediary.

On 11 January, 1926, an application was made by M. J. Bullock and wife for the adoption for life of Ellen Louise and appended thereto, or endorsed thereupon, was a consent to said adoption by the Children's Home Society of North Carolina, Inc., by John J. Phoenix, State Superintendent. This application was forwarded by mail to M. W. Gant, clerk of the Superior Court of Guilford County. The application, with an unsigned order or decree of adoption, was recorded in the Book of Orders and Decrees, the record remaining in this condition until the present proceeding to cancel the order of adoption was instituted.

It appears from this record of the adoption proceeding that no notice was given to the parents of Ellen Louise Holder. Neither was made a party of record, and neither was present at any part of the proceeding before the clerk. There was no consent other than that contained in the clause of the paper writing signed by the mother, Bessie Holder, at the time that Ellen Louise was committed to the custody of the Society.

Meantime, M. J. Bullock died on 1 December, 1936. The petitioner, a brother and heir at law or distributee of the estate under the statutes of descent and distribution, brought this proceeding to have the order of adoption declared void.

It was, and is, contended by the petitioner that inasmuch as (a) no notice was given to the parents of Ellen Louise and they were not parties to the action, and (b) since no parental abandonment of the child

has been found, and (c) since the child had not been at any time of the adoption proceeding within the jurisdiction of the court (actually residing in Winston-Salem and in Horry County, S. C., during that period), the proceedings were void. The petitioner further insists that it does not appear from the record that any order of adoption had ever been rendered or signed.

The respondent contended that, under the proceedings set out, the Superior Court of Guilford County acquired jurisdiction for the purpose of adoption both of the child and of the subject matter; that the consent of the Children's Home Society was all that was required; and that the adoption decree was actually rendered, although not signed. The respondent raised no question as to the propriety of the proceeding adopted by the petitioner.

On the hearing before the assistant clerk of the Superior Court of Guilford County, the latter decided the matters in issue against the petitioner, amongst other things finding as facts:

"(9) That upon said petition and consent an order granting letters of adoption was entered, and letters of adoption were issued on or about January 11, 1926. That on or about January 11, 1926, J. C. Franklin, Deputy Clerk of the Superior Court of Guilford County, issued certified copies of said petition, consent, order granting letters of adoption and letters of adoption, and delivered two sets of the same to John J. Phoenix, one of which sets was retained by him, and the other set delivered to M. J. Bullock and wife, Mrs. M. J. Bullock.

"(10) That the original petition with consent appended, order granting letters of adoption and letters of adoption were all duly recorded in the office of the Clerk of the Superior Court of Guilford County, North Carolina, but the original order granting letters of adoption and the original letters of adoption appearing in the proceedings in the file in the office of the Clerk of the Superior Court of Guilford County were not signed by M. W. Gant, the then Clerk of the Superior Court of Guilford County; his name, however, appears upon the recorded page of the original records in the office of the Clerk of the Superior Court of Guilford County and his rubber stamp signature appears upon both of the certified copies of said proceedings delivered to John J. Phoenix as aforesaid."

Upon his findings of fact, the assistant clerk of the Superior Court concluded, as a matter of law, that upon the original adoption proceeding the court had plenary jurisdiction and that Ellen Louise Holder had been legally adopted, thereupon dismissing the case at the cost of the petitioner, R. M. Bullock.

During the proceeding, according to the findings of the assistant clerk, the respondent moved to have the order of adoption signed *nunc pro tunc,* which the assistant clerk hearing the matter proceeded to do.

The petitioner appealed and the matter was finally heard by Clement, J., presiding at the 2 October, 1939, Civil Term of Guilford County Superior Court. By agreement of counsel, the hearing before Judge Clement was *"de novo"* and upon the record and the evidence taken before the clerk.

From an adverse judgment of Judge Clement, the petitioner appealed to this Court, assigning errors.

Benj. T. Ward and Varser, McIntyre & Henry for appellant.
Smith, Wharton & Hudgins for appellees.

SEAWELL, J. The facts pertinent to the decision of this case are sufficiently set out above, and repetition will be avoided as far as possible.

The petitioner challenges the validity of the proceeding for the adoption of the child Ellen Louise Holder. He contends that the proceeding is wanting in certain essentials to its validity, namely, notice to the parents of the child, or either of them, consent of such parents, or proof and finding of such parental abandonment as would render such notice and consent unnecessary. He furthermore contends that upon the evidence in this case no order of adoption was ever made or entered. After careful examination of the record, with the aid of able briefs of counsel on both sides, we are of the opinion that these objections of the petitioner are ineluctable. *Truelove v. Parker,* 191 N. C., 430, 132 S. E., 395; *Ward v. Howard,* 217 N. C., 201; *In re Shelton,* 203 N. C., 75, 164 S. E., 332. Facts sustaining the jurisdiction should affirmatively appear. Here, on the contrary, it is clear from the record that neither parent was made a party to the proceeding or gave consent to the adoption in the manner contemplated by the statute. This, in the cited cases, is held to be essential to jurisdiction of the subject matter. Abandonment is not suggested in the adoption proceeding and, of course, no finding was made with regard to it. There is nothing, however, in the record which could be construed to indicate an abandonment in the statutory or legal sense. *In re Shelton, supra; Truelove v. Parker, supra,* p. 438; *S. v. Whitener,* 93 N. C., 590.

The respondent contends that the consent of the mother is to be inferred from the conditions under which she surrendered custody of the child to the Children's Home Society of North Carolina, Inc., and from the clause in the paper writing signed by her, above quoted, and that this was available in the adoption proceeding as, so to speak, relayed from the mother.

We regard it as insufficient for that purpose. The consent noted in the adoption proceeding is the consent of the Children's Home Society of North Carolina, Inc., and not that of the mother.

This sort of attempted innovation on the law of adoption was dealt with in *Ward v. Howard, supra,* at p. 206. We quote: "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."

Under the statute, the consent must appear within and not *dehors* the proceeding, and must have reference to the particular proceeding which will culminate in adoption. Jurisdiction of the court cannot be made to depend upon a blanket release or consent on the part of the parent that the child may be adopted in whatsoever proceeding may be brought and to whomsoever may apply. This Court has been careful to preserve the principle of certainty in adoption proceedings, since the laws of inheritance and distribution of property are directly involved. The social importance of preserving the integrity of this system is as great as that involved in the benevolent reconstruction of family relations.

The proceeding is in derogation of the common law and must be strictly construed. *Grimes v. Grimes,* 207 N. C., 778, 178 S. E., 573.

We do not find in this record evidence to sustain the position of either court before whom the matters were heard that any order of adoption was actually either made or entered, and the signing of the order *nunc pro tunc* was wholly unjustified. Neither does it appear that Ellen Louise Holder was ever within the jurisdiction of the Superior Court of Guilford County. The fact that the home office of the corporation—the Children's Home Society of North Carolina, Inc.—was in Greensboro would not give her constructive residence there. Her actual residence, down to the time she was delivered to Mrs. Bullock, was in Forsyth County, and, thereafter, in Horry County, South Carolina. *Burrowes v. Burrowes,* 210 N. C., 788, 188 S. E., 648.

There is much evidence in the record—omitted in the above statement—which has no bearing on the issues of the case, but which, nevertheless, is calculated to engage the humanities. This prompts some comment, which is not intended to be homiletic, but may afford a helpful suggestion.

Considering the nature and great importance of the adoption of children into the home and family in comparison with most other trans-

actions of life, it seems to us amazing that so little regard is often paid to the vital necessity of legality. The necessary steps are easy to understand and easy to observe, and only a fair degree of attention at the right time will serve to prevent frustration, disappointment and heartbreak. One cause of such recurring disappointments seems to lie in the mistaken notion that some of the essential elements of the proceeding may be initiated in the juvenile court, or, as in this instance, that some institution or agency to which the child has been committed may take over and exercise functions which the statute leaves exclusively to the parent or guardian. A clearer understanding of the limitations of jurisdiction and authority of the various agencies dealing with the custody and welfare of children is imperative.

We have reached the conclusion that the proceeding challenged by the petitioner, culminating in the purported adoption of Ellen Louise Holder, is void for the reasons assigned.

The judgment of the court below is

Reversed.

FIRST & CITIZENS NATIONAL BANK OF ELIZABETH CITY, N. C., v. MARGUERITE J. SAWYER AND J. C. SAWYER.

(Filed 18 September, 1940.)

1. Execution § 20: Registration § 4b: Assignments § 8—

The purchaser of a life estate in lands at an execution sale under a judgment against the life tenant acquires the estate free from a prior unrecorded assignment of rents made by the life tenant to the remainderman for money advanced to pay taxes, since even if it be conceded that the remainderman acquired a lien on the property by reason of the assignment, such lien cannot be asserted against a purchaser for value without notice of the assignment.

2. Same: Laborers' and Materialmen's Liens § 9—

The purchaser of a life estate in lands at an execution sale under a judgment against the life tenant acquires the estate free from a prior unrecorded assignment of rents made by the life tenant to the remainderman for money advanced for repairs when the assignee has not filed any lien or brought any action to enforce a materialman's lien within the statutory period, C. S., 2433, *et seq.*, since the purchaser for value has a right to rely upon the public records and the statutory notice required of the existence of liens.

3. Registration § 1: Assignments § 8—

While rents accrued are choses in action and an assignment thereof need not be recorded, rents accruing are incorporeal hereditaments which, if for a period of more than three years, must be registered to pass any property as against purchasers for valuable consideration. C. S., 3309.

BANK *v.* SAWYER.

APPEAL by defendants from *Frizzelle, J.*, at March Term, 1940, of PASQUOTANK.

McMullan & McMullan for plaintiff, appellee.
R. Clarence Dozier for defendants, appellants.

SCHENCK, J. This is an action by a life tenant to be declared the owner of and entitled to receive the rents and profits arising from three houses and lots in Elizabeth City, and to have free and unrestricted use thereof until its ownership ceases. The cause came on for hearing and it was agreed by all parties that the judge might find the facts and enter judgment thereon. It was later agreed that there was evidence sufficient to sustain the facts found by the court. Upon the facts so found the court entered judgment that the plaintiff have and recover of the defendants the rents and profits accruing from the land in controversy after 4 December, 1939, and that the defendants have no right, title or interest in and to the same. From this judgment the defendants appealed, assigning as error that the facts found did not support the judgment entered.

The facts found by the court were substantially these: In 1931 R. M. Sawyer was the owner of a life estate in the lands in controversy; that thereafter in the Superior Court of Pasquotank County, the plaintiff recovered judgment against R. M. Sawyer and his wife, Rosa J. Sawyer, for $4,433.00 and interest, and a commissioner was appointed to sell the interests of the defendants in the lands in controversy to satisfy said judgment, which was done on 4 December, 1939, when the plaintiff became the purchaser of the life estate of R. M. Sawyer therein, and that the plaintiff has been the owner of such life estate since 4 December, 1939; "9. That the life tenant, R. M. Sawyer, had permitted the said three houses and lots to become run down to such extent as to become almost uninhabitable, and had also permitted county and city taxes and street assessments to accrue against the same for several years in the amount of $920.83, and in order to enable the said R. M. Sawyer to pay accrued taxes and make the proper repairs to said property, the said Marguerite J. Sawyer agreed to borrow money on her own real estate and advance the necessary amount to said R. M. Sawyer for the purposes aforesaid; and on the 1st day of June, 1936, the said R. M. Sawyer executed to said Marguerite J. Sawyer the assignment which is set out verbatim in paragraph 4 of the answer, *the same having never been admitted to recordation.*

"10. That in the early part of 1935, prior to the execution of the aforesaid assignment, there was an oral agreement between Marguerite J. Sawyer, R. M. Sawyer, M. B. Sawyer and J. C. Sawyer that the said

M. B. Sawyer would loan to the said Marguerite Sawyer money to be advanced by her to the said R. M. Sawyer for the payment of taxes and the making of repairs as aforesaid, it being agreed, further, that the said Marguerite J. Sawyer would borrow on her separate real estate to repay the money thus advanced by the said M. B. Sawyer and, further, that the rents accruing from said properties should be turned over to said M. B. Sawyer to be applied in payment of the moneys advanced by him for the purposes aforesaid, and, further, that J. C. Sawyer should take charge of the said properties, rent the same, collect the rent, pay the taxes, make necessary repairs, and pay the excess moneys coming into his hands from that source to said M. B. Sawyer until such time as he was fully reimbursed, and that J. C. Sawyer duly took charge of said properties under that agreement.

"11. That the said J. C. Sawyer, assisted by counsel, paid on the 28th day of February, 1935, City and County taxes on said properties in the amount of $920.83.

"12. That the said M. B. Sawyer advanced on said properties pursuant to said agreement and the said assignment the sum of $1,993.15, exclusive of the aforesaid amount advanced for the payment of taxes.

"13. In the fall of 1936, Marguerite J. Sawyer obtained a loan from the Federal Housing Authority in the sum of $3,800.00, a considerable portion of which was used by her in repaying M. B. Sawyer the moneys by him advanced as aforesaid, and after giving credit for the moneys applied out of the Federal Housing Authority loan, and the moneys paid to him by J. C. Sawyer from the rentals of said property, there is now due to the said M. B. Sawyer the sum of approximately $1,000.00.

"14. That there is now due Marguerite J. Sawyer for money advanced to R. M. Sawyer by her the sum of approximately $2,000.00.

"15. That the only money advanced for the purposes aforesaid by either the said Marguerite J. Sawyer or the said M. B. Sawyer prior to June 1, 1936, was the sum of $920.83 for taxes on 28th February, 1935.

"16. That Marguerite J. Sawyer owns the remainder, after the life estate, for the life of R. M. Sawyer, owned by the plaintiff in and to the properties in controversy."

The assignment set out in paragraph 4 of the answer is in words and figures as follows: "State of North Carolina, Pasquotank County, City of Elizabeth City. I, the undersigned, acknowledge myself indebted to Marguerite J. Sawyer for advances made me to pay taxes and make repairs and alterations on three houses and lots located in the City of Elizabeth City and described more fully below; and to pay the same, I hereby transfer and assign unto the said Marguerite J. Sawyer all the rents and income arising and accruing from this day on those certain three houses and lots in City of Elizabeth City located as follows: First,

house and lot situated on the east side of North Road Street and known as house No. 310; Second, house and lot situated on the North side of West Cypress Street and known as house No. 102; Third, house and lot situated on the East side of Greenleaf Street and known as house No. 704.

"And I, the undersigned, hereby authorize the said Marguerite J. Sawyer by herself or by her Agent to collect all said rents and income from said property from this day until this loan together with interest shall have been paid in full.

"As witness my hand and seal this the 1st day of June, 1936.

(Signed) R. M. SAWYER (Seal)

"Witness: G. R. LITTLE."

The question presented is: Did the failure to record the assignment from R. M. Sawyer, the life tenant, to Marguerite J. Sawyer, the remainderman, of the rents and income derived from the lands in controversy until the loan, made by her to pay taxes and make repairs and alterations, had been paid in full, render said assignment invalid as against the plaintiff, a subsequent purchaser of the life estate for value without notice of such assignment? We are of the opinion, and so hold, that the question was properly answered in the affirmative.

Even if it be conceded that Marguerite J. Sawyer, the remainderman, by advances made to pay taxes and the taking of an assignment of rents and income, acquired a lien against the life tenant, R. M. Sawyer, for such advances, it does not follow that this lien can be asserted against the plaintiff, a third party and purchaser for value and without notice of the assignment. The plaintiff, as a purchaser, had a right to rely upon the public records of the county. *Guaranty Co. v. McGougan,* 204 N. C., 13; *Callahan v. Flack,* 205 N. C., 105. There was nothing in the public records to indicate any memorial of the lien now attempted to be asserted against the plaintiff.

What has been said as to money advanced for the payment of taxes, applies with equal force to money advanced to pay for repairs, since it does not appear that Marguerite J. Sawyer has ever filed any lien or brought any action to enforce a lien within the statutory period. The plaintiff as a purchaser for value had a right to rely upon the statutes governing liens for materials furnished and labor performed, C. S., 2433, *et seq.,* and the public records.

It might be observed in passing that the defendants in their pleadings as well as in their brief admit that Marguerite J. Sawyer agreed to advance the money to R. M. Sawyer, the life tenant, with which to pay the taxes and for repairs in order to avoid insisting upon "a declaration that the life estate become forfeited," and waive any right to now have such a declaration made.

There is yet another reason why the validity of this assignment by the life tenant as against an innocent purchaser for value depends upon its registration. It will be observed that the assignment is of rents accruing, as distinguished from rents accrued. While rents accrued are choses in action, the assignment of which does not come within the purview of the statute requiring registration; rents accruing are incorporeal hereditaments, *Schmid v. Baum's Home of Flowers,* 162 Tenn., 439, 75 A. L. R., 261; *Winnisimmet Trust, Inc., v. Libby,* 232 Mass., 491, 122 N. E., 575, interests in lands, the assignment of which comes clearly within the provision of the statute, and is in truth a *quasi*-lease, and since for a period of more than three years is governed by C. S., 3309, and is required to be registered to pass any property as against purchasers for valuable consideration. That rents accruing are incorporeal hereditaments and are incident to and connected with an estate in land has been repeatedly held by this Court. *Kornegay v. Collier,* 65 N. C., 69; *Wilcoxon v. Donelly,* 90 N. C., 245; *Mercer v. Bullock,* 191 N. C., 216, and cases there cited.

The judgment of the Superior Court is

Affirmed.

ROBERT MILLER v. J. A. GREENWOOD.

(Filed 18 September, 1940.)

1. Appeal and Error § 6e—

A broadside exception to the admission of evidence, including a number of questions and answers, does not properly present any question for review.

2. Malicious Prosecution § 7b—

In an action for malicious prosecution, plaintiff has the burden of showing want of proper cause.

3. Malicious Prosecution § 8b—Evidence that at time of issuance of warrant defendant had knowledge of facts negativing intent constituting essential element of crime charged is competent to show want of probable cause.

The evidence disclosed that defendant, an automobile dealer, delivered to plaintiff a car on a Saturday afternoon for plaintiff to try out, that on Sunday plaintiff took the car on a trip and wrecked same and notified defendant's employee of the accident the following Wednesday, and that defendant thereafter procured a warrant charging plaintiff with temporary larceny. *Held:* Plaintiff's evidence that he attempted to return the car Saturday night but that defendant's place of business was closed, that he undertook to notify the defendant of the wreck before going to work Monday morning but was unable to do so, and testimony as to a conversation with defendant's employee in which plaintiff offered to reimburse defendant in installments for the cost of repairs, is competent upon

the question of want of probable cause as tending to show facts within the knowledge of defendant at the time of the issuance of the warrant negativing intent constituting an essential element of the crime charged.

4. Malicious Prosecution § 8c—

In an action for malicious prosecution, the testimony of plaintiff that the fact that he had been indicted and charged with temporary larceny was generally known in the town in which he lived and the town in which he worked is competent.

5. Trial § 13—

Even after conclusion of the evidence and the court's ruling in favor of defendant upon defendant's motion for judgment as of nonsuit, the court has the discretionary power to reopen the case and permit plaintiff to introduce the summons in evidence, and to overrule the motion after the deficiency has been supplied, since the admission of such evidence does not take the defendant by surprise or prejudice his cause.

6. Trial § 6—Court, in exercise of duty to see that parties are given fair trial, has discretionary power to take any action to this end not inhibited by C. S., 564.

The record disclosed that at the conclusion of all the evidence the court ruled favorably on defendant's motion to nonsuit and stated that there was a serious defect in the record and that if plaintiff wished to reopen the case and supply the deficiency the court would permit him to do so, that there followed a 10-minute recess after which the court told plaintiff he had not introduced the summons which was very material, and that upon plaintiff's request the deficiency in the record was supplied. *Held:* The remarks of the court did not constitute an expression of opinion upon the evidence inhibited by C. S., 564, but were within the court's sound discretion in discharging its duty to see to it that each side has a fair and impartial trial.

7. Malicious Prosecution § 1—

Allegations and evidence to the effect that defendant procured a warrant for plaintiff and his arrest and trial before a magistrate thereunder, that the warrant was issued maliciously and without probable cause and that the prosecution was terminated in favor of plaintiff, constitute a cause of action for malicious prosecution.

8. Malicious Prosecution § 6—

Where a person is arrested under a warrant issued against him, there is an interference with his person sufficient to constitute a "prosecution" within the meaning of the law.

9. Malicious Prosecution § 8a—

The absence of grounds for the prosecution or want of probable cause is evidence to be considered by the jury on the question of malice or malicious motive.

10. Malicious Prosecution § 10—Failure of court to charge facts that would constitute probable cause held not prejudicial to defendant on the record.

The evidence disclosed that defendant, an automobile dealer, swore out a warrant against plaintiff for temporary larceny of an automobile which defendant had delivered to plaintiff to try out, and which plaintiff had

taken on a trip and wrecked. Plaintiff's evidence disclosed that the fact of the wreck and the circumstances thereof had been explained to defendant and that plaintiff had offered to pay the damages. There was no evidence of any facts sufficient to show probable cause within the knowledge of defendant at the time of the issuance of the warrant. The court charged the jury as to what constituted probable cause and that the action of the magistrate in binding the plaintiff over constituted *prima facie* evidence thereof. *Held:* If there was error in the failure of the court to charge as to facts that would constitute probable cause, such failure was favorable to defendant and he may not complain thereof on appeal.

APPEAL by defendant from *Pless, J.*, at February Term, 1940, of SURRY. No error.

Civil action for malicious prosecution of plaintiff upon a warrant procured by defendant charging him with the crime of temporary larceny.

On or about 1 February, 1936, defendant, a dealer in automobiles, was approached by plaintiff relative to the purchase of a Ford. Defendant delivered to him a Plymouth to try it out. This was on one Saturday afternoon. That night he went by the defendant's place of business to return the car but the place of business was closed. He continued to drive the car and on Sunday took a trip to Winston-Salem, N. C. During this trip the car was wrecked. On Monday morning plaintiff undertook to notify defendant before returning to his work but was unable to do so. He placed the wrecked car in another garage and finally notified defendant's employee about Wednesday. Defendant had the automobile repaired at a cost of $78.16.

Thereafter defendant sent his employee to plaintiff to demand reimbursement for the cost of repairs. Plaintiff paid $10.00 and promised to pay $25.00 per month until the full amount was paid. Defendant returned the $10.00. Plaintiff went to see defendant, explained that he could not pay all in cash and offered to pay in installments. Defendant replied with an oath: "You will pay it all or I will put you on the roads or get your job."

On 2 May, defendant procured the issuance by a justice of the peace of a warrant charging the plaintiff with the crime of temporary larceny. This plaintiff was arrested thereunder and at the trial probable cause was found and plaintiff gave bond for his appearance in the Superior Court. The grand jury returned the bill of indictment drawn on the warrant "not a true bill." In the meantime, while the hearing in the Superior Court was pending, the defendant wrote the plaintiff's superior as follows:

"One of your men in your Jonesville Shop 'Bob Miller' took a car of mine away, kept it over the week-end without my permission, wrecked

the car with a damage of around $75.00. I have done everything I can, including having him arrested, tried and bound to court, trying to get him to settle, but he has done nothing. Your men in charge here have referred me to you. I don't know what the Highway Commission or your policy is in a case like this. Mine has always been if they won't pay, let them go, and I know a lot of big and little businesses do likewise. I don't want anything but actual damage, but of course would like to have that. I am sure I can give him plenty of trouble in court as it was a plain case of Temporary Larceny, but this, of course, will be a long drawn out affair, and is no way to settle anyway. Will you please investigate this case and see if you don't think you would be justified in bringing a little pressure and getting settlement for me."

Thereafter, on 24 September, 1937, plaintiff instituted this action for damages. The defendant answering the complaint denied the material allegations thereof and set up a counterclaim for the recovery of the damages sustained to the automobile. Upon the trial there was a verdict for the plaintiff for $500.00 compensatory and $1.00 punitive damages. The defendant recovered $68.13 on his counterclaim. From judgment on the verdict the defendant appealed.

Hampton & Barker and Woltz & Barber for plaintiff, appellee.

Folger & Folger, William M. Allen, and Hoke F. Henderson for defendant, appellant.

BARNHILL, J. There are numerous assignments of error. Some of these are broadside in nature, including a number of questions and answers. These do not properly present any question for our decision.

The burden rested upon the plaintiff to show want of probable cause. Intent was an essential element of the crime with which he had been charged. Therefore, the evidence as to the efforts the plaintiff made to give the defendant notice that the automobile had been wrecked and as to his conversations with the defendant's employee Reece was competent on the question of *scienter* if for no other reason. Likewise, the evidence of plaintiff that the fact that he had been indicted and charged with temporary larceny was generally known in Jonesville and in Elkins, where the defendant lived and had his place of business, was admissible.

The defendant renewed his motion for judgment of nonsuit at the conclusion of all the evidence. In respect to same the record discloses the following which is the subject matter of one of defendant's exceptive assignments of error, to wit:

"(Mr. Folger: We move for judgment as of nonsuit.

"The Court: Motion allowed.

"Mr. Woltz: I didn't understand,—what was your Honor's ruling?

"The Court: Motion allowed. There is a serious defect in the record. If you want to re-open and introduce that the court will allow you to do so.

(Recess ten minutes.)

"The Court: You did not introduce the summons, which is very material.

"Mr. Woltz: I would like to introduce the summons, then, your Honor.)

"The part enclosed in parentheses is Exception No. 7."

The record does not disclose that objection was made to any part of the foregoing proceedings but it is made the subject matter of an exception which apparently was not entered at the time.

Is the exception directed to the action of the court in granting the motion of nonsuit or to the remark of the court that "there is a serious defect in the record," or to his offer to re-open the case to permit the plaintiff to introduce the summons? As to this we are required to guess. In any event, a 10-minute recess was had before any exception was entered. Likewise, whether the exception is directed to the remark of the court after reconvening that "you did not introduce the summons, which is very material," or, the statement of counsel that he would like to introduce the summons is left in doubt. In any event, the exception cannot be sustained.

It is altogether discretionary with the presiding judge whether he will re-open the case and admit additional testimony after the conclusion of the evidence and even after argument of counsel. *Williams v. Averitt,* 10 N. C., 308; *Ferrell v. Hinton,* 161 N. C., 348, 77 S. E., 224; *Worth v. Ferguson,* 122 N. C., 381; *Dupree v. Ins. Co.,* 93 N. C., 237. When the ends of justice require this may be done even after the jury has retired. *Parish v. Fite,* 6 N. C., 258; see also *Gregg v. Mallett,* 111 N. C., 74, and *Wood v. Sawyer,* 61 N. C., 251, at p. 274.

The summons was a matter of record. Its introduction did not take the defendant by surprise or improperly prejudice his cause. Nor may the remarks of the court be held for error. The presiding judge is something more than an umpire. It is his duty to see to it that each side has a fair and impartial trial. It is within his discretion to take any action to this end within the law and so long as he does not impinge upon the restrictions contained in C. S., 564. The remarks of the court, even if properly excepted to, do not constitute the expression of an opinion that a fact is fully or sufficiently proven. *S. v. Brown,* 100 N. C., 519.

The court was correct in its interpretation of the complaint and in its conclusion that plaintiff's cause of action is for malicious prosecution. The evidence tends to establish the essential elements which are

necessary as a basis for recovery in such action. *Mooney v. Mull,* 216 N. C., 410; *Overton v. Combs,* 182 N. C., 4, 108 S. E., 357; and was such as required its submission to a jury.

That the defendant procured the issuance of a warrant against the plaintiff and his arrest and trial before a magistrate thereunder and the warrant was issued maliciously and without probable cause is sufficient when it appears that the prosecution has been terminated. When the warrant was issued and the plaintiff was arrested thereunder there was an interference with the plaintiff's person and there had been a "prosecution" within the meaning of the law. *Overton v. Combs, supra; Carpenter v. Hanes,* 167 N. C., 551, 83 S. E., 577.

The court instructed the jury to the effect that the groundlessness of the suit or the want of probable cause is evidence to be considered by the jury on the question of malice or malicious motive. In this there was no error. *Turnage v. Austin,* 186 N. C., 266, 119 S. E., 359; *Dickerson v. Refining Co.,* 201 N. C., 90, 159 S. E., 446; *Bowen v. Pollard & Co.,* 173 N. C., 129, 91 S. E., 711; *Humphries v. Edwards,* 164 N. C., 154, 80 S. E., 165. Nor was there error in the court's definitions of legal malice such as is required to support an award of compensatory damages.

The defendant did not testify and offered no evidence tending to establish good faith and the existence of probable cause upon the facts as they appeared to him at the time he secured the issuance of the warrant. The court instructed the jury as to what constituted probable cause and charged that the action of the justice of the peace constituted *prima facie* evidence thereof. If there was any error in its failure to charge as to what facts would constitute probable cause, such error was favorable to the defendant.

Upon the record as presented to us no facts appear sufficient to show probable cause within the knowledge of the defendant at the time of the issuance of the warrant. As he delivered the automobile to the plaintiff there was no asportation. While he here contends that possession was obtained by trick there was no evidence to sustain the contention. The fact of the wreck and the circumstances thereof had been explained to him and the plaintiff had offered to pay the damages. The charge on this phase of the case was as favorable as the defendant could demand.

We have examined the other exceptive assignments of error and find in none of them cause for disturbing the verdict.

No error.

GRANT PRESNELL v. HARRY LEE LINER AND CHARLES UNDERWOOD.

(Filed 18 September, 1940.)

1. Torts § 8a—

Where a literate man signs a release from liability for negligent injury, he may not thereafter, upon attacking the release for fraud and misrepresentation, assert that he did not read the release and was ignorant of its purport unless he was prevented from reading the release by artifice or fraud, since it is his duty to read the instrument before executing it unless prevented from doing so.

2. Torts § 8c—Plaintiff's evidence held to disclose ratification of release estopping him from thereafter attacking its validity.

Plaintiff's evidence disclosed that after discovering the import of a release from liability signed by him, he endorsed and cashed the draft given in accord with the release, and used a portion thereof for his own use and allowed the balance to be paid the hospital and his physician, and made no further demand on defendant until the institution of this action nearly two years thereafter. *Held:* Plaintiff's own evidence discloses ratification of the release estopping him from attacking its validity even conceding that its original execution was obtained by fraud and misrepresentation, since plaintiff will not be allowed to accept the benefits and deny the liabilities of the instrument.

APPEAL by defendants from *Bobbitt, J.*, at January Term, 1940, of HAYWOOD.

This is an action to recover damages for personal injuries alleged to have been caused by the negligence of the defendants in running an automobile truck over the plaintiff while crossing a public highway. The defendants pleaded in bar of the plaintiff's recovery a release signed by him. The plaintiff admitted the signing of the release but averred that such signing was procured by fraud and misrepresentation. The defendants moved for judgment as in case of nonsuit when plaintiff had introduced his evidence and rested his case, and renewed their motion at the close of all the evidence. The motions were denied and defendants reserved exceptions.

The issues were answered in favor of the plaintiff, and from judgment predicated on the verdict the defendants appealed, assigning error. The sole exceptions set out in the appellants' brief are those which relate to the denial of the motions for judgment as in case of nonsuit.

W. T. Crawford, J. Hayes Alley, and F. E. Alley, Jr., for plaintiff, appellee.

Williams & Cocke for defendants, appellants.

SCHENCK, J. The release admitted to have been signed by the plaintiff reads: "Received from H. L. Liner the sum of one hundred twenty-

eight & 50/100 dollars ($128.50), which I (being of lawful age) acknowledge to be in full settlement, accord and satisfaction of a disputed claim growing out of a bodily injury sustained by me on or about Sept. 1, 1937, for which bodily injury I have claimed the said H. L. Liner to be legally liable, which liability is expressly denied, and in consideration of said sum so paid, I hereby remise, release and forever discharge the said H. L. Liner, heirs, successors, administrators, and assigns from any and all actions, causes of actions, claims and demands, for, upon, or by reason of, any damage, loss, injury or suffering which heretofore has been, or which hereafter may be sustained by me in consequence of such accident and injury.

"Witness my hand and seal the day and date first above written.

"This is a Release.

(Signed) GRANT PRESNELL. (L. S.)"

This release is sufficient in form to bar recovery by the plaintiff. The plaintiff, however, alleges and contends that its execution was obtained by fraud and misrepresentation, and was therefore void. The defendants deny that the release was obtained by fraud and misrepresentation, but allege and contend that if so obtained the plaintiff, after ascertaining the purport and effect of such release, ratified his action in signing it by using the money derived therefor for his benefit, and by waiting nearly two years to make further demand upon the defendants.

There was evidence tending to show that the agent of the defendants represented to the plaintiff at the time the release was presented to him for signature that it was a paper writing to assure his remaining at the hospital for an additional three weeks, and that the plaintiff was thereby lulled into a state of security and signed the release without reading it, or having it read to him. However, it appears from the plaintiff's own testimony that he is a literate man, that he had been a mail carrier for three or four years and had been for 14 years chairman of the board of education of Watauga County, and had had considerable experience handling and endorsing checks and drafts. It further so appears that the plaintiff endorsed the draft which was payable to him in accord with the release and that the money was obtained thereon and distributed among the plaintiff's physician, the hospital and the plaintiff; and that the plaintiff after he had learned that the paper writing was indeed a release had spent a portion of the money realized from the draft for his own uses.

If the plaintiff did not read the release before he signed it, this fact cannot avail him unless prevented from so doing by the defendants. He could read; it was his duty to read the instrument before executing it, *Aderholt v. R. R.*, 152 N. C., 411, unless prevented; he had the oppor-

tunity to do so, and it is doubtful whether there were any circumstances connected with the signing thereof which relieved him of the duty of reading it. However, it is not necessary to determine this question since it appears from the plaintiff's own testimony that after he learned that the paper writing he had signed was indeed a release, he collected the money from the draft given in accord with the release and used a portion thereof for his own use, and allowed the balance to be paid to the hospital and his physician; and since it further appears the plaintiff waited from September, 1937, the date of the release, until 5 June, 1939, the date of summons, to make further demands upon the defendants. These facts and circumstances constitute a ratification of the release, even if it be conceded that its original execution was obtained by fraud and misrepresentation.

A release, originally invalid or voidable, for any reason may be ratified and affirmed by the subsequent acts of the persons interested. Thus if one, who has been induced by fraud and misrepresentation to execute a release and subsequently learns the true import thereof, knowingly takes the benefits of it he thereby ratifies and gives it force and effect. If the plaintiff knew the facts and circumstances of the execution of the release and knew its provisions, and then accepted its benefits he is thereby estopped to deny its validity. With full knowledge of its contents, he cannot accept the benefits and deny the liabilities of the instrument—he cannot ratify it in part and reject it in part. *Sherrill v. Little,* 193 N. C., 736, and cases there cited.

The plaintiff's ratification is further evidenced by his long delay, nearly two years, after learning the true character of the instrument he had signed, in making further demands upon the defendants.

We are of the opinion that it was error to deny the defendants' motion for judgment as in case of nonsuit, and for this reason the judgment of the Superior Court is

Reversed.

FEDERAL FARM MORTGAGE CORPORATION v. MILDRED MAE BARCO AND HUSBAND, W. H. BARCO.

(Filed 18 September, 1940.)

1. Ejectment § 13—

Where defendants in an action in ejectment deny in their answer the allegation of the complaint in respect to plaintiff's title and defendants' wrongful possession, nothing else appearing, plaintiff has the burden of proving both title in himself and wrongful possession by defendants.

2. Ejectment §§ 13, 15—Where defendants deny wrongful possession, and do not claim title to land which may be identified as a matter of law as that described in the complaint, plaintiff must prove possession by defendants.

Where, in an action in ejectment, plaintiff's allegations of title in himself and wrongful possession by defendants are denied in the answer, the fact that defendants in their further answer assert ownership of land does not relieve plaintiff of the burden of proving wrongful possession by defendants when the description of the land set forth in the complaint and contained in plaintiff's evidence and the description of the land referred to in the further answer are not sufficiently identical to admit of holding as a matter of law that the lands are the same, and in the absence of evidence by plaintiff of wrongful possession by defendants, defendants' motion for judgment as of nonsuit should have been allowed. In this action the complaint and plaintiff's evidence described land "located on North Carolina State Highway 34, two miles northwest of Elizabeth City," while the land referred to in the further answer was described as "situate on State Highway 17 near Elizabeth City."

APPEAL by defendants from *Burney, J.*, at June Term, 1940, of PASQUOTANK.

Civil action in ejectment.

Plaintiff, in its complaint, alleges: (1) That it is the owner and entitled to possession of a certain tract of land "known as the Mildred Mae Barco place, located on N. C. State Highway No. 34, two miles northwest of Elizabeth City," bounded as therein described, and being "more fully described by metes and bounds in the deed of trust executed by Mildred Mae Barco and W. H. Barco to W. O. Gibony, Trustee, recorded in the office of the register of deeds of Pasquotank County in Book 85, at page 169, to which reference is made"; and (2) "That defendants are in wrongful possession of said land and wrongfully and unlawfully withhold same from plaintiff."

Defendants in their answer deny each of these allegations. And in further answer defendants say that they "were heretofore the owners of a valuable tract of land situated on State Highway No. 17 near Elizabeth City," and that they placed thereon a deed of trust to the Federal Land Bank and a second deed of trust to the Land Bank Commissioner, the amounts of which were far less than the value of the land. That a sale was held at the courthouse door in Elizabeth City, North Carolina, at which sale attorney for the Land Bank Commissioner and plaintiff, L. S. Blades, Esq., arranged for the property to be bid in for the plaintiff; that said Blades was acting for the plaintiff at said sale both as its agent and attorney, and as its general attorney locally, which arrangement by the said Blades who was acting for the trustee and for the holder of the indebtedness was wrongful and unlawful and a trespass upon the rights of these defendants.

"Wherefore, defendants demand that plaintiff take nothing by its action; that they be declared to be the owners of the land, subject to the claim of plaintiff; that an accounting be had and the true and just indebtedness be established, and that when the same is paid a decree be entered ordering that defendants are owners of said lands; that the purported foreclosure be set aside, and that the trustee's deed to the plaintiff be canceled; for the costs of this action and for such other and further relief as the nature and circumstances of the case may demand."

On the trial below plaintiff offered only the following evidence: (1) Record appearing in Pasquotank County, Book 85, page 169, of deed of trust dated 16 May, 1934, from Mildred M. Barco and husband, W. H. Barco, to W. O. Gibony, trustee for the Land Bank Commissioner, in which, as security for indebtedness therein stated, two tracts of land, described, known and bounded in almost identical words as set forth in the complaint, and specifically described, are conveyed, and in which deed of trust power of sale is given to the trustee in event of default as therein provided; (2) Record of report of sale 24 May, 1939, by the trustee pursuant to the default in the payment of notes secured by said deed of trust, at which sale Federal Farm Mortgage Corporation became the last and highest bidder, the report being dated 20 July, 1939, and submitted by "W. O. Gibony, trustee, by L. S. Blades, Jr., agent and attorney for the trustee"; (3) Order of the clerk of Superior Court dated 31 July, 1939, confirming the sale to the Federal Farm Mortgage Corporation; (4) Record of deed from W. O. Gibony, trustee, to Federal Farm Mortgage Corporation, purporting to be in pursuance of said foreclosure sale, conveying the land by the same description as is in the said deed of trust; and (5) Record of final account of trustee signed W. O. Gibony, trustee, by L. S. Blades, Jr., attorney for trustee.

Thereupon plaintiff rested. Defendant moved for judgment as in case of nonsuit. Motion overruled. Exception. The court submitted one issue: "Is the plaintiff the owner of and entitled to possession of lands described in complaint?" To which, under peremptory instruction, the jury answered "Yes."

To judgment declaring the plaintiff is the owner and entitled to the immediate possession of lands as described in the complaint and ordering that the clerk issue forthwith a writ of possession directing the sheriff or his deputy of Pasquotank County to forthwith remove and eject the defendants from the premises described, and place the plaintiff or its representatives in possession thereof, the defendants except and appeal to the Supreme Court and assign error.

L. S. Blades, Jr., and W. A. Worth for plaintiff, appellee.
M. B. Simpson and R. M. Conn for defendants, appellants.

WINBORNE, J. Upon the record in this appeal the exception to the refusal of the court to allow defendants' motion for judgment as in case of nonsuit, assigned as error, is well taken.

The plaintiff, having elected to bring this action for the recovery of land, that is, an action in ejectment, alleges that it is the owner of certain land and that defendants are in wrongful possession thereof and wrongfully and unlawfully withhold same from plaintiff. Defendants deny each of these allegations. Upon such denial, nothing else appearing, issues of fact arise both as to the title of plaintiff and possession by defendants—the burden of proof as to each being on the plaintiff. On the trial below no issue was submitted, and no evidence was offered as to possession by defendants.

Plaintiff, however, contends that by their further answer defendants assert ownership of the land to which plaintiff alleges and claims title; that under the authorities this is tantamount to an admission of possession; and that, hence, as a matter of law, no issue as to possession by defendants is raised on the pleadings as a whole. Without going into a discussion of the legal proposition arising upon such contention, we are of opinion that the description of the land as set forth in the complaint and that of that referred to in the further answer are not sufficiently identical to admit of holding as a matter of law that the lands are the same. It is noted that in the complaint the land is in part described as being "located on the N. C. State Highway No. 34, two miles northwest of Elizabeth City," while the lands to which the further answer relates is referred to as "situated on State Highway 17, near Elizabeth City." Therefore, the factual situation in the present case does not admit of the application of the principle of law advanced by plaintiff, nor of the legal conclusion for which plaintiff contends.

The judgment below is

Reversed.

ROBERT ROUSE WILLIAMS v. JOHN R. ELSON.

(Filed 18 September, 1940.)

1. Food § 11—

Allegations to the effect that defendant, through his agents and servants, prepared food for sale to the general public and warranted same to be fresh and to contain no deleterious, poisonous or harmful substances, that plaintiff was damaged by reason of the negligence and carelessness of defendant in preparing food containing foreign, poisonous and deleterious substances and offering same for sale in violation of his warranty, *is held* sufficient, liberally construed, to state a cause of action *ex contractu*, for breach of implied warranty that the food was fit for human consumption.

2. Food § 12—Evidence that plaintiff found glass in food sold by defendant sustains allegation of breach of implied warranty that food was fit for human consumption.

Evidence tending to show that plaintiff purchased a barbecue sandwich at defendant's store, that the sandwich was wrapped up by someone in the store and was taken by plaintiff on a hunting trip, that plaintiff started eating lunch some hours later, and after eating part of the sandwich, bit down on some foreign substance which cut his gums and tongue, that plaintiff ascertained that the foreign substance was glass, that he took the remaining part of the sandwich containing particles of glass back to defendant's store and showed it to defendant, that thereafter while going to his home in his car, his dog ate the remainder of the sandwich and became sick, and that plaintiff suffered both in body and mind as a result of having eaten a part of the sandwich containing glass, *is held* sufficient to support plaintiff's cause of action for breach of warranty, and defendant's motion for judgment as of nonsuit should have been denied.

3. Food § 11—

A person preparing and selling food to the public impliedly warrants that it is fit for human consumption at least.

4. Same—Whether person preparing food for immediate consumption on premises may be held liable for breach of warranty held not presented for decision.

Where it does not clearly appear from the evidence that the sandwich purchased by plaintiff from defendant's drug store was for immediate consumption on the premises, nor that defendant made or prepared the sandwich, the evidence does not show the basis for the rule followed in some jurisdictions and invoked by defendant that an innkeeper or a person preparing food for the immediate consumption on the premises can be held liable only for negligence and not for breach of warranty, and whether this jurisdiction will follow that rule need not be decided.

APPEAL by plaintiff from *Johnston, Special Judge,* at December Term, 1939, of BUNCOMBE.

Ford & Lee for plaintiff, appellant.
Harkins, Van Winkle & Walton for defendant, appellee.

SCHENCK, J. This is an action to recover damages for injury which the plaintiff alleges he sustained by reason of a foreign substance, glass, contained in a barbecued beef sandwich sold by the defendant to him for his consumption. The complaint is based both upon negligence and upon breach of warranty. When the plaintiff had introduced his evidence and rested his case, the court sustained the defendant's motion for judgment as in case of nonsuit, and entered judgment accordingly. The plaintiff appealed, assigning as error the action of the court.

In so far as the alleged cause of action in tort, negligence, is concerned, we are of the opinion that the motion for judgment as in case

of nonsuit was properly allowed. This is virtually conceded in the appellant's brief.

As to the alleged cause of action in contract, a breach of warranty, we will first consider the complaint. Paragraph VII thereof is as follows: "That, as this plaintiff is advised, informed and believes, the defendant, by and through his servants, agents and employees, prepared, compounded and manufactured sandwiches, pies and other food, and offered for sale and sold to the general public such foods at its stores to be consumed by such customers, and *warranted* said articles so sold for human consumption to be fresh and to contain no deleterious, poisonous or other substances injurious to the life or health of persons who might purchase the same." And paragraph XI thereof is in part as follows: "That by reason of the negligence and carelessness of the defendant in compounding and manufacturing foods containing such foreign, poisonous and deleterious substances, and offering to sell and selling impure, deleterious and unwholesome food to the plaintiff in violation of its *warranty* and in violation of the law, the plaintiff has been greatly injured and damaged in that he has been rendered physically unable to do any work since consuming said food . . ." When liberally construed, we are of the opinion that an action for a breach of warranty has been alleged.

The evidence tends to show that on 13 December, 1938, the plaintiff went to the drug store of defendant near Enka and purchased a barbecued beef sandwich which was delivered to him wrapped up by someone from the store; that the plaintiff took the sandwich with him and hunted for about three hours, and then drove to Wilson's store in Canton for shells, and while there started to eat his lunch; he unwrapped the sandwich and took four bites thereof without untoward incident, but when the fifth bite was taken he "bit down on something hard," which "cut my tongue and gums," that he "spit it out of my mouth and discovered that it was a piece of glass; it was about the size of my little finger nail;" the plaintiff then took the remainder of the sandwich to the defendant's drug store and showed it and the piece of glass to the defendant; while on his way back to defendant's drug store the plaintiff felt with his fingers other glass in the remaining portion of the sandwich; after showing the sandwich to defendant the plaintiff took it back to his car and drove home; and that his dog ate the remainder of the sandwich in the car. When plaintiff got home he called his family physician who prescribed for him, that he suffered in both body and mind as a result of having eaten a part of the sandwich containing glass; that his dog became sick.

We are of the opinion, and so hold, that under authority of *Rabb v. Covington,* 215 N. C., 572, there was error in sustaining the motion for

judgment as in case of nonsuit. The allegation of a breach of warranty is sufficient, and the evidence when construed most favorably to the plaintiff is sufficient to support the allegation. When the defendant sold the sandwich to the plaintiff there was at least an implied warranty that it was fit for the purpose for which it was sold, namely, for human consumption, *Ward v. Sea Food Co.,* 171 N. C., 33, and, nothing else appearing, the finding of glass therein was evidence of a breach of this warranty, and presented an issue for the jury.

The defendant in his brief contends that there is a distinction between *Rabb's case, supra,* and the instant case in that the evidence shows that the sandwich in the instant case was delivered to the plaintiff for immediate consumption at the place of delivery, whereas the sausage in the *Rabb case, supra,* was delivered for future consumption away from the place of sale, and that therefore the instant case is governed by the principle enunciated in some jurisdictions to the effect that food delivered for a consideration for immediate consumption at the place of delivery constitutes a service rendered, rather than a sale, and that the deliverer thereof owes to the consumer only the duty to exercise due care to see that the food delivered is fit for human consumption, and is not bound by any contractual relations growing out of an implied warranty of fitness. *Nisky v. Childs Co.,* 103 N. J., 464, 135 Atl., 805, 50 A. L. R., 227, and annotations thereunder. Such principle being stated in an old case as follows: "An innkeeper . . . does not sell but utters his provisions." *Parker v. Flint,* 12 Mod., 1303, 88 Eng. Reprint, 1303. With this contention we cannot concur for the reasons, *inter alia,* it does not clearly appear from the evidence that the sandwich delivered to the plaintiff by a person from the drug store of the defendant was for immediate consumption at the place of delivery, nor does it appear from the evidence that the defendant made or prepared the sandwich. Hence, we are not called upon at the present time to determine whether we will agree with the principle enunciated in the *Nisky case, supra,* or adopt the opposite view enunciated by the Courts of New York and Massachusetts. *Temple v. Keeler,* 238 N. Y., 344, 144 N. E., 635, 35 A. L. R., 920, and *Friend v. Childs Dining Hall Co.,* 231 Mass., 65, 120 N. E., 407, 5 A. L. R., 1100.

The judgment of the Superior Court is

Reversed.

IN RE WILL OF J. F. SMITH.

(Filed 18 September, 1940.)

1. Wills § 17—

The clerk of the Superior Court, in his probate jurisdiction, has the power to vacate a previous order admitting a will to probate in common form on motion aptly made when it is clearly made to appear that the order of probate was improvidently granted, or that the court had been imposed upon and misled as to the essential and true conditions of the case.

2. Wills § 9—Held: Words in handwriting of testator held not to constitute complete instrument and not to disclose animus testandi, and the instrument was improvidently admitted to probate as holograph will.

An instrument admitted to have been properly probated in common form as a holographic will, provided that testator's wife should have all testator's property without restriction as long as she lived and that at her death the property then remaining should go to testator's two brothers or other heirs. Thereafter testator's widow propounded for probate a purported codicil which consisted of a typewritten statement of the liabilities and assets of testator followed by words in testator's handwriting "all of the above property is willed to my wife . . . without reservation and any other property now owned by me," which was dated and signed by testator. *Held:* The *animus testandi* does not appear from the purported codicil and its reference to property as "willed my wife" apparently related to the holograph will theretofore probated, and the words in the handwriting of the testator required reference to the words not in his handwriting to give them meaning, and the purported codicil was improvidently admitted to probate in common form and the order of probate was properly revoked by the clerk upon motion.

APPEAL by movants from *Pless, J.*, at March Term, 1940, of ROCKINGHAM. Reversed.

Motion before the clerk by Eugene Smith and others to set aside the probate of a purported codicil or supplemental will of J. F. Smith, deceased. The motion was heard in the Superior Court upon appeal from the ruling of the clerk. From an adverse judgment movants appealed.

Sharp & Sharp for appellants.
Hunter K. Penn and Junius C. Brown for appellee.

DEVIN, J. There is no controversy as to the facts. They may be briefly stated as follows:

J. F. Smith died in Rockingham County seized and possessed of real and personal property, and his will was duly probated as a holographic will 10 November, 1938. The validity of this will is admitted. Therein

the testator made the following provisions: "I give unto my beloved wife Gladys Smith all of my property of every description and wherever found, the same to be used by her as she thinks proper, without restriction from any source, as long as she lives. At the death of my said wife, I give unto my two brothers, Darien and Eugene Smith, or their heirs, all of my property then remaining." This will was dated 10 October, 1921.

On 6 March, 1939, the widow propounded for probate a purported codicil or supplemental will of J. F. Smith, dated 15 April, 1932. This was admitted to probate in common form as a holographic will.

This last mentioned paper writing was in words and figures following:

"ASSETS OF J. F. SMITH, AT THIS DATE, APRIL, 15, 1932:

"One-half owner Smith-Pinnix Warehouse building, lot and fixtures.
One-half owner of Walters lot on Wentworth Road.
One-third interest in farm in Henry Co., Va.
Deed of trust on Eugene Smith's interest in above farm (467.00)
(Note $50.00)
Jesse Comer, Chattel Mortgage
L. F. Manley,
W. N. Duke Estate, note and canceled check
(As evidence Note $100.00 check $75.00).

H. P. Clifton Note	90.00
Junior Order	750.00
Penn Mutual	1,200.00
Life Ins. Mutual Benefit	2,000.00
(Buck Comer, ck.)	(25.00)
(Cash in Bank of Reidsville)	(900.00)

LIABILITIES:

Bank of Reidsville, note secured by life Ins.	$1,900.00
" " ½ of $3,600.00 secured by deed of trust	1,800.00
TOTAL LIABILITIES	$3,700.00

"(All of the above property is willed to my wife, Gladys G. Smith without reservation and any other property now owned by me.)

"(This April 15, 1932)

(J. F. Smith)"

Only the portions of this paper writing enclosed in parentheses were in the handwriting of J. F. Smith. The other portions were typewritten.

IN RE WILL OF SMITH.

On 14 October, 1939, Eugene Smith and the heirs of Darien Smith, after notice to the widow, entered motion before the clerk to set aside the probate of the purported codicil or supplemental will, on the ground that this was not a will, was not in the handwriting of the testator, and that the paper writing was erroneously and improvidently admitted to probate as a will.

The order of the clerk setting aside the probate of this instrument was overruled in the Superior Court, the trial judge being of opinion that after the paper writing had been probated in common form the clerk was without authority later to revoke this action under the circumstances of this case. The appeal to this Court by movants presents for review this ruling of the court below.

From a consideration of the facts as they appear of record, we think the learned judge who heard this matter was in error. The power of the clerk, in proper cases, to vacate previous orders admitting wills to probate in common form has been frequently upheld by this Court. In the case of *In re Meadows,* 185 N. C., 99, 116 S. E., 257, *Hoke, J.,* speaking for the Court, used this language: "It is the approved practice in this jurisdiction that courts having power to admit wills to probate may, in proper instances and on motion and due notice made in apt time, set aside the proof of a will in common form had before them and recall letters of administration or other orders made in such proceedings, or modify same, where it is clearly made to appear that their adjudications and orders have been improvidently granted, or the court has been imposed upon or misled as to the essential and true conditions existent in a given case."

This statement of the law is supported by the holding in *In re Johnson,* 182 N. C., 522, 109 S. E., 373; *Dickenson v. Stewart,* 5 N. C., 99; *Redmond v. Collins,* 15 N. C., 430; *Edwards v. Edwards,* 25 N. C., 82; *Hyman v. Gaskins,* 27 N. C., 267; *Armstrong v. Baker,* 31 N. C., 109; *Springer v. Shavender,* 116 N. C., 12, 21 S. E., 397; *Clark v. Homes, Inc.,* 189 N. C., 703 (711), 128 S. E., 20; *Moore v. Packer,* 174 N. C., 665, 94 S. E., 449; *Bank v. Bridgers,* 207 N. C., 91 (95), 176 S. E., 295.

In this instance we think the paper writing presented 6 March, 1939, was improvidently admitted to probate in common form. An examination of the instrument leads us to the conclusion that it was not in form sufficient to be entitled to probate as a holographic will. The words written by J. F. Smith on the typewritten statement of his assets in 1932 are insufficient of themselves to constitute a valid will. The reference to property as "willed to my wife" apparently related to his will dated 10 October, 1921. The *animus testandi* does not appear. That J. F. Smith intended this paper to constitute a new or different disposition of his property is negatived by the context and purport of his written

words, and by the character of the situation in which they are found. *In re Perry,* 193 N. C., 397, 137 S. E., 145; *In re Will of Johnson,* 181 N. C., 303, 106 S. E., 841; *Spencer v. Spencer,* 163 N. C., 83, 79 S. E., 291; *Alston v. Davis,* 118 N. C., 202, 24 S. E., 15. Words not in the handwriting of the testator are essential to give meaning to the words used. *In re Will of Parsons,* 207 N. C., 584, 178 S. E., 78; *In re Will of Lowrance,* 199 N. C., 782, 155 S. E., 876.

The construction of the will dated 10 October, 1921, which was properly admitted to probate, is not involved in this appeal, and we express no opinion as to the legal effect of the language in which its provisions are expressed.

For the reasons stated, we conclude that the ruling of the court below on the motion must be

Reversed.

JUNIUS D. GRIMES v. COUNTY OF BEAUFORT AND L. A. SQUIRES, SINKING FUND COMMISSIONER.

(Filed 18 September, 1940.)

1. Reference § 2—Action held to involve long account within meaning of compulsory reference statute.

This action was instituted to recover for services rendered defendant county by plaintiff as an attorney, plaintiff alleging as a basis of recovery, services rendered in a certain civil action and services rendered relating to twenty-one different transactions extending over a period of more than a year, subsequent to the termination of the civil action. *Held:* It cannot be said as a matter of law that the cause of action does not require the consideration of a long account, and defendants' exception to the order of compulsory reference on this ground cannot be sustained. C. S., 573.

2. Reference § 3—Plea in bar held not to extend to entire cause and not to preclude compulsory reference.

Plaintiff instituted this action to recover for services rendered defendant county by plaintiff as an attorney, plaintiff alleging as a basis of recovery services rendered in a certain civil action and services rendered relating to twenty-one different transactions extending over a period of more than a year, subsequent to the termination of the civil action. Defendants alleged that final judgment in the civil action was entered more than two years prior to the institution of the present suit, that plaintiff's cause of action for services rendered therein accrued at the time of the rendition of the judgment, and that plaintiff's cause of action for services rendered therein is barred by the statute of limitations, C. S., 442. *Held:* The plea of the statute of limitations relates solely to the claim for services rendered in the civil action, and is not a plea in bar which would defeat plaintiff's claim in its entirety.

3. Same—

A plea in bar such as will preclude a compulsory reference is one which extends to the whole cause of action so as to defeat it absolutely and entirely, and which if found in favor of the pleader will put an end to the case, leaving nothing further to be determined.

APPEAL by defendants from *Thompson, J.*, at January Term, 1940, of BEAUFORT. Affirmed.

Civil action to recover compensation for services rendered as an attorney.

Plaintiff was retained by defendants to prosecute an action to its termination against the sinking fund commissioner of Beaufort County and his sureties for an accounting and to recover sinking fund assets. The plaintiff alleges that after the termination of the action against the sinking fund commissioner he rendered services to the defendants in the collection of mortgages by foreclosures and by negotiations for settlement and the like for which he is due compensation.

The defendants answering admit that plaintiff was employed to prosecute said action and assert that such litigation was terminated by final judgment in 1936 and no claim was filed for compensation until more than two years thereafter. They pleaded the two-year statute of limitations. C. S., 442. The defendants further allege that services rendered by plaintiff after the termination of the civil action were rendered as county attorney under a contract of employment on a salary basis; that the salary has been paid; and the plaintiff has been fully compensated for said services.

On motion of the plaintiff and over the objection of the defendants the cause was referred and the defendants excepted and appealed.

Rodman & Rodman and Carter & Carter for plaintiff, appellee.
E. A. Daniel for defendants, appellants.

BARNHILL, J. The plaintiff in his complaint lists twenty-one different transactions in which he rendered services to the county, exclusive of his appearance as counsel in the action against the sinking fund commissioner and his sureties and in addition to certain collections made on the judgment rendered in the civil action. These various items extend over a period from December, 1936, to January, 1938.

It may not be said as a matter of law that the plaintiff's cause of action does not require the consideration of a long account. C. S., 573. Therefore, defendants' exception to the order of reference on this ground cannot be sustained.

But the defendants contend that they have interposed a plea in bar and that an order of reference prior to the adjudication of this plea was erroneous.

The plea in bar is to the claim for compensation for services rendered in the civil action, the defendants alleging that such suit "was terminated by a final judgment in that cause at the December Term, 1936, Beaufort County Superior Court, and said case went off the docket and all attorney services were complete, at which time plaintiff's cause of action against these defendants, if any, accrued, but that plaintiff failed to present any claim for services at that time or at any other time until May 1, 1939, and that more than two years have elapsed since the plaintiff's cause of action accrued, and the defendants plead this lapse of time in bar of plaintiff's recovery." The plea is not directed to the claim of plaintiff for compensation for services rendered subsequent to the final termination of the action. Thus it appears that the plea in bar does not extend to the whole cause of action and, if sustained, would not defeat plaintiff's claim in its entirety.

It is well settled in this jurisdiction that a plea in bar 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, only when such plea extends to the whole cause of action so as to defeat it absolutely and entirely. 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., 326; *Reynolds v. Morton,* 205 N. C., 491, 171 S. E., 781, and cases there cited; *Brown v. Clement Co.,* 217 N. C., 47; McIntosh, P. & P., sec. 523.

The judgment below is

Affirmed.

ELMER N. GRIGGS, ADMINISTRATOR OF THE ESTATE OF MARGARET YOUNG GRIGGS, DECEASED, v. SEARS, ROEBUCK & COMPANY.

(Filed 18 September, 1940.)

1. Negligence § 4d: Evidence § 5—Evidence that floor of aisle was partly tile and partly linoleum waxed in ordinary manner held insufficient to show negligence.

Plaintiff's evidence tended to show that his intestate, while a customer in defendants' store, fell when she stepped from the tile floor onto a piece of waxed linoleum in an aisle maintained for the use of customers, and that the fall resulted in injuries accelerating intestate's death. Plaintiff's evidence on the issue of negligence tended only to show that the linoleum

had been waxed in the usual manner, and plaintiff relied upon the difference between the slipperiness of the tile floor and the waxed linoleum as a basis for the allegation of negligence, but offered no evidence of the smoothness or slickness of the tiling as compared with the surface of the linoleum. *Held:* The court cannot take judicial notice as being a matter within common knowledge that a difference existed between the two surfaces to such a degree as to constitute evidence of negligence, and defendants' motion for judgment as of nonsuit was properly entered.

2. Negligence § 4d—

A store proprietor is not an insurer of the safety of his customers and is not held to the standard of the perfectly prudent man, but is required only to exercise that degree of care which would be used by the ordinarily prudent man under the circumstances.

APPEAL by plaintiff from *Warlick, J.*, at March Term, 1940, of BUNCOMBE. Affirmed.

Jordan & Horner for plaintiff, appellant.
Harkins, Van Winkle & Walton for defendant, appellee.

SEAWELL, J. In this action plaintiff seeks to recover damages for the injury and death of his intestate, Margaret Young Griggs, which, he alleges, was caused by the negligent conduct of the defendant in maintaining a floor, or walkway, in its store in a condition dangerous for ordinary use. The negligence is alleged to have consisted in placing upon the tiled floor, and in the walkway which plaintiff's intestate had to use, a piece of linoleum upon which defendant had allowed or caused to accumulate an excessive quantity of wax, thereby producing a slippery and unsafe surface. The plaintiff's intestate, it is alleged, had completed a purchase and was leaving the store in the usual way, and placing one foot on the linoleum she slipped upon the slick surface, fell heavily to the floor, and sustained injuries which caused her death some two months later. The injury sustained, it is alleged, was in aggravation of a duodenal ulcer, which finally disrupted, or came to puncture the walls of the duodenal canal, causing death.

There was evidence supporting the allegation as to the fall of plaintiff's intestate by slipping on the linoleum and, upon a close appraisal, as to the acceleration of death by reason of the fall through such aggravation of the ulcer. But, in our opinion, the evidence did not support the allegation that an excessive or unusual quantity of wax had been allowed to remain on the linoleum, which was the condition alleged in the complaint to be the basis of the negligence charged and to be the proximate cause of the fall and injury and death.

The evidence, as we view its natural inferences, goes only so far as to show that the linoleum surface had been waxed in the usual manner.

Plaintiff here depends for recovery on the circumstance that the polished surface of the linoleum was interposed in the usual walkway and was much slicker than the rest of the floor, which consisted of tiling. He points out that this introduces the element of surprise and demands a speedier readjustment of the way of walking over other parts of the floor than could be readily made.

There is a want of evidence as to the condition of the tiling with regard to its smoothness or slickness as compared with the surface of the linoleum; and this want of direct evidence could only be supplied by assuming, as a matter of common knowledge of the materials used in the floor, that such difference existed between the surfaces. We could hardly go so far as to assume the difference existed at the time and to such a degree as to be evidence of negligence.

We are unable to interfere with the result of the trial—not so much on the theory of variance between *allegatur* and *probatur*—although in the history and light of similar cases that difference is important—but because we are unable to see evidence of negligence in the facts themselves. The Court is reluctant to advance the standard of due care to such an unreasonable length as would practically put every accident in the category of actionable negligence, or make a storekeeper the insurer of the safety of his customers. *Brown v. Montgomery Ward & Co.*, 217 N. C., 368, 8 S. E. (2d), 199; *Schwingle v. Kellenberger*, 217 N. C., 577, 8 S. E. (2d), 918; *Fox v. Tea Co.*, 209 N. C., 115, 182 S. E., 662; *Bowden v. Kress & Co.*, 198 N. C., 559, 152 S. E., 625; *Bohannon v. Stores Co., Inc.*, 197 N. C., 755, 150 S. E., 356; *Leavister v. Piano Co.*, 185 N. C., 152, 116 S. E., 405.

The measure of due care adopted in this State is that of the ordinarily prudent, not the perfectly prudent, man. *Gold v. Kiker*, 216 N. C., 511, 516, 5 S. E. (2d), 548; *Templeton v. Kelley*, 215 N. C., 577, 2 S. E. (2d), 696; *Ellis v. Refining Co.*, 214 N. C., 388, 390, 199 S. E., 403; *Boswell v. Hosiery Mills*, 191 N. C., 549, 132 S. E., 598; *Saunders v. R. R.*, 167 N. C., 375, 83 S. E., 573; *McAtee v. Mfg. Co.*, 166 N. C., 448, 82 S. E., 857; *Anderson v. R. R.*, 161 N. C., 462, 77 S. E., 402; *Comrs. v. Jennings*, 181 N. C., 393, 401, 107 S. E., 312. "No better standard has yet been devised than the care of the 'ordinarily prudent man.'" We think the rule is more tolerant than that contended for by the plaintiff. It takes into consideration the tare of carrying on, which, try as we may, we cannot wholly remove from the contract which, by being mere members, we make with society.

A marginal line, within which negligence may be reasonably discerned by the courts, emerges from the decisions in numerous cases dealing with these situations. *Brown v. Montgomery Ward & Co., supra; Schwingle v. Kellenberger, supra; Anderson v. Amusement Co.*, 213 N. C., 130, 195

S. E., 386; *Parker v. Tea Co.*, 201 N. C., 691, 161 S. E., 203; *Bowden v. Kress, supra.* See collection and comparison of cases by *Brogden, J.*, in *Bowden v. Kress, supra.*

The instant case does not fall within the field of negligence comprehended in these cases, and we are not inclined to transgress or enlarge its limits.

The judgment of nonsuit is

Affirmed.

SOUTHERN RAILWAY COMPANY v. CHEROKEE COUNTY, T. P. CALHOUN, E. A. WOOD AND J. M. ANDERSON, THE BOARD OF COUNTY COMMISSIONERS OF CHEROKEE COUNTY, NORTH CAROLINA, AND CITIZENS BANK & TRUST COMPANY, TREASURER AND FINANCIAL AGENT OF CHEROKEE COUNTY, NORTH CAROLINA.

(Filed 18 September, 1940.)

Taxation § 3a—Ordinarily, expenses of holding courts, maintaining county jail and caring for prisoners are general expenses.

Only under exceptional circumstances may the expenses of holding courts and maintaining the county jail and caring for jail prisoners be classified as expenses for special purposes, since ordinarily the holding of courts is a general expense recurring in the ordinary course of and as necessary steps in the operation of the county government, and the maintenance of the county jail and the caring for prisoners is a general expense, continuous and ever present, and under the facts of this case the expenses are *held* general expenses, and a tax levy therefor in addition to the 15c levy made for general county purposes in another item, Constitution of North Carolina, Art. V, sec. 6, is invalid, and plaintiff is entitled to recover the amount paid under the additional levy in his suit therefor instituted in accordance with the statutory procedure.

APPEAL by defendants from *Rousseau, J.*, at January Term, 1940, of CHEROKEE.

Civil action for recovery of *ad valorem* taxes alleged to have been assessed illegally and paid under protest.

The parties waived jury trial and agreed that the court should find the facts and render judgment in accordance therewith.

The court made findings of facts substantially these: On 11 July, 1938, the board of commissioners for the county of Cherokee, duly organized, levied taxes for the year 1938 at specified rates on the one hundred dollars property valuation for designated purposes—some of the items being: (1) For general county purposes, *fifteen cents,* and (2) "For the special purpose of paying the expenses of holding courts in the county, and the expense of maintaining the county jail and jail

prisoners," *five cents.* The latter levy was made pursuant to chapter 441 of Public Laws of 1931, and subject to and with the approval of the director of local government of the State of North Carolina. The levy for general county purposes is to the full constitutional limit of fifteen cents on the one hundred dollars valuation of taxable property. Article V, sec. 6, of North Carolina Constitution. The purposes of the said second item of the levy are necessary expenses of the county, but, though the levy is designated "for a special purpose," the purposes "are general expenses recurring regularly in the ordinary course of and as necessary steps in the orderly operation of county government."

For the year 1938 the board of commissioners of said county levied and assessed taxes, including the levy for the purposes above stated, on the valuation of the plaintiff's property in Cherokee County, as fixed and certified by the Utilities Commissioner, in the total amount of $23,332.68, of which the sum of $713.93 was the amount arising from the said five cents levy. Plaintiff paid the $713.93 under protest and duly made demand for refund thereof, and in due time instituted this action to recover same.

The court below concluded and held as a matter of law that the said levy of five cents is for a necessary expense of the county; that the same was not levied for a special purpose within the meaning of the Constitution and laws of the State of North Carolina; that the holding of courts is a general expense recurring in the ordinary course of and as necessary steps in the orderly operation of county government, and the caring for and feeding jail prisoners is a general county expense, continuous and ever present, and that, therefore, the five cents levy is for general expenses of the county, citing *Power Co. v. Clay County,* 213 N. C., 698, at 708. The court thereupon further concludes as a matter of law that the board of commissioners for the county of Cherokee, having in the first item levied fifteen cents for general county purposes, the limit prescribed in the Constitution, Article V, sec. 6, the five cents so levied on each one hundred dollars valuation of property in said county and under attack in this action, is unconstitutional, illegal and invalid. Thereupon, judgment was rendered in favor of the plaintiff against defendants for the amount of tax paid under protest.

Defendants appeal to the Supreme Court and assign error.

W. T. Joyner, Jones, Ward & Jones, and Gray & Christopher for plaintiff, appellee.

D. Witherspoon for defendants, appellants.

WINBORNE, J. The sole question presented for decision on this appeal relates to the ruling of the court below that, on the facts found, the tax

levy made by the board of commissioners for the county of Cherokee for the purpose of paying expenses of holding courts and of maintaining the county jail and jail prisoners in said county is unconstitutional, illegal and invalid. The ruling is in keeping with the decision as to item 10 in *Power Co. v. Clay County,* 213 N. C., 698, 197 S. E., 603, where the same question was under consideration. While in that case it is said that there may be circumstances under which these expenses would be expenses for special purposes, such circumstances did not arise there. Nor do they appear on the facts found here.

Upon authority of *Power Co. v. Clay County, supra,* the judgment below is

Affirmed.

MAHALAH EDNEY, ADMINISTRATRIX, v. RUTH EDNEY MATTHEWS ET AL.

(Filed 18 September, 1940.)

Executors and Administrators §§ 13a, 31—Agreement held to have converted proceeding to sell lands to make assets into an administration suit, and petitioner could not object to being made party in individual capacity.

In this proceeding to sell land to make assets, defendants pleaded the statute of limitations as to certain indebtedness alleged in petitioner's bill of particulars and asked for an accounting, and the parties thereupon agreed that the matters in controversy should be heard by the judge without a jury upon an agreed statement of facts, and that the judge might find such additional facts as he might consider necessary to a complete determination of the matters in controversy. *Held:* The proceeding was converted by consent into an administration suit, C. S., 135, and petitioner is precluded by the agreement from objecting to an order requiring her to be made a party in her individual capacity, C. S., 547, and to account for certain money paid to her either individually or as the widow of the deceased, the agreement not constituting the proceeding a controversy without action in which the authority of the court is limited to the matters submitted, C. S., 626.

APPEAL by plaintiffs from *Johnston, Special Judge,* at April-May Special Term, 1940, of CHOWAN.

Petition by administratrix to sell land to make assets.

Upon motion of the defendants, the plaintiff was required to make her petition more specific and to add thereto a bill of particulars. From this order of the clerk, the administratrix appealed to the Superior Court in term.

The order of the clerk was approved, whereupon the petitioner filed an amended petition, accompanying it with a bill of particulars. The defendants answered, pleaded the statute of limitations as to certain alleged indebtedness and asked for an accounting.

It was agreed that the matters in controversy should be heard by the judge, without a jury, upon an agreed statement of facts, and further that "the judge may find such additional facts as he may consider necessary to a complete determination of the matters in controversy."

In apt time, the defendants made motion that the administratrix be made a party in her individual capacity. Motion allowed; exception.

Upon the facts agreed and additional facts found by the judge, there was judgment of accounting, from which the plaintiffs appeal, assigning errors.

P. H. Bell for plaintiffs, appellants.
W. D. Pruden for defendants, appellees.

STACY, C. J. As was said in *Fisher v. Trust Co.,* 138 N. C., 90, 50 S. E., 592, the proceedings herein have been "somewhat eccentric and irregular." A special proceeding before the clerk, instituted by the personal representative of a decedent to sell land to make assets, is, by consent, converted into an administration suit and heard by the judge. C. S., 135. *Rigsbee v. Brogden,* 209 N. C., 510, 184 S. E., 24. If the parties are content to proceed in this way, perhaps the court ought not to object *sua sponte.* Its jurisdiction is not questioned. *Tillett v. Aydlett,* 93 N. C., 15.

There is objection, however, on the part of the petitioner, to the order requiring that she come in and account for certain moneys paid to her individually or as the widow of the deceased. On the record facts, the objection would seem to be untenable. C. S., 547. The apparent conversion of the proceeding, by consent, into an administration suit did not render it a controversy without action, C. S., 626, wherein the authority of the court is limited or confined to the matters submitted. *Waters v. Boyd,* 179 N. C., 180, 102 S. E., 196.

Objections are also made to several items in the account and to the findings of the court in respect thereof. These objections cannot avail in the face of the stipulation of the parties. It would serve no useful purpose to deal with them *seriatim.*

Upon the record as presented, the judgment of the Superior Court will not be disturbed.

Affirmed.

J. J. WILKINSON v. W. B. COPPERSMITH.

(Filed 18 September, 1940.)

1. Appeal and Error § 37—

The referee's findings of fact, approved and adopted by the court below, are conclusive upon appeal when supported by competent evidence.

2. Master and Servant § 1: Partnership § 1—Contract held one of employment and not to create partnership.

Plaintiff and defendant entered into a contract whereby it was agreed that defendant should buy certain sawmill and logging equipment, buildings and lumber, that plaintiff should have charge of salvaging and selling the property, that defendant should be reimbursed for the purchase price and all other expenses from the proceeds of sale, and the profits, if any, should be equally divided, but that any loss should be borne solely by defendant. *Held:* While division of profits is one of the tests of partnership, an agreement to share the profits solely as a means of ascertaining the compensation one of the parties should receive for his services rendered does not create a partnership, and under the facts of this case the contract was one of employment and plaintiff is not entitled to any part of the proceeds of a fire insurance policy on part of the property which defendant had purchased and which had been destroyed by fire, nor does plaintiff have any title or present interest in property purchased by defendant which had not been sold.

APPEAL by plaintiff from *Burney, J.*, at June Term, 1940, of PASQUOTANK. Affirmed.

This was an action for an accounting, growing out of dealings between the parties pursuant to a contract for the purchase and disposition of certain sawmill and logging equipment.

The action was referred. The referee made report of his findings of fact and conclusions of law, and the plaintiff filed exceptions thereto. The trial judge overruled all of plaintiff's exceptions, adopted the referee's findings of fact and approved his conclusions of law. From judgment confirming the report, plaintiff appealed.

M. B. Simpson and R. Clarence Dozier for plaintiff, appellant.
McMullan & McMullan for defendant, appellee.

DEVIN, J. The referee's findings of fact, approved and adopted by the court below, are supported by competent evidence, and hence are conclusive on appeal. *Kenney v. Hotel Co.*, 194 N. C., 44, 138 S. E., 349.

From these findings it appears that plaintiff and defendant entered into a contract whereby it was agreed that the defendant should buy

certain sawmill and logging equipment, buildings and lumber, and that plaintiff should have charge of the salvaging, preparing for sale and selling the property, each party to pay his own personal expenses, and that upon effecting sale defendant was to be reimbursed for the purchase price and all other expenses, and the profits, if any, were to be equally divided. The obligation for the purchase price of the property was to be that of the defendant alone, and in the event the venture resulted in loss, the loss was to be borne solely by defendant.

Consequent upon this agreement, certain property was purchased by defendant and subsequent sale thereof effected by plaintiff, resulting in a net profit of $14.63. Certain other property which had been purchased by defendant was destroyed by fire, and insurance thereon, which had been taken out by defendant, was paid by the insurance company into court. Some of the property remained unsold at the institution of this action. It was also found by the referee that plaintiff was entitled to the sum of $62.05 for services rendered defendant in another matter. The referee, however, found that the amounts due plaintiff were more than offset by larger sums which defendant had advanced to plaintiff for his personal expenses, and that plaintiff was entitled to recover nothing of defendant.

From these findings of fact it was correctly concluded by the court below that plaintiff's compensation for his services in effecting sales of property purchased by defendant under the contract was limited to one-half of the net profits arising therefrom, and that the plaintiff had no right, title or present interest in the property unsold, or in the funds derived from insurance on property destroyed by fire.

The facts found sustain the conclusion that the contract between the parties did not create the relationship of partners with respect to the property, so as to vest any rights in the plaintiff therein other than to a share in the profits when sold as the measure of his compensation. While an agreement to share profits as such is one of the tests of partnership, an agreement to receive part of the profits for services rendered, as a means only of ascertaining the compensation, does not create a partnership. *Gurganus v. Mfg. Co.,* 189 N. C., 202, 126 S. E., 423; *Gorham v. Cotton,* 174 N. C., 727, 94 S. E., 450; *Lance v. Butler,* 135 N. C., 419, 47 S. E., 488.

The judgment predicated upon the facts found must be upheld.

Affirmed.

W. S. BAILEY ET AL. v. J. D. HAYMAN.

(Filed 18 September, 1940.)

1. Boundaries §§ 2, 3—Specific description held not too indefinite to permit parol evidence in aid thereof, and holding as matter of law that description in prior deed to which it referred controlled is error.

Defendant claims under a commissioner's deed describing the land as being bounded by the lands of named parties "and on the east by a tract of land known as the Richardson tract . . . containing seventy acres, more or less, and being the same land conveyed" to defendant's predecessor in title, giving the book and page on which the prior deed is recorded. Plaintiffs claim the "Richardson tract." It was admitted that the description in the prior deed embraced the entire *locus in quo*, including the "Richardson tract." *Held:* The description in the deed to the plaintiff is not so indefinite as to preclude parol evidence in aid of the description, and the holding of the court as a matter of law that the reference to the prior deed was equivalent to incorporating its calls as a second description, and that therefore defendant owns the entire tract, *is held* for error, it being for the jury to say upon conflicting evidence whether plaintiffs have located the "Richardson tract" according to their contentions.

2. Partition § 5b—

In partition, upon a plea of sole seizin by respondent, petitioners have the burden of proving their title as alleged as tenants in common with respondent.

3. Partition § 5d—Directed verdict for defendant pleading sole seizin held error upon facts of this case.

Respondent claimed sole seizin under a deed to him, and it was admitted that respondent is the sole owner of the land conveyed by that deed, but petitioners denied that the description of the land in that deed embraced the *locus in quo* and introduced evidence in support of their contention. *Held:* The specific description in the deed not being too indefinite to admit parol evidence in aid thereof, the court's holding that the description in the deed to defendant was controlled by the description in a prior deed to which it referred and which embraced the *locus in quo*, and thereupon directing a verdict for defendant, is error.

APPEAL by plaintiffs from *Burney, J.*, at May Term, 1940, of DARE.

Petition for partition. Plea of sole seizin by respondent. Order of reference. Report of referee in favor of plaintiffs. Exceptions to report by defendant and demand for jury trial. Directed verdict for defendant.

Plaintiffs appeal, assigning error.

Martin Kellogg, Jr., R. B. Bridgers, and Worth & Horner for plaintiffs, appellants.

J. H. Leroy and McMullan & McMullan for defendant, appellee.

STACY, C. J. On the hearing, the case was made to turn on the proper construction of the following description in a deed from Thos. J. Markham, Commissioner, to Hattie M. Dough:

"Lying and being in Nags Head Township, Dare County, and bounded as follows: Situated on the north end of Roanoke Island and known as the Abby Dough tract and bounded on the north by the land of the heirs of Thos. A. Dough, deceased, on the east by a tract of land known as the Richardson tract; on the south by the lands of Hattie M. Dough, and on the west by the lands of the heirs of Spencer Etheridge, deceased, containing seventy (70) acres, more or less, and being the same land conveyed to Abby Dough and husband, Warren A. Dough, by William S. Etheridge, by deed duly recorded in Book No. 10, page 196, office of the register of deeds of Currituck County, and being the same place where Hattie M. Dough now resides."

The question in difference arises out of the attempted determination and location of the eastern boundary of the land covered by the above description.

The plaintiffs contend that the Richardson tract which they here seek to partition is timber land lying immediately east of the Abby Dough tract, which latter tract consists of cultivated land, with dwelling house thereon, and is known as the home place. They admit that the foregoing deed covers the Abby Dough tract, but they deny that it also conveys the Richardson tract.

The defendant, on the other hand, insists that the entire tract, including the woodland, or the part here sought to be partitioned, is known as the Abby Dough tract, and that the "Richardson tract," mentioned as the eastern boundary, while ostensibly a locative call, is, in reality, a fugitive or indeterminable call in the description. 8 Am. Jur., 747; 16 Am. Jur., 589. Each side offered evidence tending to support its position.

The plaintiffs concede that both tracts, as they speak of them, are within the outer bounds of the William S. Etheridge deed to which reference is made in the Markham deed, and that the defendant is the sole owner of whatever is conveyed by the Markham deed.

Upon this concession, the trial court held as a matter of legal construction, *ipso jure,* that the reference to the William S. Etheridge deed was equivalent to incorporating its calls as a second description in the Markham deed, and that, therefore, the Richardson tract as the plaintiffs speak of it, is covered by the description in the Markham deed. Accordingly, the jury was instructed to find for the defendant. The correctness of this ruling is challenged by the appeal.

The evidence offered on behalf of the plaintiffs tends to bring the case within the principles announced in *Von Herff v. Richardson,* 192 N. C.,

595, 135 S. E., 533; *Ferguson v. Fibre Co.,* 182 N. C., 731, 110 S. E., 220; *Williams v. Bailey,* 178 N. C., 630, 101 S. E., 105; *Potter v. Bonner,* 174 N. C., 20, 93 S. E., 370; and *Cox v. McGowan,* 116 N. C., 131, 21 S. E., 108. That offered by the defendant tends to bring it within the doctrine of *Quelch v. Futch,* 172 N. C., 316, 90 S. E., 259.

It is for the jury to say whether the plaintiffs have located the Richardson tract according to their contention. *Edwards v. Bowden,* 99 N. C., 80, 5 S. E., 283, 6 A. S. R., 487.

In partition, upon a plea of sole seizin, *non tenent insimul,* the burden is on the plaintiff to show title as alleged, *i.e.,* the tenancy in common. *Huneycutt v. Brooks,* 116 N. C., 788, 21 S. E., 558. There was error in directing a verdict for the defendant.

New trial.

IRENE GREEN WILLIAMSON, SOMETIMES CALLED MARY WILLIAMSON, WIDOW OF HENRY W. WILLIAMSON, DECEASED, ET AL., v. ELLEN W. COX AND HUSBAND, DAVE COX.

(Filed 25 September, 1940.)

1. Wills § 31—Cardinal rule in interpretation of will is to effectuate intent of testator.

The cardinal principle in the interpretation of wills is that the intention of the testator as expressed in the language of the instrument shall prevail, and that the application of technical rules will not be permitted to defeat an intention which substantially appears from the entire instrument, although accepted canons of construction which have become settled rules of law and property cannot be disregarded.

2. Wills § 33b—

A devise to testator's son "to have and to hold to him and his bodily heirs born in wedlock, if any, if no such heirs then to go back to his nearest of kin," *is held* to disclose that the words "bodily heirs" were not used in their technical sense as heirs general, but were used in the sense of children or issue, and the rule in *Shelley's case* does not apply.

3. Wills § 33c—

Under the statute of uses, a fee simple may be limited after a fee simple by executory devise under the doctrine of springing or shifting uses, but in order for this doctrine to apply it is necessary that there be a supervening contingency to limit or cut down the first estate and make room for the limitation over.

4. Same—

Where a contingent limitation over is made to depend upon the death of the first taker without children or issue, the limitation takes effect when the first taker dies without issue or children living at the time of his death. C. S., 1737.

5. Same—First taker held to take determinable fee with limitation over to his next of kin upon his death without issue.

A devise to testator's son "to have and to hold to him and his bodily heirs born in wedlock, if any, if no such heirs then to go back to his nearest of kin," *is held* to devise a determinable fee to the first taker upon the supervening contingency of his death without children or issue him surviving, it being apparent that the words "bodily heirs" were not used in their technical sense, but meant issue or children, C. S., 1739, and upon the death of the first taker without issue him surviving, his surviving sister takes as his next of kin to the exclusion of his nephews and nieces, children of deceased brothers and sisters.

APPEAL by plaintiffs from *Nimocks, J.*, at June Term, 1940, of WILSON. Affirmed.

Luke Lamb for plaintiffs, appellants.
A. O. Dickens and Connor & Connor for defendants, appellees.

DEVIN, J. This case involves the construction of the following clause in the will of Patrick Williamson:

"I give and bequeath to my son, Henry Singler Williamson, all the balance of my land, to have and to hold to him and his bodily heirs born in wedlock, if any, if no such heirs, then to go back to his nearest of blood kin."

Henry Singler Williamson died without issue, leaving surviving his widow and several nieces and nephews, children of deceased brothers and sisters, who are the plaintiffs in this action, and one surviving sister, Ellen W. Cox, the defendant.

The plaintiffs contend that under the will Henry Singler Williamson took a fee simple, and that hence the land descended to his heirs general, subject to the dower right of the widow. They base their contention upon several grounds: (1) That the first portion of the will devised an estate in fee simple, and that a limitation over was void; (2) that the first taker was presumably the favorite of the testator, and that language of doubtful meaning should be construed in favor of the early vesting of the estate; (3) that the limitation over is made to depend upon no supervening contingency, the happening of which would defeat the prior estate; (4) that if the phrase "bodily heirs" be construed children, then Henry Singler Williamson having no children, the devise conveyed an estate tail which the statute (C. S., 1734) would convert into a fee simple.

On the other hand, the defendants contend that by the use of the words "heirs of the body born in wedlock," taken in connection with the entire language in which the devise was expressed, there was manifest the intention on the part of the testator that these words be understood to

mean lawful issue or children; that by this expression in connection with the following words, "if any, if no such heirs, then to go back to his nearest of blood kin," there was constituted a contingency upon which the limitation over was to depend; that Henry Singler Williamson took only a determinable fee under the will; and that upon his death without bodily heirs born in wedlock, the land passed to his nearest of blood kin, his surviving sister, Ellen W. Cox.

The cardinal principle in the interpretation of wills is that the intention of the testator as expressed in the language of the instrument shall prevail, and that the application of technical rules will not be permitted to defeat an intention which substantially appears from the entire instrument. *Heyer v. Bulluck,* 210 N. C., 321, 186 S. E., 356; *Smith v. Mears, post,* 193. However, accepted canons of construction which have become settled rules of law and of property cannot be disregarded. As was said in *May v. Lewis,* 132 N. C., 115, 43 S. E., 550: "It is our duty, as far as possible, to give the words used by a testator their legal significance, unless it is apparent from the will itself that they were used in some other sense." 4 Kent's Com., 231.

It may be noted at the outset that the rule in *Shelley's case* has no application here. *Daniel v. Bass,* 193 N. C., 294, 136 S. E., 733; *Wallace v. Wallace,* 181 N. C., 158, 106 S. E., 657; *May v. Lewis, supra.* The language of the devise does not present a case which would require the application of that rule of ancient origin and continuing vitality which *Justice Douglas* in *Stamper v. Stamper,* 121 N. C., 251, wittily dubbed "the Don Quixote of the law."

If the testator had used the words "to Henry Singler Williamson and his bodily heirs," and no more, undoubtedly a fee simple would have been conveyed. Did the subsequent words, "if any, if no such heirs, then to go back to his nearest of blood kin," defeat that estate upon his death without bodily heirs born in wedlock, and serve to pass the fee to his nearest of blood kin? At common law a fee simple could not be limited after a fee simple. But after the statute of uses (27 Henry VIII), it was held that the estate created by a deed operating under the statute might be made to commence *in futuro* without immediate transmutation of possession, and that by such conveyances inheritances might be made to shift from one to another upon a supervening contingency, and thence arose the doctrine of springing and shifting uses or conditional limitations. As stated by *Ashe, J.,* in *Smith v. Brisson,* 90 N. C., 284, "It was under the doctrine of a shifting use that it has been held since early after the statute of uses that a fee simple may be limited after a fee simple either by deed or will; if by deed, it is a conditional limitation; if by will, it is an executory devise. 'And in both cases a fee may be limited after a fee.' 2 Blk., 235." By the Act of 1827, now C. S., 1737,

it was provided that: "Every contingent limitation in any deed or will, made to depend upon the dying of any person without heir or heirs of the body, or without issue or issues of the body, or without children, . . . shall be held and interpreted a limitation to take effect when such person dies not having such heir, or issue, or child . . . living at the time of his death."

In *Massengill v. Abell,* 192 N. C., 240, 134 S. E., 641, this Court construed a will wherein the testator devised land to "Nathan A. Massengill and his heirs, and if no heirs at his death, to return to his nearest relations." It was there held, *Adams, J.,* speaking for the Court, that if Nathan A. Massengill should die leaving no issue at his death the limitation over would take effect, the ulterior limitation "if no heirs at his death" becoming effective. The Court said, "He (the testator) limited a fee upon a fee by cutting down the first in order to make room for the second. *Carroll v. Herring,* 180 N. C., 369, 104 S. E., 892. The principle is familiar. A devise to A and his heirs, to be void if A have no child living at his death, leaves the devisor some interest which he may give to a third person, and in the disposition of such interest under the doctrine of springing and shifting uses a fee may be limited after a fee (*Willis v. Trust Co.,* 183 N. C., 267, 111 S. E., 163; *McDaniel v. McDaniel,* 58 N. C., 351), and the ulterior limitation will become effective upon the death of the first taker."

It was also said in this well considered case of *Massengill v. Abell, supra:* "A limitation to the heirs of a living person, if no contrary intentions appear in the deed or will, will be construed to be to the children of such person. C. S., 1739. But this is not a limitation to the heirs of a living person, but a limitation over if there be no heirs at the death of the first taker, and the word 'heirs' in this phrase means 'issue.'" It was accordingly held that the limitation over would become effective if the first taker had no issue living at his death.

In *Hudson v. Hudson,* 208 N. C., 338, 180 S. E., 579, the testator devised land to his daughter "to be hers and her heirs, if any, and if no heirs to be equally divided with other children." It was held this did not convey an indefeasible fee.

In *Puckett v. Morgan,* 158 N. C., 344, 74 S. E., 15, the devise of land was to "M during her life, then to her bodily heirs, if any, but if she have none, back to her brothers and sisters." The Court held the words "bodily heirs, if any," coupled with an ulterior limitation to her brothers and sisters, showed that the words "bodily heirs" (equivalent to heirs of the body) were not used in their technical sense but meant children or issue. And in *Jones v. Whichard,* 163 N. C., 241, 79 S. E., 503, where the conveyance was to R and M for life, "and then to their legal bodily heirs provided they have any and if not to be equally divided among nearest kin," the same result was reached.

In *Hampton v. Griggs,* 184 N. C., 13, 113 S. E., 501, the present *Chief Justice* pointed out that, in determining whether the testator used the words "lawful heirs of my son" in their technical sense, the ordinary principles of construction should be applied in order to ascertain the intent of the testator. It was held in that case that these words were used in the sense of issue or children. The same view was expressed by *Hoke, J.,* in *Pugh v. Allen,* 179 N. C., 307, 102 S. E., 394, and similar rulings of this Court in *Francks v. Whitaker,* 116 N. C., 518, 21 S. E., 175; *Rollins v. Keel,* 115 N. C., 68, 20 S. E., 209; and *Sain v. Baker,* 128 N. C., 256, 38 S. E., 858, were cited.

In *Reid v. Neal,* 182 N. C., 192, 108 S. E., 769, the testator devised land to his daughter, "to her during her natural life, and at her death I give it to her bodily heirs, if any, and if none, to return to my estate." After reviewing a number of decided cases, *Adams, J.,* uses this language: "After a careful consideration of the authorities we conclude that effect must be given the ulterior limitation, 'and if none, to return to my estate'; that the testator gave to his daughter a life estate with remainder in fee defeasible upon failure of 'bodily heirs,' " these words being construed to mean issue.

In *Wallace v. Wallace, supra,* the Court construed a deed conveying land to C. A. Wallace for life, and after his death "to his bodily heirs in fee simple, if any, and if none, to go to his next of kin." It was held the words "bodily heirs" were used in the sense of children or issue, and that the estate conveyed was to C. A. Wallace for life, remainder to his issue, and upon failure of issue over to his next of kin, the term next of kin being synonymous with nearest of kin.

In *Smith v. Brisson,* 90 N. C., 284, the conveyance was "to Rowland Mercer and the heirs of his body, and if said Rowland Mercer should have no heirs, the said land shall go to the heirs of my son, James A. Mercer." The deed was construed as if it read "to Rowland Mercer and the heirs of his body, and if Rowland Mercer should die not having such heirs living at his death, the land shall go to the children of James A. Mercer." It was accordingly held that the deed conveyed only a determinable fee to Rowland Mercer, which terminated by his death without children and vested an absolute fee simple by the limitation in the deed in the children of James A. Mercer.

In *McDaniel v. McDaniel,* 58 N. C., 351, where the devise was to L and his heirs; provided, should L die leaving no lawful heir or issue surviving him, the land to be divided among testator's surviving sons, it was held the restriction operated as a condition to cut down the estate so that L took not a fee simple but a fee determinable upon his death without issue him surviving.

In the case of *Harrell v. Hagan,* 147 N. C., 111, 60 S. E., 909, where

the devise was to four daughters: "if either or all of the above girls die without leaving a lawful heir," the land to go to testator's sons, it was held the estates devised to the daughters were determinable as to each devisee on her dying without leaving a lawful heir. It was said by the Court: "The event by which the interest of each is to be determined must be referred . . . to the death of the several takers of the estate in remainder without leaving a lawful heir."

Plaintiffs contend that the devise in the instant case should be construed in accord with the principle held to be controlling in *Daniel v. Bass,* 193 N. C., 294, 136 S. E., 733, and *Boyd v. Campbell,* 192 N. C., 398, 135 S. E., 121.

In *Daniel v. Bass, supra,* the testator devised land "to my sisters, Nancy Daniel and Mehala Daniel, . . . to them and their heirs forever, if any. If not, to the heirs of my sisters, Mary Jane Hathaway, Celia Bass and Sallie Powe, to them and their assigns forever." It was held by this Court that in the expression "to them and their heirs forever," the word "heirs" must be given its technical meaning, and that an estate in fee simple was thereby devised to the first takers, and that the additional words "if any" did not change the quantity of the estate. The Court said: "There can be no limitation of a fee after a fee unless there be some contingency which defeats the estate of the first taker. The prior estate may be a fee defeasible or determinable by the contingency on which it is limited; but such supervening contingency is essential, and it must operate to defeat, abridge or cut down the prior estate in order to make room for the limitation. In the will under consideration we discover no such contingency. There is no limitation over in the event of the first takers' death without children or issue; and herein, if in no other respect, the devise differs from that in *Massengill v. Abell,* 192 N. C., 240."

The distinction is apparent when it is noted that in the case at bar the devise is "to Henry Singler Williamson and his bodily heirs born in wedlock, if any, if no such heirs, then to go back to his nearest of blood kin."

In *Boyd v. Campbell,* 192 N. C., 398, 135 S. E., 121, it was decided that a deed "to Pleas Clodfeler, his children, their heirs, and then to his grandchildren forever" carried the fee to the first taker. Pleas Clodfeler having no children when the deed was executed, he took an estate tail, which, under C. S., 1734, was converted into a fee simple. There was no supervening contingency to give efficacy to the doctrine of shifting uses and to convey a fee after a fee by way of conditional limitation. Here there was the contingency that Henry Singler Williamson have "no such heirs," that is, "bodily heirs born in wedlock," failing which the land passed by the terms of the will to his next of kin.

In *Westfeldt v. Reynolds,* 191 N. C., 802, 133 S. E., 168, a devise of one-half of the property to Lulie Westfeldt, "and should Lulie Westfeldt die without heirs the property to go over to Overton Westfeldt Price's children," was, under the particular circumstances of the parties in that case, held to convey a fee simple. And in *Cooper, Ex Parte,* 136 N. C., 130, 48 S. E., 581, a devise to Arch Cooper "and if Arch Cooper ever marries and has a lawful heir they have the land," was held to convey a fee simple to the first taker. "We must regard the words 'if Arch Cooper ever marries' as surplusage," said the Court.

The decisions upon the particular facts of those cases may not be held controlling in the construction of the language used in the devise under consideration in this case.

It will be noted that in the first clause the testator here devised the land to Henry Singler Williamson "and his bodily heirs born in wedlock." This expression is similar to that construed in *Blackledge v. Simmons,* 180 N. C., 535, 105 S. E., 202, where the language used was "heirs of the body lawfully begotten." There it was stated that in order to invoke the rule constituting a fee simple the inheritance must be limited to heirs as heirs of the first taker, as an entire class of persons and not merely individuals embraced within that class; and that "heirs of the body lawfully begotten" would be understood to mean begotten in lawful wedlock. This, it was held, would exclude illegitimate children who, under certain circumstances, and by virtue of C. S., 277, and C. S., 279, might, in a restricted way, become heirs.

While the expression "bodily heirs" is equivalent to "heirs of the body," and the term heirs of the body ordinarily comes within the general definition of heirs in its technical significance (*Donnell v. Mateer,* 40 N. C., 6 [9]), the words heirs of the body, in numerous cases, in view of the context and the manifest intention of the devisor, have been held to mean children or issue. *Allen v. Pass,* 20 N. C., 207; *Thompson v. Mitchell,* 57 N. C., 441; *Pless v. Coble,* 58 N. C., 231; *Crawford v. Wearn,* 115 N. C., 540, 20 S. E., 724; *Francks v. Whitaker,* 116 N. C., 518, 21 S. E., 175; *Bird v. Gilliam,* 121 N. C., 326, 28 S. E., 489; *May v. Lewis, supra; Smith v. Lumber Co.,* 155 N. C., 389, 71 S. E., 445; *Swindell v. Smaw,* 156 N. C., 1, 72 S. E., 1; *Puckett v. Morgan,* 158 N. C., 344, 74 S. E., 15; *Blackledge v. Simmons,* 180 N. C., 535, 105 S. E., 202; *Moseley v. Knott,* 212 N. C., 651, 194 S. E., 100. By statute (C. S., 1739) it is required that "a limitation by deed, will, or other writing, to the heirs of a living person, shall be construed to be the children of such person, unless a contrary intention appear by the deed or will." This statute was construed by *Chief Justice Shepherd* in *Starnes v. Hill,* 112 N. C., 1, 16 S. E., 1011.

Upon the authorities herein cited, and others, containing expressions in deeds and wills similar to those used in the will under consideration, we conclude that the limitation over in the event Henry Singler Williamson should die without issue born in wedlock became effective upon his dying without such issue, and that by the terms of the will the land thereupon passed to his nearest of blood kin.

There is no serious question raised that on the death of Henry Singler Williamson without lawful issue, his nearest blood relation was his surviving sister, Ellen W. Cox, the defendant. *Knox v. Knox,* 208 N. C., 141, 179 S. E., 610; *Wallace v. Wallace,* 181 N. C., 158, 106 S. E., 501; *Miller v. Harding,* 167 N. C., 53, 83 S. E., 25; *Davenport v. Hassell,* 45 N. C., 29.

We think the trial judge has given the proper interpretation to the will of Patrick Williamson, and has correctly decided the questions presented in this case. The judgment of the court below is

Affirmed.

MARTIN HART v. P. P. GREGORY.

(Filed 25 September, 1940.)

1. Courts § 10—

An employee may maintain an action in the courts of this State to recover compensation alleged to be due him under the Federal Fair Labor Standards Act, since State courts of general jurisdiction have power to decide cases involving the rights of litigants under the Constitution or statutes of the United States, unless forbidden by the Federal Constitution or act of Congress.

2. Master and Servant § 63—

Evidence that defendant operated a lumber mill, located in this State, and that he sold and shipped lumber on repeated occasions to out-of-State customers in the regular course of his business, *is held* sufficient to show that defendant is engaged in interstate commerce within the purview of the Federal Fair Labor Standards Act. 29 U. S. C. A., secs. 201-219.

3. Master and Servant § 64—Night watchman having duty to keep water in boilers held engaged in occupation necessary to production of goods within meaning of Federal Fair Labor Standards Act.

The evidence tended to show that plaintiff was employed as a night watchman and that in addition to the ordinary duties of a night watchman in making periodic inspections, he was charged with the duty of keeping water in the boilers to prevent the boilers from becoming dry and being ruined and in order that the plant could be put in immediate operation at the beginning of the day. *Held:* Plaintiff was employed in an occupation necessary to the production of goods within the meaning of the Fair Labor Standards Act of 1938, 29 U. S. C. A., sec. 203 (j), (3), and his

employer being in the business of processing lumber for interstate commerce, judgment for the recovery of the difference between the wages paid him and the minimum wages prescribed by the act with the statutory penalty is upheld.

BARNHILL, J., dissents.

APPEAL by plaintiff from *Cowper, Special Judge,* at May Term, 1940, of PASQUOTANK. Reversed.

The complaint alleges, in part:

"(2) That at the time hereinafter complained of the defendant was engaged in the business of manufacturing and selling lumber, and said defendant at said times sold lumber to parties in or at places outside of the State of North Carolina and transported or had the same transported from his said mill or place of business at Shawboro, North Carolina, to places outside of North Carolina. That the defendant, as employer and the plaintiff as employee were at the times hereinafter referred to and complained of engaged in the production and sale of goods in commerce within the meaning and definitions of the 'Fair Labor Standards Act of 1938.'

"(3) That the plaintiff was employed by the defendant and worked for him, as aforesaid, at his said lumber or manufacturing plant at Shawboro, North Carolina, from November 7th, 1938, to and including June 10, 1939, the said plaintiff having been an employee of the defendant, engaged in commerce or in the production of goods for commerce within the meaning of the aforesaid Act of 1938. The said plaintiff, over said period of time, pursuant to his said employment, performed work and labor for said defendant at his aforesaid place of business, and in connection therewith and as a part thereof—his duties and services having been those of a watchman at said plant or mill, inspection of and work in connection with the boilers and other machinery used in the operation of said lumber mill and the manufacture of said lumber, and other work in connection with the operation of said lumber mill and the manufacture of said lumber.

"(4) That during said time the plaintiff worked for the defendant in said employment eleven hours per day, or a total of 2,376 hours, and was paid as wages only the gross amount of $255.61. That the defendant paid the plaintiff nothing for the overtime which he worked, and paid plaintiff wages of only 10.33c per hour.

"(5) That plaintiff was entitled to be paid by defendant a minimum wage of not less than 25c per hour and should have worked during said period of time, unless paid for overtime, a maximum of only 1,364 hours during the said 216 days that he was employed by and worked for the said defendant in the production of goods for commerce, as aforesaid.

"(6) That because of the matters and things hereinbefore set out defendant is indebted to the plaintiff for unpaid minimum wages of $197.37 and unpaid overtime compensation of $379.50, with interest, together with additional equal amounts as liquidated damages, making a total of $1,153.74, with proper interest; and plaintiff is further entitled to recover of the defendant a reasonable attorney's fee, and the costs of this action." Judgment for the above sum was demanded.

Defendant in his answer says: "Answering the *second* section of the complaint, the defendant admits that he is engaged in the business of manufacturing and selling lumber and that some of the lumber manufactured by him is transported to places outside of North Carolina. . . . Answering the *third* section of the complaint the defendant admits the plaintiff to have been in his employment from November 7, 1938, to, and including June 10, 1939, as a night watchman, with the duties usually incident to such employment and none other. . . . Answering the *fifth* section of the complaint, the defendant denies the same. He says, however, that if the plaintiff comes within the provisions of the 'Fair Labor Standards Act of 1938,' which is again denied, nevertheless, the defendant has fully discharged each and every of his obligations unto the plaintiff." The other material allegations of the complaint are denied.

Plaintiff testified, in part: "I had occasion to work for the defendant, Mr. P. P. Gregory. I worked for him from November 7th, 1938, up until June 10, 1939. I was night watchman for him at his sawmill at Shawboro, Currituck County, North Carolina. It is about 11 miles from here and Shawboro is on the main highway from here to Norfolk, and is on the Norfolk Southern Railroad, which runs from Norfolk into North Carolina. I worked seven days a week and eleven hours a day. This was from November 7, 1938, to June 10, 1939, and was according to the terms of my contract of employment. I was to make twelve punches, I was to go on at six and make the last punch at five in the morning. That is 11 hours a day, seven days to the week. My duties were to punch the clock, go around the lumber yard and the mill, see that there was no fire or anything like that, see that nobody was taking anything away on my hours. There was no one else on duty at the mill when I was on duty, and this is a pretty fair sized mill, I should say it employed about 20 or 25 men regularly. They were cutting lumber and piling lumber and loading cars. It was a lumber mill. *Under my employment I was required to pump the boilers up to keep the water in the boilers as long as the steam was up, so they would not get dry.* I had to pump them every two or three hours until about 12 o'clock some nights, and sometimes longer, depending on how the fire was left. I would pump the water with a force pump operated by steam, and when the

pump would be broken down I would use an injector—the injector was used by turning on to pump the water from the well into a barrel, and then use a pump to pump it from the barrel into the boiler. Mr. Gregory would keep fires going in the boilers all night and there would be fire in the morning. They would take and throw in wood, and would never hardly ever have to use a match to light it. They ran the mill with steam generated from those boilers, and the steam furnished the power for the machinery in the mill. *It was necessary to have those boilers filled up with water, and if they had not been kept filled up at night they would have burned dry and that would have ruined the boilers.* The mill foreman told me to pump up the boilers at 8 o'clock, and they would have to be pumped after that. I have pumped as high as four or five times in a night, and would average three or four times. A glass showed whether the boilers did or did not have water in them, and I was supposed to keep enough water in them so that the fireman could raise the steam in the morning without slowing down. I was not paid anything extra for that. Mr. Duncan asked me if I would watch the woodpile and not let anybody take any of the wood away, except he would send a note to let them have it, and I would occasionally deliver under these orders. During the eleven hours that I was on the job I was required to stay on the defendant's mill premises, and did stay. During the time I was working over there Mr. Gregory sold some of the lumber from this operation in Norfolk, Va. I have been on the yard different times when the trucks were loading for Norfolk. There was lumber put out there for the Ballard Fish Company at Norfolk that they built the new oyster house with. I heard Mr. Gregory say once or twice he had orders in Norfolk, some orders for lumber for the Cement Plant over there. During the time I was working for Mr. Gregory I have been in Norfolk and seen some of Mr. Gregory's lumber up there. It was lumber that had been shipped from the Shawboro mill. They were loading cars right about every day right straight along, going out. I have heard Mr. Gregory and Mr. Duncan say that they had to get the lumber ready and get the trucks so that they could haul it out of there so as to load on a sailboat for hauling to Baltimore. Mr. Gregory had trucks operating in and out of the yard. The sailboat was in Elizabeth City and the Baltimore I referred to is in the State of Maryland. There was a railroad siding at the mill alongside of the main railroad track, and that would be picked up by a through freight train during the night, bound for Norfolk. The through freight did not make local stops between Shawboro and Norfolk. The local freight ran between 10 and 11 o'clock during the day. Mr. Gregory had two or three trucks operating in and out of that plant while I worked there, and they hauled from Shawboro to Norfolk to deliver lumber, and haul logs from the woods to the mill,

and hauled lumber from the mill over here in Elizabeth City to load on the boat. That mill would cut from 16,000 to 25,000 feet of lumber a day. The batch of papers which you hand me are all the pay envelopes which I received while working over there, and they total $255.61. The amount of money that is designated on each one of these pay envelopes is the amount that I received at those different times. I did not receive any additional compensation other than what was paid me in those pay envelopes. The amount shown on the outside of the envelope would be the amount that was in them. It would take me from 18 to 20 minutes to make my rounds just as watchman, and I had to make the rounds every hour. The 18 or 20 minutes did not include the time it would take me to fill up the boilers. I made the rounds as watchman, made twelve times daily, and that would be eleven hours. . . . I was supposed to pump the water in the boilers at eight o'clock and ten o'clock, but I did it three or four times during the night, because the boilers were so hot, and I had to pump them up in order to keep water in them. The mill did not run at night. I was not required to keep steam in the boilers, I was just required to keep water in them. The pump I was talking about was a steam force pump, and to start it I had to turn a valve on the pump and a valve on the pipe line to go into the boilers. I had to stay there and watch it. It would take the steam force pump from ten to fifteen minutes to put water in the boiler. I would have to stay there about ten to fifteen minutes to each boiler and there were two boilers. I would not turn them both on at the same time. I never ran two pumps at the same time. . . . I was informed by Mr. Duncan and Mr. Gregory to look after the water in the boilers the night they hired me. . . . *In addition to being employed to punch the clock, I was employed to keep water in the boilers, to see that there would be water in the boilers so they could get steam in the morning.* When I made my rounds I would observe whether the boilers needed water or not, I would have to go up in front so I could see the water glass, and when I finished my rounds I would then start the pump. I did not fire the boilers. I did nothing around the yard, nor the mill, in the way of working. I was not employed while the mill was running. . . . Q. You did nothing toward the actual manufacture or production of the lumber which was manufactured? Ans.: No. There were 62 steps of stairway every punching, and I quit the job because I did not feel like I could punch the clocks every 30 minutes. The through freight trains stopped at Shawboro to pick up loaded cars. . . . I should say the mill site occupied 20 acres."

Tommy Harrington testified, in part: "I can't call the names of the places where I made deliveries of lumber in Norfolk while Mr. Hart was working at the mill, but I do remember delivering lumber to Davis

Milling Company in Norfolk. I can't say that I remember other places, and I don't know how many different places I carried lumber. I have helped make deliveries of lumber from the mill to boats lying here at the foot of Main Street at Elizabeth City. I don't know where the lumber went."

John Johnson testified, in part: "I drive a truck for the defendant, and I was working for him at his Shawboro mill between the dates of November, 1938, and June, 1939. I did haul some lumber and make deliveries in the State of Virginia between the dates of November, 1938, and June, 1939. I carried a little to Pinner's Point and to Smith-Douglass in Norfolk. My truck was not a regular lumber truck, it was a log trailer and would carry from 1,000 feet to 3,000 feet, and that is the type of truck I would make deliveries with up there in Virginia. I would make deliveries up there while Mr. Hart was working for the defendant once a month and sometimes once every two weeks. The Smith-Douglass I refer to is a large fertilizer manufacturing plant in Norfolk. The kind of lumber that I would make deliveries of up in the State of Virginia would be pine in the form of manufactured boards, some of it would be 2x4's and sills. I was working for Mr. Gregory the whole time Mr. Hart was working for him. The plant of Mr. Gregory at Shawboro lies between the State Highway on one side and the Norfolk Southern Railroad on the other. The highway is the State Highway leading from Elizabeth City to Norfolk."

The plaintiff made numerous exceptions and assignments of error and appealed to the Supreme Court.

R. B. Lowry and John H. Hall for plaintiff.
R. M. Cann and R. Clarence Dozier for defendant.

CLARKSON, J. At the close of plaintiff's evidence the defendant in the court below made a motion for judgment as in case of nonsuit, C. S., 567. The court below allowed the motion and in this we think there was error.

We take it that there is no question as to the jurisdiction to sue in the State court.

In 14 Am. Jur., pp. 440-441, part sec. 247, is the following: "Courts of the United States and of the states have concurrent jurisdiction in all cases between citizens of different states, whatever may be the matter in controversy, if it is one of judicial cognizance, and a conflict of jurisdiction is always to be avoided. It is therefore a general rule that the right of a plaintiff to prosecute his suit in a court, having once attached, cannot be taken away by proceedings in another court. So, it may be stated as a general rule that whenever a legal right arises and the State

court is competent to administer justice, the right may be asserted in the State court, although the Federal Court may have jurisdiction of the same question, subject, however, to the proviso that there is no law limiting jurisdiction to the Federal Courts. In regard to State courts the law is also said to be settled that courts of general jurisdiction therein have power to decide cases involving the rights of litigants under the Constitution or statutes of the United States unless deprived of the right so to do by the terms of the Federal Constitution or acts of Congress." For another clear statement of the same rule, see 21 C. J. S., p. 797. There was plenary evidence that defendant was engaged in interstate commerce within the purview of the act.

In *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S., 1, the Supreme Court upheld the constitutionality of the National Labor Relations Act of 5 July, 1935, and speaking through the *Chief Justice,* said: (op. 37, 38) "Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. . . . The close and intimate effect which brings the subject within the reach of Federal power may be due to activities in relation to productive industry although the industry when separately viewed is local." The argument that the percentages between interstate and intrastate commerce in the distribution of goods produced is a material consideration, is held futile in two decisions of the Supreme Court of the United States. In *Santa Cruz Fruit Packing Co. v. National Labor Relation Board,* 303 U. S., 453 (decided 28 March, 1938), the *Chief Justice* said: (op. 467) "There is thus no point in the instant case in a demand for the drawing of a mathematical line. . . . The critical words of the provision of the National Labor Relations Act in dealing with the described labor practices are 'affecting commerce,' as defined. Section 2 (6). It is plain that the provision cannot be applied by a mere reference to percentages and the fact that petitioner's sales in interstate and foreign commerce amounted to 37 per cent, and not to more than 50 per cent, of its production cannot be deemed controlling."

The question for our determination: Did plaintiff, an employee of the defendant, come within the provision of the Fair Labor Standards—Acts of 1938 (29 U. S. C. A., secs. 201-219)? We think so, under the facts and circumstances of this case.

The language of the act to be construed, 29 U. S. C. A., sec. 203 (j), being sec. 3 (j) of the act, reads as follows: "For the purposes of this act an employee shall be deemed to have been engaged in the production of goods, if such employee was employed in producing, manufacturing,

mining, handling, transporting, or in any other manner working on such goods, or in any process or *occupation necessary to the production thereof in any State.*" (Italics ours.)

Plaintiff testified: "It was necessary to have those boilers filled up with water, and if they had not been kept filled up at night they would have burned dry and that would have ruined the boilers. The mill foreman told me to pump up the boilers at 8 o'clock, and they would have to be pumped up after that. I have pumped as high as four or five times in a night, and would average three or four times. A glass showed whether the boilers did or did not have water in them, and I was supposed to keep enough water in them so that the fireman could raise the steam in the morning without slowing down. I was not paid anything extra for that. . . . During the eleven hours that I was on the job I was required to stay on the defendant's mill premises, and did stay. . . . In addition to being employed to punch the clock, I was employed to keep water in the boilers, to see that there would be water in the boilers so they could get steam in the morning. When I made my rounds I would observe whether the boilers needed water or not, I would have to go up in front so I could see the water glass, and when I finished my rounds I would then start the pump."

In *Wood v. Central Sand and Gravel Co. and Fischer Lime and Cement Co.* (U. S. Dist. Court, Western Dist. of Tenn., Memphis Division), 33 Fed. Supp., 40, the decision was rendered in an employee suit by a night watchman who also fired an engine to maintain steam in said engine for use each morning. There was an elaborate, well-written opinion, by *Martin, District Judge,* citing many authorities, in which the night watchman was allowed to recover. We quote from p. 46: "In a later case, *Southern Pacific Co. v. Industrial Accident Commission,* 251 U. S., 259, 64 L. Ed., 258, 40 Sup. Rep., 130, 10 A. L. R., 1181, the Supreme Court cites the *Pederson case,* the *Shanks case,* and also *N. Y. Central R. Co. v. Porter,* 249 U. S., 168, and *Kinzell v. Chicago, M. & St. P. R. Co.,* 250 U. S., 130, and says: (op. 263) 'Generally, when applicability of the Federal Employers Liability Act is uncertain, the character of the employment in relation to commerce may be adequately tested by inquiring whether at the time of the injury, the employee was engaged in work so closely connected with interstate transportation as practically to be a part of it.'" Applying the true principle of these Supreme Court decisions to the facts concerned here, it is found that the plaintiff, serving as he was as night watchman to protect all the property and equipment at an employer's plant where interstate commerce goods were produced and also performing the additional duties of firing an engine so as to keep up steam and have the engine ready each morning for use in connection with interstate commerce was in

actuality engaged in the production of goods for interstate commerce within the meaning of sections 6 and 7 of the Fair Labor Standards Act of 1938. Certainly, Congress intended no such unjust discrimination against a night watchman, situated as was the plaintiff in the instant case, as would result from an unjustifiably narrow interpretation of the humane Fair Labor Standards Act.

The present case we think comes within the provisions of the Fair Labor Standards Act, as the duties of this night watchman were more than that ordinarily required of one so termed. The duty of plaintiff was to keep water in the boiler so that in the morning steam could easily be available. If the boilers were not kept filled up at night, they would have burned dry and that would have ruined them and made them unfit for use. It is clearly apparent that the man who attended to the boiler in the day was engaged in "occupation necessary to the production thereof" of goods. Why should not the man at night whose duty it was to keep the boiler fit for service in the production of goods receive the same benefit accorded men directly at work producing these goods? His duties were more than a night watchman, he fed water to the boilers which were necessary in the production of goods.

We think this case distinguishable from *Rogers v. Glazer,* 32 Fed. Sup., 990. *Otis, J.,* writing the opinion, at p. 992, said: "I do not think that it can be said that a watchman for such an establishment as the defendants maintain, a part of whose duty it may be said—a very small part of whose duty was to watch the pile of scrap iron on the premises, I do not think that it can be said that he is engaged in an occupation *necessary* to the production of goods. Perhaps I may be giving too literal an interpretation to the word 'necessary.' Certainly it is not *necessary* to the production of goods that there should be a watchman at all. In many yards scrap is assembled and sold without any watchman and I do not think that it can be said that a watchman *produces* goods. He may do that which is helpful to the business, he may help to produce the profits that arise from the business. He does not produce the goods." In the present case he performed a duty necessary in the production of goods.

The United States Department of Labor Interpretative Bulletin No. 1, issued November, 1938, at pp. 4 and 5, reads as follows: "The second category of workers included, those engaged 'in the production of goods for (interstate) commerce,' applies, typically but not exclusively, to that large group of employees engaged in manufacturing, processing, or distributing plants, a part of whose goods moves in commerce out of the State in which the plant is located. This is not limited merely to employees who are engaged in actual physical work on the product itself, because by express definition in section 3 (j) an employee is deemed to

have been engaged 'in the production of goods, if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.' Therefore the benefits of the statute are extended to such employees as maintenance workers, *watchmen,* clerks, stenographers, messengers, all of whom must be considered as engaged in processes or occupations 'necessary to the production' of the goods. Enterprises cannot operate without such employees. If they are not doing work 'necessary to the production' of the goods they would not be on the pay roll." Although this administrative interpretation is not binding on this Court, its reasonableness is persuasive.

The court permitted defendant to ask plaintiff on cross-examination the following question: "You did nothing toward the actual manufacture or production of the lumber which was manufactured?" The witness answered, "No." We think the court was in error in permitting this question, for, as the question was stated it involved a conclusion of law for the court, and was not an evidentiary factual matter. He could tell what he did, but whether these acts constituted the "manufacture or production of lumber" was a question of law for the court to decide.

For the reasons given, we think the judgment of the court below must be

Reversed.

BARNHILL, J., dissents.

MARY WEBSTER SMITH, BY P. C. SMITH, HER GENERAL GUARDIAN, v. GEORGE A. MEARS ET AL.

(Filed 25 September, 1940.)

1. Wills § 31—

The guiding star in the interpretation of wills, to which all rules must bend, unless contrary to some principle of law or public policy, is the intent of the testator, and this is to be ascertained from the language used by him, "taking it from its four corners," and considering the instrument as a whole.

2. Same—

A codicil is a supplement to a will, annexed for the purpose of expressing the testator's afterthought or amended intention, and the will and any codicil or codicils are to be considered as constituting a single instrument and read together in ascertaining the intent of the testator.

3. Wills § 33f—

A devise to a person generally or indefinitely, with power of disposition or appointment, carries the fee; but when such power is annexed to a life estate, the express limitation for life will control the operation of the power and prevent it from enlarging the estate into a fee.

4. Same—

Testator devised certain property to his daughter and certain property to named sons, for life, and by codicil stipulated that each should have power to dispose of the interest devised to him. *Held:* The power of disposition, being annexed to the life estates, did not enlarge the life estates into estates in fee simple.

5. Wills § 31—

Since each will must be construed to ascertain the intent of the testator as expressed in the particular language used by him, interpreted according to the circumstances of its use, with no two situated exactly alike, the law of will is *sui generis*, yet the adjudicated cases will be assiduously pursued for any gleam of light that may help with the problem in hand.

6. Wills § 33f—

Whether a devise of a life estate with power of disposition empowers the devisee to dispose of the property by will depends upon testamentary intent as gathered from the instrument.

7. Same—Power of disposition held not to authorize devisee to dispose of the property by will.

Testator devised certain property to his sons for life, and by codicil provided that they should have "full power to sell or dispose of any or all of the property in this will devised to them in fee and receive the proceeds thereof as to them seems best or proper." *Held:* The clause "and receive the proceeds thereof as to them seems best or proper" indicates that testator contemplated a sale or disposition by act *inter vivos*, and not by will, and the attempted disposition by will on the part of two of the sons in favor of others of them is without effect.

8. Same—Exercise of power of disposition by deed held to convey fee simple to grantee.

Testator devised certain of his property to his daughter for life, and by codicil provided that she should have "full power to sell or dispose of her interest in all the property devised to her under this will in fee." The devisee conveyed said property by deed to one of her daughters, and also devised said property to the same daughter by will. The devisee's only children were two daughters, one being the grantee, and the other having predeceased the devisee leaving but one child her surviving. *Held:* Whether the devisee had power to dispose of the property by will is immaterial in view of the unchallenged finding of the trial court that the deed executed by her conveyed a good and indefeasible title, but the holding of the court that the grantee took the property impressed with a trust in favor of the daughter of her deceased sister is at variance with the power of disposition granted in the codicil and is error.

APPEAL by defendants, Martha Webster McLeod and R. L. Mears, from *Warlick, J.*, at January Term, 1940, of BUNCOMBE.

Proceeding to determine rights of legatees or beneficiaries under a will.

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 findings and conclusions essential to the questions presented by the appeal follow:

1. That G. Augustus Mears, late of Buncombe County, died testate on 21 January, 1913, leaving him surviving an only daughter, Mrs. Ella Mears Webster, and five sons, Frank A. Mears, S. Parley Mears, Clarence L. Mears, Jay J. Mears and Robert L. Mears.

(a) In the second paragraph of the will of G. Augustus Mears, published on 21 February, 1912, the testator's "Home Place" is devised to his daughter, Ella Mears Webster, "during her natural life, and at her death to the children of her body absolutely in fee forever."

(b) In the fourth paragraph, the testator's "Daylight Store," situate on Main Street in the city of Asheville, is devised to four of his sons, S. Parley, Clarence L., Clyde E., and Jay J. Mears, "for and during their natural life."

(c) In the fifth paragraph the testator's "Slayden and Fakes Wholesale Building," situate on Lexington Avenue, is devised one-half interest to his son, Robert L. Mears, "for and during his natural life," and the remaining undivided one-half interest is devised to his sons, S. Parley, Jay J., Clarence L., and Clyde E. Mears, "during their natural life."

(d) In the eighth paragraph, an undivided one-fourth interest in the testator's "Haywood Street Store" is devised to his son, Robert L. Mears, "to be his absolutely forever," provided he "shall marry a respectable and worthwhile woman."

(e) In the ninth paragraph, the remaining three-fourths interest in the testator's "Haywood Street Store" is devised to his sons, S. Parley, Clarence L., Jay J. and Clyde E. Mears, "for and during their natural life, to share and share alike."

(f) In the eleventh paragraph, it is provided "That upon the death of my sons to whom I have given and devised for life the property (Daylight Store . . . the Slayden and Fakes Wholesale House . . . and the three-fourths interest in the property situate on Haywood St.) . . . shall die without issue, then in that event I give and devise to my grandchildren, that is, the children of all my sons and daughter, the remainder of said estate in fee as *per stirpes* and not *per capita.*"

(g) In a codicil published 2 June, 1912, the testator ratified and confirmed his will except as changed thereby, and among other changes, provided:

(h) "I further modify my last will and testament in this respect. That is, each of my said sons may or shall have full power to sell or dispose of any or all of the property in this will devised to them in fee and receive the proceeds thereof as to them seems best or proper. My daughter, Mrs. Webster, shall have full power to sell or dispose of her interest in all the property devised to her under this will in fee."

(i) "I change my will so that Robert L. Mears shall have one-half interest in the store at the River in place of a fourth as is set out in the eighth paragraph herein, and the remainder to the other parties."

2. That Clyde E. Mears, son of the testator, died in the interim between the execution of the original will and the codicil thereto, leaving him surviving a daughter, Eugenia Mears Belcher, who is substituted in his stead by the codicil.

3. That Ella Mears Webster had two daughters, Martha Webster McLeod and Mary Webster Smith. The latter died in 1936, leaving her surviving an infant daughter and namesake, Mary Webster Smith, who is the plaintiff herein.

4. That on 14 October, 1936, Ella Mears Webster executed a deed for the "Home Place" mentioned in item two of her father's will, to her daughter, Martha Webster McLeod. The deed recites a consideration of $10.00 and other good and valuable considerations. Also in her will, the Home Place is devised to her daughter Martha. She died 18 January, 1937.

5. That the value of the Home Place on 14 October, 1936, was $10,000.

6. That Robert L. Mears has met the condition named in the eighth paragraph of his father's will and his title to the property devised therein has become absolute.

7. That Clarence L. Mears died 19 March, 1914, without issue, he never having married, and by his will devised all of his real estate to his two brothers, Robert L. and Jay J. Mears.

8. That Jay J. Mears died 1 April, 1928, without issue, he never having married, and Robert L. Mears claims an additional interest in his father's estate by virtue of the will of his brother, Jay J. Mears.

Upon the foregoing, and other findings (not here set out because unnecessary to questions presented by the appeal), his Honor concluded, among other things, (1) that Martha Webster McLeod took a good and indefeasible title to the Home Place, under the deed from her mother, impressed, however, with a trust in favor of the plaintiff for one-half its value, and (2) that Robert L. Mears acquired no additional interest in his father's estate under and by virtue of the wills of his brothers, Clarence L. Mears and Jay J. Mears.

From these rulings, the defendants, Martha Webster McLeod and Robert L. Mears, appeal, assigning errors.

Jordan & Horner for plaintiff, appellee.

Sanford W. Brown and J. W. Haynes for Martha Webster McLeod, defendant, appellant.

R. M. Wells, George M. Pritchard, and M. A. James for defendant R. L. Mears, appellant.

Harkins, Van Winkle & Walton for defendants George A. Mears and Elizabeth Mears Moore, appellees.

Johnson & Uzzell for defendant Eugenia Mears Belcher, appellee.

STACY, C. J. Does the annexation, by codicil, of the power of sale or disposition, to the life estates given in the original will, convert them into fee simple estates? The trial court answered in the negative, and under the authorities to be cited, we agree.

In limine, it may be well to recall that the guiding star in the interpretation of wills, to which all rules must bend, unless contrary to some principle of law or public policy, is the intent of the testator, and this is to be ascertained from the language used by him, "taking it by its four corners," and considering for the purpose the will and any codicil or codicils as constituting one instrument. *Richardson v. Cheek,* 212 N. C., 510, 193 S. E., 705; *Heyer v. Bulluck,* 210 N. C., 321, 186 S. E., 356; *Jolley v. Humphries,* 204 N. C., 672, 167 S. E., 417; *Ellington v. Trust Co.,* 196 N. C., 755, 147 S. E., 286; *Satterwaite v. Wilkinson,* 173 N. C., 38, 91 S. E., 599.

A codicil is a supplement to a will, annexed for the purpose of expressing the testator's after-thought or amended intention. *Green v. Lane,* 45 N. C., 113. It is to be construed with the will itself, and the two are to be considered as constituting a single instrument. *Darden v. Matthews,* 173 N. C., 186, 91 S. E., 835.

So looking at the will before us, we find that in the codicil the testator first ratifies and confirms his "last will and testament, dated Feb. 21st, 1912," except as "changed hereby," and then he proceeds to "modify" it in certain respects. It results, therefore, that the devises in question to the sons are to them "during their natural life," with "full power to sell or dispose of any or all of the property in this will devised to them" in fee, and the devise to the daughter is to her "during her natural life," with "full power to sell or dispose of her interest in all the property devised to her under this will" in fee.

It has been said in a number of cases that a devise to a person generally or indefinitely, with a power of disposition or appointment, carries the fee. *Roane v. Robinson,* 189 N. C., 628, 127 S. E., 626; *Hoskins*

v. May, 213 N. C., 795, 197 S. E., 689; *Fletcher v. Bray,* 201 N. C., 763, 161 S. E., 383; *Bass v. Bass,* 78 N. C., 374. The rule is otherwise, however, when such power is annexed to a life estate. *Patrick v. Morehead,* 85 N. C., 65. In that case the express limitation for life will control the operation of the power and prevent it from enlarging the estate into a fee. *Darden v. Matthews, supra.*

In *Chewning v. Mason,* 158 N. C., 578, 74 S. E., 357, the pertinent authorities are reviewed in a careful opinion by *Walker, J.,* and the following conclusion reached: "We may, therefore, take the rule to be settled that where lands are devised to one generally, and to be at his disposal, this is a fee in the devisee; but where they are devised to one expressly for life, and afterwards to be at his disposal, only an estate for life passes to the devisee, with a bare power to dispose of the fee." The conclusion is supported by numerous decisions and by the great weight of authority throughout the country. *Helms v. Collins,* 200 N. C., 89, 150 S. E., 676; *Cagle v. Hampton,* 196 N. C., 470, 146 S. E., 88; *White v. White,* 189 N. C., 236, 126 S. E., 612; *Darden v. Matthews, supra; Tillett v. Nixon,* 180 N. C., 195, 104 S. E., 352; *Fellowes v. Durfey,* 163 N. C., 305, 79 S. E., 621; *Griffin v. Commander,* 163 N. C., 230, 79 S. E., 499; *Herring v. Williams,* 153 N. C., 231, 69 S. E., 140; *Parks v. Robinson,* 138 N. C., 269, 50 S. E., 649; *Long v. Waldraven,* 113 N. C., 337, 18 S. E., 251; *Troy v. Troy,* 60 N. C., 624; Annotation, 36 A. L. R., 1177.

Applying these principles to the provisions of the will before us, it follows that Ella Mears Webster took a life estate in the Home Place with power to sell or dispose of it in fee, and similarly that Clarence L. Mears and Jay J. Mears took life estates in the properties devised to them in items four, five and nine of the will, with power to sell or dispose of any or all of them in fee. The cases of *Hoskins v. May, supra,* and *Fletcher v. Bray, supra,* are distinguishable by reason of the different intents and purposes sought to be accomplished by the testators, and so expressed in their wills. It is this quest for the variant minds of testators, with no two situated exactly alike, and the necessity of interpreting language according to the circumstances of its use, that often results in close distinctions and renders the law of wills *sui generis. Richardson v. Cheek, supra; McIver v. McKinney,* 184 N. C., 393, 114 S. E., 399. Yet after saying this, we assiduously pursue the adjudicated cases for any gleam of light that may help us with the problem in hand. Worthy ideas expressed elsewhere and on other occasions, like nuggets of truth when or wherever found, know no barriers of time or place. It is only the foggy horizon that shuts them out. *Goode v. Hearne,* 180 N. C., 475, 105 S. E., 5.

The question then occurs whether this power of sale or disposition may be exercised by will. The answer is one of testamentary intent.

Speaking directly to the question in *Phifer v. Phifer,* 41 N. C., 155, it was said: "A power given generally may, it is true, be executed either by deed or will, unless the particular mode of execution is prescribed. Sug. on Pow., 207; 1 Law Lib., 250. But the mode of execution, when the power is given by will, depends on the intention of the testator, and that is to be ascertained upon a fair construction of the will, like any other intention, when the terms are not express. Sug. on Pow., 97; 1 Law Lib., 117."

It will be noted that the testator ratified and confirmed his will in the codicil, except as changed thereby, and to the power of sale or disposition he added the expression, "and receive the proceeds thereof as to them seems best or proper." This added clause would seem to contemplate a sale or disposition by act *inter vivos,* and not by will. *Cochran v. Groover,* 156 Ga., 323, 118 S. E., 865; *Moody v. Gallagher,* 36 R. I., 405, 90 Atl., 663, L. R. A., 1916 C, 1040, and annotation. The trial court so concluded, and we agree. It follows, therefore, that Robert L. Mears acquired no additional interest in his father's estate under and by virtue of the wills of his brothers, Clarence L. Mears and Jay J. Mears.

It is suggested that the provision, "and receive the proceeds thereof," is not annexed to the power granted to Mrs. Webster, and that as to her the power is general. *Herring v. Williams, supra.* The point is apparently not material on the present record as the court held that the deed executed by her on 14 October, 1936, conveyed a good and indefeasible title to her daughter, and this ruling is not challenged by the appeal.

The further holding that the grantee takes the property impressed with a trust in favor of the plaintiff for one-half its value, appears to be at variance with the power of sale or disposition granted in the codicil, *Herring v. Williams, supra,* as well as beyond the pleadings, and to this extent the judgment will be modified. *Buncombe County v. Wood,* 216 N. C., 224, 4 S. E. (2d), 505; *Darden v. Matthews, supra; Troy v. Troy, supra.*

It is stated in appellant's brief that Martha Webster McLeod, under the will of her brother, Jay J. Mears, acquired a one-fourth interest in all the property which he received from his father, and that this is erroneously stated in the judgment to be a one-sixteenth interest. The inadvertence is apparently conceded as the matter is not mentioned in the other briefs.

The cause will be remanded for modification of the judgment in accordance with this opinion.

Modified and affirmed.

DENNIS LOGAN v. HOWARD W. JOHNSON.

(Filed 25 September, 1940.)

1. Master and Servant § 55d—

The findings of fact of the Industrial Commission, when supported by competent evidence, are binding upon the courts upon appeal, but findings not supported by competent evidence are not conclusive and must be set aside.

2. Master and Servant §§ 37, 41a—Loss of eye and loss of vision of eye mean total, as distinguished from partial, loss of vision.

In construing the North Carolina Workmen's Compensation Act, the words of the statute must be taken in their natural or ordinary meaning, and upon such construction the phrases "the loss of an eye" and "total . . . loss of vision of an eye" in prescribing the amount of compensation to be allowed for injury thereto, ch. 120, Public Laws of 1929, sec. 31 (q) (t), mean the state or fact of loss of an eye or total destruction of the vision of an eye as distinguished from the partial loss of vision.

3. Master and Servant § 41a—Evidence held not to support finding that claimant had suffered total loss of vision of one eye.

The evidence before the Industrial Commission was to the effect that plaintiff has "slight peripheral vision but only slight perception in center of cornea" of one eye, and that he had only a small percentage of normal vision in the eye. *Held:* The evidence does not support a finding that claimant had total loss of vision in the eye, and such finding and the award of compensation based thereon, is set aside and the cause remanded to the Industrial Commission for a proper finding from the evidence as to the extent or percentage of loss of vision claimant had sustained.

4. Master and Servant § 52b—

An unsigned copy of a letter from one physician to another as to the extent or percentage of loss of vision claimant had sustained, is incompetent and has no place in the record and evidence in the cause.

APPEAL by defendant from *Ervin, Special Judge,* at Regular April Term, 1940, of RUTHERFORD.

Proceeding under the North Carolina Workmen's Compensation Act, Public Laws 1929, chapter 120, as amended, for an award to plaintiff, the claimant, Dennis Logan, for injury to and loss of his right eye.

Three hearings have been held before a member of the North Carolina Industrial Commission with regard to the claim in question.

Following the first hearing on 12 November, 1937, the commissioner found as a fact "that the plaintiff sustained injury by accident arising out of and in the course of his employment on 30 May, 1937, when he sustained an injury to his right eye; that as result of such injury plaintiff was totally disabled for a period of 90 days and that plaintiff now has a substantial loss of vision in the right eye, the amount of same to

be determined six or eight months hence." In opinion filed the Commissioner states that Dr. Glenn, who is not an eye specialist, testified that he regularly treated the plaintiff; that he has a marked opacity and no acute vision in the right eye; that Dr. J. F. McGowan, of Asheville, testified that upon first examination the plaintiff had 22/100 vision in the right eye, and on 28 August, 1937, it was 21/100; that in his opinion there would be further improvement; that plaintiff should continue to treat his eye in accordance with the doctor's instructions, and that the percentage of vision of the injured right eye be determined six or eight months from the date of hearing. Thereupon the Commissioner entered an order awarding to plaintiff compensation (1) for the 90 days total disability, and (2) thereafter for the percentage of loss of vision to the right eye to be determined six or eight months from 12 November, 1937. For the latter purpose the case was ordered to "be held open for a reasonable period of time until such time as Dr. McGowan feels that vision should be rated."

At second hearing 30 May, 1939, Dr. C. F. Glenn testified: "In a case like this he can discern objects and can discern daylight from dark. As far as to identify anybody at any distance he was unable to do so. It was my opinion at the last hearing that he was industrially blind and I was not inclined to think it would improve with treatment or time. I examined him yesterday and his condition is unchanged and I think he is industrially blind and I do not think his condition will improve with time or treatment." On cross-examination, the witness further testified: "He can see a blurred object, daylight and dark, but no fingers. He can't make out that sort of thing at all. I know industrial terms experts use in referring to injuries of the eye. I know what the terms 22/100 and 21/100 vision mean. That is the fraction of the normal vision that remains in reference to normal vision." The witness further testified that when the claimant was admitted to the hospital shortly after his injury, he was given treatment for his luetic infection. The Commissioner at this hearing finds as fact (1) that the only issues then involved "were the determination of loss of vision of the plaintiff's right eye, if any, and the additional amount of compensation due him by reason of such loss"; (2) that defendant did not have an opportunity to secure an expert eye specialist as a witness at the time of the hearing "due to the fact that the plaintiff employee had only recently been released from the chain-gang, and upon agreement it is directed that the Industrial Commission designate some eye specialist" to examine plaintiff "and that the report of said eye specialist on the condition of the eye, the right of the plaintiff Dennis Logan shall be considered by the Industrial Commission, or any member of said Commission, as competent evidence in said case and shall become a part of the record of said case."

The Industrial Commission designated "Dr. T. B. Gold, eye specialist of Shelby, North Carolina, as the physician to examine the eye of the plaintiff pursuant to the said agreement."

On 20 September, 1939, Dr. Gold, in letter to Chairman T. A. Wilson, made this report: "I am writing you in regards to Dennis Logan. He has an old scar covering about two-thirds of cornea of right eye on nasal side. The scar is thicker in center than on edges. There is also a scar on temporal side about 11 A. M. The eye is quiet and the scar is not progressing and I would say that his status has not changed in the last year or year and half. He has slight peripheral vision, but only slight perception in center of cornea. The left eye is normal."

After a third hearing held on 21 September, 1939, the Commission rendered an opinion in which, after referring to the report of Dr. Gold, it is stated that: "Dr. Gold gave as his opinion that the plaintiff has 100 per cent loss of vision in the right eye due to the injury by accident." And continuing stated: "Upon all of the competent evidence and the admissions the Commission finds as a fact that the plaintiff now has 100 per cent loss of vision in the right eye which was due to the injury he sustained May 30, 1937, while working for Howard W. Johnson." Pursuant to such finding an award was made for compensation "for 100 weeks for the complete loss of vision in the right eye."

Upon appeal by defendant to the Full Commission, the findings of fact, conclusions of law, and the award at the last hearing were approved, affirmed and adopted as its own. Defendant appealed therefrom to the Superior Court of Rutherford County.

Pending hearing in Superior Court at request of counsel for plaintiff, the Industrial Commission, by supplemental certificate, incorporated as a part of the certified record in this proceeding a copy of letter from Dr. Frank C. Smith, of Charlotte, transmitting to Mr. T. A. Wilson, North Carolina Industrial Commission, copy of an unsigned letter dated 25 October, 1937, from Dr. Smith to Dr. C. F. Glenn regarding plaintiff in which he states, in part, to Dr. Glenn: "This patient has a 100 per cent loss of industrial vision due to scarring of the right cornea. The scar is so dense that the visual loss will be permanent. . . ."

From judgment of Superior Court affirming the award of the Industrial Commission, defendant appeals to the Supreme Court and assigns error.

Hamrick & Hamrick for plaintiff, appellee.
J. S. Dockery and Charles Hutchins for defendant, appellant.

WINBORNE, J. Upon the record on this appeal we are of opinion and hold that exception by defendant to the judgment below, assigned as error, is well taken.

Findings of fact of the Industrial Commission when supported by competent evidence are binding on the Superior and Supreme Courts. Decisions of this Court uniformly so hold. But, where it appears that a finding of fact upon which the award is based is not supported by competent evidence, the finding is not conclusive and must be set aside. This is the rule likewise uniformly established by decisions of this Court.

The North Carolina Workmen's Compensation Act, Public Laws 1929, chapter 120, section 31, as amended, provides for compensation to be allowed: "(q) For the loss of an eye, sixty per centum of the average weekly wages during one hundred weeks." Then in subsection (t) of said section it is declared: "Total loss of use of a member or loss of vision of an eye shall be considered as equivalent to the loss of such member or eye. The compensation for partial loss of or for partial loss of use of a member or for partial loss of vision of an eye shall be such proportion of the payments above provided for total loss as such partial loss bears to total loss. . . ."

The words used in the statute must be taken in their natural or ordinary meaning. *Borders v. Cline,* 212 N. C., 472, 193 S. E., 826.

The word "loss" is defined by Webster as: "State or fact of being lost or destroyed; ruin; destruction; as the loss of a vessel at sea." The word "lose" is there defined as "To bring to destruction; to ruin; to destroy; . . . to suffer the loss of; to be deprived of; to part with . . . especially in an accidental or unforeseen manner; as . . . to lose an eye." Hence, the phrases "The loss of an eye" and "Total . . . loss of vision of an eye," as used in the Workmen's Compensation Act, when given the natural or ordinary meaning manifestly indicate the state or fact of loss of an eye or total destruction of the vision of an eye—as distinguished from a partial loss of such vision.

Here there is evidence of loss of a large percentage of vision of the right eye of plaintiff which, when determined, is compensable under the provision of the act. Yet there is no evidence, competent or otherwise, to support the finding of the Commission "that plaintiff now has 100 per cent loss of vision in the right eye." This finding appears to have been predicated upon misinterpretation of the report of Dr. Gold. Reference thereto reveals that plaintiff has "slight peripheral vision, but only slight perception in center of cornea." Dr. Glenn, too, says that plaintiff "can see a blurred object, daylight and dark." Therefore, that finding of fact is set aside and the cause is remanded to the North Carolina Industrial Commission for further consideration as to the extent of partial loss of vision plaintiff has sustained to his right eye in accordance with this opinion.

As the case goes back to the Industrial Commission it is appropriate to say that even though there may be other testimony to the same effect,

the unsigned copy of letter of 25 October, 1937, from Dr. Smith to Dr. Glenn, to which defendant excepted, is incompetent, and has no place in the record and evidence in the case.

Other assignments need not now be considered.

Error and remanded.

NORMAN GOLD, ADMINISTRATOR, v. W. B. KIKER ET AL.

(Filed 25 September, 1940.)

1. Trial § 48—Denial of motion for mistrial for alleged prejudice resulting from conduct of codefendant held not prejudicial.

An action for wrongful death and an action for negligent injury against the same defendants as joint tort-feasors, were consolidated for trial. Both defendants participated in the selection of the jury and in cross-examining plaintiff's first three witnesses, but counsel for the two defendants were conducting the case at "arm's length." Appealing defendant moved for a mistrial on the ground that its codefendant was attempting to fix it with liability and the court thereupon made investigation and found that the codefendant had agreed to compromise the case against it but to remain in the case to prevent appealing defendant from placing sole responsibility upon it, and ordered the cause dismissed as to the codefendant and denied the motion for mistrial. The appealing defendant thereafter cross-examined an adverse witness relative to the compromise agreement, and the court charged the jury that the compromise agreement should have no bearing upon the liability of the appealing defendant, but should be considered solely as credit on damages, if any, awarded against the appealing defendant. *Held:* While it is apparent that the court dismissed the action as to the compromising defendant because probable harm might otherwise come to appealing defendant, it not being clear from the record that harm already had been done and it further appearing that the motion for mistrial was addressed to the discretion of the court and that appealing defendant itself elected to place the circumstances before the jury and was allowed to take credit for the amount its codefendant had agreed to pay plaintiffs, that the court instructed the jury to disregard the compromise in determining the liability of the appealing defendant and to consider it only for the purposes of credit in case they came to award damages, the refusal of appealing defendant's motion for mistrial cannot be held for prejudicial error.

2. Appeal and Error § 38—

The party alleging error has the laboring oar and must overcome the presumption against him.

3. Appeal and Error § 37b—

Discretionary rulings of the trial court are not ordinarily considered on appeal unless accompanied by some imputed error of law or legal inference.

4. Appeal and Error § 39a—

Verdicts and judgments are not to be disturbed except upon a showing of prejudicial error, which is error amounting to the denial of some substantial right.

5. Negligence § 19b—

The fact that plaintiff's testimony-in-chief and his testimony upon cross-examination is not wholly consistent, his testimony-in-chief being weakened by his testimony upon cross-examination, does not warrant the granting of defendants' motion to nonsuit on the ground of contributory negligence, the testimony being sufficiently equivocal to require its submission to the jury.

6. Negligence § 11—

Contributory negligence, *ex vi termini*, presupposes negligence on the part of the defendant, and contributory negligence will bar recovery if it is one of the proximate causes of the injury.

7. Highways § 19—

In this action against a road contractor to recover for injury sustained by plaintiff driver while attempting to travel a highway which was under construction, evidence of negligence of defendant in failing to maintain proper warning signs of danger and evidence on the issue of contributory negligence *held* properly submitted to the jury.

8. Costs § 2b—

In this action against joint tort-feasors, the court, upon ascertaining that one defendant had reached a compromise agreement with plaintiff and had agreed to remain in the case solely to prevent the other defendant from fixing it with sole liability, dismissed the action as to the compromising defendant. *Held:* The order of the court taxing plaintiffs with one-half the costs which accrued prior to the dismissal of the actions against the compromising defendant is authorized by C. S., 1242.

CLARKSON and SCHENCK, JJ., dissent in part.

SEAWELL, J., dissents.

APPEALS by plaintiffs and defendant, Ames & Webb, Inc., from *Bone, J.*, at April Term, 1940, of NASH.

Civil actions to recover damages (1) for an alleged wrongful death, and (2) for alleged negligent injuries, consolidated and tried together, without objection, as the two actions arise out of the same wreck. *Hewitt v. Urich*, 210 N. C., 835, 187 S. E., 759.

1. *The Action for Wrongful Death (Gold case).* This is the same case that was here on plaintiff's appeal from a judgment of nonsuit, reported in 216 N. C., 511, 5 S. E. (2d), 548, where the facts are fully set out. The nonsuit was reversed and the cause remanded for further hearing. Reference to the previous report of the case will suffice for statement of the principal facts, as they are substantially the same on the present record.

2. *The Action for Personal Injuries (Walker case).* I. D. Walker was the driver of the truck and sustained serious and permanent injuries

when it ran into, or "sideswiped," the bridge abutment three miles south of Whitakers on paved Highway No. 301 on the night of 19 May, 1938.

The two actions having been consolidated were tried upon the same evidence and the same state of facts. Reference to previous report of the *Gold case* will disclose the entire factual situation.

The trial was started on Thursday of the first week of the April Term. Both defendants participated in the selection of the jury and in the cross-examination of the first three witnesses offered by the plaintiffs—the third witness being I. D. Walker, plaintiff in the second suit. When the examination of Walker had been completed, counsel for defendant, Ames & Webb, Inc., in the absence of the jury, asked that a mistrial be ordered on the ground that defendant, Kiker & Yount, had evidently reached an understanding with the plaintiffs which was "perfectly apparent" as to the character of their defense "amounts to an invitation to the jury to return a verdict against them."

Upon inquiry, it was disclosed that Kiker & Yount had agreed to pay the plaintiffs $3,500, in full discharge and protection against further liability, which the plaintiffs had agreed to accept "either before or during the trial . . . or after a final settlement with Ames & Webb," upon mutually satisfactory terms, "and that Kiker & Yount (would) participate in the trial for the purpose of resisting any effort of Ames & Webb to place the sole responsibility upon Kiker & Yount."

It further appeared that, before the trial, counsel for Kiker & Yount had notified counsel for Ames & Webb, Inc., they would henceforth "deal in these cases at arms length," because of the latter's avowed purpose to try to place sole responsibility for the wreck upon Kiker & Yount.

Without undertaking to determine the character of the agreement between Kiker & Yount and the plaintiffs—whether release, indemnity, covenant not to sue, or whatnot—as there was no request so to determine or plea requiring it, and after a full investigation, the court announced that it "would decline to allow Kiker & Yount to participate further in the trial."

After some debate as to how the actions should be terminated as against Kiker & Yount—whether by voluntary nonsuit or otherwise—the court ordered "that the action be dismissed as to the defendant, Kiker & Yount."

The motion of Ames & Webb, Inc., for a mistrial was thereupon denied. Exception.

Thereafter, in the presence of the jury, apparently on Saturday, Norman Gold was examined as an adverse witness by counsel for Ames & Webb Inc., in respect of the "contemplated settlement" or understanding between the plaintiff and Kiker & Yount.

Later, apparently on Monday of the following week, the plaintiffs, over objection of defendant, were allowed to offer in evidence the substance of their agreement with Kiker & Yount. Exception. In the charge, the court instructed the jury that the "compromise" with Kiker & Yount should have no bearing upon the liability of Ames & Webb, Inc., and could only be considered and allowed as a credit upon any damages awarded, in the event they should reach these issues in the two cases.

The plaintiffs recovered in both cases, the damages in the wrongful death action being fixed at $10,000, and in the personal injury action at $8,000.

From judgments on the verdicts, the defendant, Ames & Webb, Inc., appeals, assigning errors.

Norman Gold and Thorp & Thorp for plaintiffs, appellants and appellees.

Thos. W. Ruffin for defendant, appellant.

STACY, C. J. (after stating the facts as above): Two serious questions are posed by the record:

First. Was it error to refuse the defendant's motion for a mistrial? The answer to this question is not altogether free from difficulty, albeit the reasons assigned by the defendant for its request were perhaps untenable. Was not the real reason for ordering a dismissal of the action as against Kiker & Yount the probable harm that might otherwise come to Ames & Webb, Inc.? And if it were hurtful for them to remain in the case, notwithstanding their agreement to do so, had not the harm already been done? *S. v. Rogers,* 173 N. C., 755, 91 S. E., 854, L. R. A., 1917 E, 1857. It may be conceded the record is such as to leave the matter in doubt. This alone would seem to defeat the assignment of error on appeal, as the party alleging error has the laboring oar and must overcome the presumption against him. *Cole v. R. R.,* 211 N. C., 591, 191 S. E., 353. But in addition, it appears that the defendant elected to place the circumstances before the jury and was allowed to take credit for the amount Kiker & Yount had agreed to pay the plaintiffs. The jury was instructed to disregard the "compromise" agreement in determining the liability of Ames & Webb, Inc., and to consider it only for purposes of credit in case they came to the award of damages. Did not this cure any previous objection or render it harmless? *Hyatt v. McCoy,* 194 N. C., 760, 140 S. E., 807. The record also reveals that the motion was addressed primarily to the court's discretion, and for reasons regarded by the court as inconclusive. Discretionary rulings of the trial court are not ordinarily considered on appeal, unless accompanied by some imputed error of law or legal inference. *Cole v. R. R., supra; S. v. Lea,* 203 N. C., 316, 166 S. E., 292.

The trial court was confronted with an unusual situation. We cannot say there was error in the way it was handled or that prejudice necessarily resulted therefrom. The "compromise" was not with the defendant and the plaintiff but with the plaintiff and a third party. The defendant's liability alone was at issue upon the trial. How could the defendant complain even if Kiker & Yount had admitted their liability on the hearing? This would not have established any liability against Ames & Webb, Inc. The defendants were dealing with each other "at arm's length." The suggestion that some disadvantage may have come to the defendant from what took place is wanting in sufficiency to work a new trial. *McNinch v. Trust Co.,* 183 N. C., 33, 110 S. E., 113. Verdicts and judgments are not to be disturbed except upon a showing of prejudicial error, *i.e.,* error which amounts to the denial of some substantial right. *Combs v. Paul,* 200 N. C., 382, 157 S. E., 12; *Wilson v. Lumber Co.,* 186 N. C., 56, 118 S. E., 797; *In re Ross,* 182 N. C., 477, 109 S. E., 365; *Brewer v. Ring,* 177 N. C., 476, 99 S. E., 358. Moreover, supposing a new trial were granted and the same situation should arise again, what would the trial court do about it? *Lane v. Paschall,* 199 N. C., 364, 154 S. E., 626. It is not contended that the actions should be dismissed *ex mero motu.* The court was only asked to declare a mistrial. The conclusion is reached that the exception must be overruled. See *Goodman v. Goodman,* 201 N. C., 808, 161 S. E., 686, and cases there cited.

Second. Was it error to overrule the defendant's motion for judgment of nonsuit in the *Walker case* on the ground of plaintiff's contributory negligence? This must be answered in the negative. It is true, the plaintiff's testimony-in-chief was weakened somewhat by his cross-examination, but on the whole it would seem the issue was one for the twelve. The ruling is supported by what was said on the former appeal in the *Gold case,* and the following cases are also in point: *Ferguson v. Asheville,* 213 N. C., 569, 197 S. E., 146; *Lincoln v. R. R.,* 207 N. C., 787, 178 S. E., 601.

It is readily conceded that the plaintiff's negligence, in order to bar a recovery in an action like the present, need not be the sole proximate cause of the injury, for this would exclude any idea of negligence on the part of defendant. *Absher v. Raleigh,* 211 N. C., 567, 190 S. E., 897. It is enough if it contribute to the injury. *Wright v. Grocery Co.,* 210 N. C., 462, 187 S. E., 564; *Construction Co. v. R. R.,* 184 N. C., 179, 113 S. E., 672. The very term "contributory negligence" *ex vi termini* implies or presupposes negligence on the part of the defendant. *Fulcher v. Lumber Co.,* 191 N. C., 408, 132 S. E., 9. The testimony of Walker, if not wholly consistent, is sufficiently equivocal on the issue of his contributory negligence to require its submission to the jury. *Moseley v. R. R.,* 197 N. C., 628, 150 S. E., 184.

Speaking to the duty of both defendants on the former appeal in the *Gold case,* it was said: "The contractual obligations assumed by each of the defendants as reflected in the provisions quoted in the above statement of the case provide evidence of legal duty which the defendants, and each of them, owed to plaintiff's intestate, and others traveling the highway, to exercise ordinary care in providing and maintaining reasonable warnings of and safeguards against conditions existent at the time and place in question—a duty which originated upon the award of the contract and continued until the final acceptance of the work by the State Highway and Public Works Commission."

The plaintiffs were taxed with one-half the costs which accrued prior to the dismissal of the actions as against Kiker & Yount, and from this they appeal. In the light of the record it would seem that the ruling is authorized by C. S., 1242.

It results, therefore, that the judgments should be upheld. This will be done.

No error.

CLARKSON and SCHENCK, JJ., dissent on first question only.

SEAWELL, J., dissents.

W. H. WESTALL v. L. B. JACKSON.

(Filed 25 September, 1940.)

1. Bankruptcy § 11—

A claim provable in bankruptcy is released by the order of discharge even though the debt is not scheduled if the creditor has notice or actual knowledge of the proceeding in bankruptcy.

2. Same—Where debtor promises to pay the debt after the filing of petition in bankruptcy, creditor's action is on the new promise and not the original debt.

Where the debtor makes a new promise to pay the debt evidenced by a note, subsequent to the filing of the petition in bankruptcy but before the order of discharge is entered, the creditor's action instituted subsequent to the proceedings is upon the new promise and not upon the note, the right to maintain an action upon the note being extinguished by the discharge and the original debt being recognized only to the extent of admitting it as a consideration for the new promise. Whether C. S., 990, is applicable to a promise made subsequent to the filing of the petition in bankruptcy but before the order of discharge is entered, *quære.*

3. Same—

A bankrupt is not estopped to set up the discharge in bankruptcy as a defense to a claim because of a promise not to plead the discharge made after the petition in bankruptcy is filed, since the express and direct provisions of the discharge cannot be waived. In the present case plaintiff did not allege or prove a promise not to plead the discharge or rely upon waiver or estoppel.

4. Limitation of Actions § 2e—

Plaintiff, the payee and holder of a note, alleged that the debtor advised him not to enter claim in bankruptcy, and made a promise after the filing of the petition but before the order of discharge was entered to pay the note. *Held:* Plaintiff's cause of action is on the new promise and not the original note, and the new promise being made more than three years prior to the institution of the action, plaintiff's cause is barred by the statute of limitations. C. S., 441.

APPEAL by plaintiff from *Warlick, J.,* at April Term, 1940, of BUNCOMBE. Affirmed.

Civil action to recover on note executed by the defendant.

On 14 July, 1929, defendant executed and delivered to the plaintiff his promissory sealed note in the sum of $2,500.00, payable 120 days after date. On 15 December, 1933, defendant filed a voluntary petition in bankruptcy. The schedule, filed 28 December, 1933, included an open account indebtedness to plaintiff but did not include the note. An order of discharge in bankruptcy was issued 8 January, 1935.

A few days after filing the petition in bankruptcy defendant informed the plaintiff that he had filed a petition in bankruptcy and stated to plaintiff that if he got any notice from the bankruptcy court for him not to file any claim at all, that he was going to pay plaintiff and that he had not included the debt in the schedule.

This action was instituted on 4 November, 1939. In his complaint he declares on the note. The defendant answering sets up and pleads the adjudication and discharge in bankruptcy. In reply plaintiff alleges the defendant's promise to pay the note, made after the petition in bankruptcy and before the discharge, and pleads that by reason thereof "the said note and indebtedness which it evidences was not and is not discharged by the bankruptcy proceedings."

At the conclusion of the evidence on motion of defendant the court entered judgment of nonsuit. The plaintiff excepted and appealed.

Jordan & Horner for plaintiff, appellant.
Weaver & Miller for defendant, appellee.

BARNHILL, J. It is admitted in the record that defendant filed a petition in bankruptcy after the execution of the note in controversy and

that he was duly discharged, and the plaintiff testified that he had actual knowledge of the proceedings in bankruptcy. Thus the questions presented are clearly defined: (1) May the plaintiff now maintain an action on the note? (2) Is the plaintiff's cause of action bottomed upon the promise to pay made after petition in bankruptcy and, if so, is it barred by the statute of limitations duly pleaded by the defendant?

A provable claim is released by the order of discharge even though the debt is not scheduled if the creditor had notice or actual knowledge of the proceeding in bankruptcy. U. S. C. A., Title II, Bankruptcy, sec. 35. That the plaintiff's note falls within the class of provable claims is not contested. The order of discharge in bankruptcy relates back to and takes effect as of the date of the filing of the petition. *Zavelo v. Reeves,* 227 U. S., 625, 57 L. Ed., 676; *Everett v. Judson,* 228 U. S., 474, 57 L. Ed., 927. The plaintiff is without remedy except upon a new unconditional and unequivocable promise to pay the debt made after the petition in bankruptcy. The legal right to maintain an action upon the original note when the bankruptcy is pleaded being extinguished by the discharge in bankruptcy *sans* the promise to pay made after the filing of the petition the plaintiff has no cause of action.

The plaintiff's contention that notwithstanding the new matter set out in his reply this action is upon the note cannot be sustained. It was so held in *Fraley v. Kelly,* 67 N. C., 78, *supra,* where the proceedings as to the pleadings were the same as here. As there held, the reply alleging the new promise opened the whole question and was equivalent to adding a new cause of action upon the new promise. Only when the pleadings are thus considered may it be held that plaintiff has stated a cause of action. *Fraley v. Kelly,* 88 N. C., 227; *Fraley v. Kelly,* 67 N. C., *supra; Hornthall v. McRae,* 67 N. C., 21; *Henly v. Lanier,* 75 N. C., 172.

While the discharge affords a complete legal defense to the enforceability of provable claims in existence at the time the petition was filed it does not relieve the bankrupt's liability upon debts or obligations incurred subsequent to the filing of the petition. A new promise to pay the debt, being supported by the moral obligation of the old debt, can be enforced at law. *Fed. Nat'n. Bank v. Koppel,* 148 N. E., 379; 40 A. L. R., 1443, 3 R. C. L., 324; 7 Remington Bankrupt (3d), sec. 3499; *Zavelo v. Reeves, supra; Fraley v. Kelly,* 67 N. C., *supra; Hornthall v. McRae, supra.* "The new promise does not revive the original contract so as to reinvest it with an actionable quality but only recognizes its moral obligation so far as to admit it as the consideration to support the new promise. This is well settled doctrine." *Fraley v. Kelly,* 88 N. C., *supra.*

The new promise, if made, was made more than 3 years next prior to the institution of this cause and action thereon is barred by the three-year statute of limitations. C. S., 441.

The plaintiff does not plead the new promise as a waiver or by way of estoppel. No agreement not to plead the discharge in bankruptcy is alleged or proven. Even if such were permissible, and we do not so hold, the bar of the discharge under the terms of the Bankruptcy Act is not restricted to those instances where the debtor has not waived his right to plead it. It is universal and unqualified in its terms. It affects all debts within the scope of its words. It would be contrary to the letter of the law and incompatible with the spirit of the act and its aim would largely be defeated if the express and direct provisions of the discharge could be waived. The bankrupt is not estopped to set up the discharge in bankruptcy as a defense to a claim because of a promise made after the petition in bankruptcy was filed. *Jelliffe v. Thaw,* 67 Fed. Rep., 880 (C. C. A., 2d); see, also, *Shapley v. Abbott,* 42 N. Y., 443, 1 Am. Rep., 548.

The defendant relies upon C. S., 990, and contends that the provisions thereof relate to a promise made subsequent to the filing of the petition in bankruptcy but before the order of discharge is entered. This we need not now decide. However, it is interesting to note that the series of cases in our own reports, beginning with the *Fraley case,* 67 N. C., *supra,* which hold that an action can be maintained upon a new promise to pay a debt provable in the bankruptcy proceedings, when made after the filing of the petition, all preceded the enactment of ch. 57, Public Laws 1899, which is now C. S., 990. So far as we have been able to ascertain there has been no decision to like effect since, when the promise was not in writing. See *Bank of Elberton v. Vicery,* 92 S. E., 547; *Jelliffe v. Thaw, supra.*

The judgment below is

Affirmed.

HENRY ROSE v. M. K. PATTERSON.

(Filed 25 September, 1940.)

Executors and Administrators § 30b: Venue § 1b—Action held against defendant individually as legatee and devisee and not in her capacity as executrix.

Judgment was rendered against the estate of plaintiff's deceased guardian for money due the guardianship estate. After reaching his majority plaintiff instituted this action alleging that defendant as executrix of the deceased guardian had paid over to herself, as sole devisee and legatee, money sufficient to discharge plaintiff's claim. *Held:* The action is not against defendant as executrix but against her individually on a liability imposed upon her by statute as legatee and devisee, C. S., 59, and defendant's motion to remove from the county of plaintiff's residence, C. S., 469, to the county in which she qualified as executrix, was properly denied.

ROSE *v.* PATTERSON.

APPEAL by defendant from *Warlick, J.*, at June Civil Term, 1940, of BUNCOMBE.

Civil action to recover of defendant for property allegedly received by her as sole legatee and devisee under the last will and testament of A. S. Patterson, deceased—heard upon motion of defendant for change of venue.

Plaintiff alleges these pertinent facts: On 19 May, 1926, A. S. Patterson was appointed, in Buncombe County, North Carolina, guardian of plaintiff, a minor, resident of said county, and acted as such until the date of his death on 9 December, 1933. On 5 April, 1934, Garland A. Thomasson was appointed and qualified as guardian of plaintiff and acted in that capacity until the plaintiff became twenty-one years of age on 10 March, 1939.

Under the last will and testament of A. S. Patterson, deceased, admitted to probate in Swain County, North Carolina, M. K. Patterson, the defendant herein, was named as executrix and sole legatee of all personal property and devisee of all real property belonging to the testator at the time of his death. M. K. Patterson qualified as executrix in Swain County. In 1936, upon objection to report, dated 26 February, 1935, filed by M. K. Patterson, executrix as aforesaid, purporting to be a final account of the guardianship of A. S. Patterson as guardian of Henry Rose, minor, it was ascertained by the clerk of Superior Court of Buncombe County that there was a balance of $1,559.25 due to the ward. Subsequently, in an action in the Superior Court of Buncombe County entitled "State of North Carolina, *ex rel.* Garland A. Thomasson, Guardian of Henry Rose, Minor, *v.* M. K. Patterson, Executrix of A. S. Patterson, Deceased, *et al.*," judgment was rendered at the June Term, 1938, in favor of the plaintiff and against the defendant for the said sum of $1,559.25, with interest. To motion of plaintiff therein for leave to issue execution under this judgment defendant therein by answer asserted that she, as executrix, had fully administered the estate of A. S. Patterson and had filed final report which was approved by the clerk of Superior Court of Swain County, on 12 December, 1936. Thereupon, motion of defendant therein to remove the action to Superior Court of Swain County for further proceeding was allowed. Thereafter plaintiff withdrew motion for leave to issue execution. Subsequently, on 8 December, 1939, the plaintiff, who was then twenty-one years of age, and resident of Buncombe County, instituted the present action, in Superior Court of said county, and upon information and belief alleges, *inter alia*, "that defendant as the sole legatee and devisee under the last will and testament of A. S. Patterson, deceased, received from herself as executrix of said estate and has taken into her possession and holds the same as her own, assets sufficient to pay off and discharge the debt owing to plaintiff."

In apt time and after notice defendant filed a motion for the removal of the action, as a matter of right, from the Superior Court of Buncombe County to the Superior Court of Swain County for trial for that the action is based upon a claim against the estate of A. S. Patterson, deceased, and involves a settlement of the accounts of the defendant, M. K. Patterson, as executrix of the will of said A. S. Patterson, and the distribution of funds in her hands.

The clerk of Superior Court, "after consideration of the facts alleged in the complaint," finding that plaintiff is a resident of Buncombe County and being of opinion that the action is not one against the executrix in her official capacity, but that plaintiff is seeking to recover against the defendant for property which plaintiff alleges she, as sole beneficiary, received from the estate of testator, and which should have been administered and paid on his debt against the estate, denied the motion of defendant. Upon appeal to him, the judge of Superior Court approved and affirmed the order of the clerk. Defendant appeals to Supreme Court and assigns error.

S. G. Bernard and Parker, Bernard & Parker for plaintiff, appellee.

Edwards & Leatherwood and Jones, Ward & Jones for defendant, appellant.

WINBORNE, J. The judgment below is correct. The record discloses that this action is not against M. K. Patterson in her official capacity as executrix of the last will and testament of A. S. Patterson, deceased, but is against her individually. While plaintiff has a judgment against the estate of the testator, he seeks to hold the defendant liable personally for the value of such property of the estate as she, as legatee and devisee under the will, has received. It is alleged that she, individually, has received from herself as executrix of said will, and "holds as her own," assets sufficient to pay off and discharge the debt owing to plaintiff. If defendant has received any such property the statute (C. S., 59) makes her liable therefor to the creditors of the estate to the limit provided in succeeding sections. C. S., 60, 61, 62, 63 and 64. Hence, plaintiff, being creditor of the estate, is entitled to choose the county of his residence as the forum for the trial of the action. C. S., 469. *Craven v. Munger,* 170 N. C., 424, 87 S. E., 216.

The cases of *Perry v. Perry,* 172 N. C., 62, 89 S. E., 999; *Lumber Co. v. Currie,* 180 N. C., 391, 104 S. E., 654; and *Montford v. Simmons,* 193 N. C., 323, 136 S. E., 875, upon which defendant relies, are distinguishable from the case in hand.

Affirmed.

EMELINE MONFILS, ADMINISTRATRIX OF JOSEPH T. MONFILS, JR., v. W. L. HAZLEWOOD AND G. N. DICKENS, TRADING AS H. & D. TRANSFER COMPANY.

(Filed 25 September, 1940.)

1. Death § 3—

Since an action for wrongful death exists solely by virtue of the statute, C. S., 160, it must be maintained and prosecuted in strict accord with the statute, and an administratrix appointed by the court of another state may not maintain an action for wrongful death in this State. Such holding does not impinge Article IV, sec. 1, of, or the 14th Amendment to, the Federal Constitution.

2. Pleadings § 19—

Where an action is removed to the county of defendants' residence upon motion aptly made, C. S., 470, defendants have 30 days after final determination of their motion to remove in which to answer or demur. C. S., 509.

3. Pleadings § 16b—

Where an action for wrongful death is instituted in this State by an administratrix appointed by the court of another state, the defect may be taken by demurrer, since such plaintiff does not have legal capacity to sue and the complaint does not state facts sufficient to constitute a cause of action. C. S., 511 (1) (2).

APPEAL by plaintiff from *Nimocks, J.*, at August Term, 1940, of HALIFAX.

This is an action by an administratrix instituted in Vance County to recover damages for the wrongful death of her intestate caused by an automobile collision in said county, under the provisions of C. S., 160.

According to the complaint the plaintiff qualified as administratrix in the county judge's court in and for Dade County, Florida. Before time for answering expired, upon motion of defendants, the cause was removed to Halifax County where the defendants were residents. C. S., 470. After the removal to Halifax County the defendants filed demurrer upon the grounds that (1) the plaintiff was appointed administratrix in a foreign jurisdiction, namely, the State of Florida, (2) the plaintiff is without capacity to sue in the State of North Carolina, and (3) the plaintiff cannot maintain the action in the courts of North Carolina. The court sustained the demurrer and dismissed the action. The plaintiff reserved exception and appealed.

J. H. Bridgers and Jasper B. Hicks for plaintiff, appellant.
Gholson & Gholson for defendants, appellees.

SCHENCK, J. This action having been instituted under the provisions of C. S., 160, it cannot be maintained by an administratrix of a foreign

jurisdiction. *Hall v. R. R.*, 146 N. C., 345; *ibid*, 149 N. C., 108. "No suit can be maintained upon a cause of action arising in this State by any person except an executor or administrator duly appointed by the local court." *Tieffenbrun v. Flannery*, 198 N. C., 397. Actions for wrongful death instituted under the provisions of the statute, C. S., 160, since they exist only by virtue of the statute, must be instituted and prosecuted strictly in accord with the statute. *Brown v. R. R.*, 202 N. C., 256.

"A foreign administrator has no authority in this State, and cannot sue nor be sued as such; and since a nonresident cannot be appointed administrator, there should be an ancillary administration by a proper person in this State." McIntosh, N. C. Prac. & Proc., sec. 250, p. 234; *Morefield v. Harris*, 126 N. C., 626; *Hall v. R. R., supra;* C. S., 8 (2).

The defendants had thirty days after the final determination of their motion to remove in which to answer or demur. C. S., 509. The demurrer in this action was filed within the statutory time.

Among the grounds for demurrer prescribed by statute are (1) the plaintiff has not legal capacity to sue, and (2) the complaint does not state facts sufficient to constitute a cause of action. C. S., 511.

It appearing that the demurrer was timely filed, that the plaintiff has not legal capacity to sue and that the complaint does not state facts sufficient to constitute a cause of action, the judgment sustaining the demurrer and dismissing the action must be affirmed.

We cannot concur in the argument of counsel for appellant that "the full faith and credit" clause of the Constitution of the United States, Art. IV, sec. 1, or the "due process of law" clause of the Fourteenth Amendment thereto, is impinged by the judgment below.

Affirmed.

F. S. LANGLEY, JR., v. W. F. RUSSELL.

(Filed 25 September, 1940.)

Master and Servant § 7d—

In an action to recover damages for maliciously causing plaintiff's employer to breach the contract of employment with plaintiff, evidence merely that defendant, as president of the employer, signed the letter advising plaintiff of his discharge, is wholly insufficient to establish the allegation that defendant maliciously procured the employer to breach the alleged contract of employment.

APPEAL by plaintiff from *Warlick, J.*, at February Term, 1940, of BUNCOMBE.

W. K. McLean for plaintiff, appellant.
Milligan & Haynes and Lee & Lee for defendant, appellee.

PER CURIAM. This is an action to recover damages for maliciously causing the Planters Tobacco Warehouse, Inc., to breach its contract of employment of the plaintiff. From judgment as in case of nonsuit entered when the plaintiff had introduced his evidence and rested his case the plaintiff appealed, assigning error.

While it may be questionable as to whether there was sufficient evidence to be submitted to the jury upon the contract alleged, the evidence is utterly wanting to establish the allegation that the defendant maliciously caused the Planters Tobacco Warehouse, Inc., to breach such contract. The utmost the evidence tends to establish is that the defendant, as president of the warehouse company, signed the letter from the company advising plaintiff of his discharge.

The judgment of the Superior Court is

Affirmed.

ORLENE WOODY v. COCA-COLA BOTTLING COMPANY, INCORPORATED, OF ASHEVILLE, NORTH CAROLINA.

(Filed 25 September, 1940.)

Food § 6—Evidence held sufficient for jury in this action to recover for injuries resulting from foreign, deleterious substance in bottled drink.

Evidence that plaintiff was injured as a result of drinking a bottled drink prepared by defendant which contained a foreign, deleterious substance, that on the same date another person purchased a bottle prepared by defendant which contained a like foreign substance, with evidence that other foreign substances were found on other dates in bottles prepared by defendant, and that when plaintiff took the bottle containing the unconsumed portion of the beverage purchased by her to defendant's manager, he undertook to demonstrate how bottles were tested under a powerful light and the light would not come on, *is held* sufficient to be submitted to the jury.

APPEAL by defendant from *Armstrong, J.*, at February Term, 1940, of RUTHERFORD. No error.

Civil action to recover damages for personal injuries resulting from drinking a bottled beverage containing a deleterious substance.

Plaintiff alleged and offered evidence tending to show that on 28 December, 1938, she purchased a bottle of Coca-Cola which was bottled and marketed by the defendant; that she drank a part of the beverage; that she discovered a dirty, oily looking substance in the bottle and that she became sick immediately and suffered ill effects for some time thereafter. She further offered evidence that another party purchased a bottle of the same beverage on the same date which contained a like substance; that another witness purchased a bottle 20 August, 1938, containing glass, and still another witness purchased a bottle 28 July, 1939, containing a spider. She testified that she carried the bottle purchased by her with the unconsumed portion of the beverage therein to the manager of the defendant company; that he undertook to demonstrate to her how bottles were tested under powerful lights to discover the presence of foreign matter before they were put on the market and that the light would not come on.

There was a verdict and judgment for the plaintiff and the defendant excepted and appealed.

Stover P. Dunagan, Harry K. Boucher, and Paul Boucher for plaintiff, appellee.

Hamrick & Hamrick for defendant, appellant.

PER CURIAM. The applicable law has been fully discussed by this Court in a number of recent cases. *Perry v. Bottling Co.*, 196 N. C., 175, 145 S. E., 14; *Enloe v. Bottling Co.*, 208 N. C., 305, 180 S. E., 582; *Blackwell v. Bottling Co.*, 208 N. C., 751, 182 S. E., 469; *Collins v. Bottling Co.*, 209 N. C., 821, 184 S. E., 834; *Blackwell v. Bottling Co.*, 211 N. C., 729, 191 S. E., 887; *Tickle v. Hobgood*, 216 N. C., 221; *Evans v. Bottling Co.*, 216 N. C., 716. Repetition would serve no good purpose. The evidence was sufficient to be submitted to the jury and in the exceptive assignments of error we fail to find cause for disturbing the verdict.

No error.

STATE v. DOLLIE LEE HUDSON.

(Filed 9 October, 1940.)

1. Homicide § 25—Evidence held sufficient for jury on question of defendant's guilt of murder in the first degree.

The evidence tended to show that defendant was the tenant of the deceased, that they had a dispute in regard to the check for tobacco which they had sold, that defendant threatened to "kill a man on the way home," that the landlord drove defendant home, no one else being in the car, that when they drove into defendant's front yard defendant's voice was heard in angry tones, that defendant went into his house, procured a shotgun and shell and went back into the front yard, that a shot was heard immediately thereafter, that early the next morning the landlord was found in defendant's front yard dead from a gunshot wound, that on the body of the deceased landlord was found a little change only, although shortly before he drove defendant home he had the proceeds of the tobacco check in his pocket, with testimony of two witnesses as to confessions made by defendant that he had assaulted deceased and then shot him, *is held* sufficient, with other circumstantial evidence, to be submitted to the jury on the question of defendant's guilt of murder in the first degree, C. S., 4200, and defendant's motions for judgment as of nonsuit were properly denied. C. S., 4643.

2. Homicide § 20—

In this prosecution of defendant for murder, the evidence tended to show that there was a dispute between defendant and defendant's landlord in regard to the proceeds of tobacco sold by them. Testimony that the landlord copied the original tobacco slip and handed the copy to defendant, that defendant refused it and stated he wanted the original from the warehouse, *is held* competent as some evidence of motive, the weight of the evidence being for the jury.

3. Criminal Law § 81b—

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

4. Homicide § 18h—

Defendant excepted to testimony of a witness that defendant stated he was going to "kill a man on the way home." Other evidence disclosed that the threat was made soon after a dispute between defendant and his landlord, and that thereafter the landlord drove defendant to defendant's home and that early the next morning the landlord was found in defendant's front yard dead from a gunshot wound. *Held:* The threat was not too remote in point of time and the other evidence gave it sufficient individuation, and defendant's exception is overruled.

5. Criminal Law § 81c—

Defendant's exception to testimony of a witness for the State cannot be sustained when defendant himself testifies to the same effect.

6. Homicide § 17—

Where evidence is relevant and competent, the fact that it may also excite commiseration and sympathy for deceased in the minds of the jurors does not render it inadmissible, and an exception thereto cannot be sustained.

7. Homicide § 21: Indictment § 24—Evidence that defendant robbed his victim held competent as tending to show premeditation and deliberation.

The indictment charged that defendant, "with force and arms, did unlawfully, willfully and feloniously, with premeditation and deliberation and of his malice aforethought kill and murder" deceased. The indictment contained no charge of murder in the perpetration of, or attempt to perpetrate robbery. Defendant objected to certain circumstantial evidence tending to show that defendant robbed deceased, and moved to strike out all evidence tending to show robbery as a motive for the commission of the crime. *Held:* The indictment was sufficient to support a conviction of first degree murder, C. S., 4641, and the circumstantial evidence tending to show robbery as a motive for the commission of the crime was competent upon the question of premeditation and deliberation charged in the indictment, and defendant's exception to the admission of the evidence and to the refusal of his motion to strike it out cannot be sustained.

8. Homicide § 20: Criminal Law § 29a—

It is always competent to show the motive for the commission of a crime even though motive does not constitute an element of the offense charged.

9. Criminal Law § 78c—

Where a portion of the answer of a witness is not responsive or is improper, defendant waives his exception thereto by failing to move that the answer be stricken out.

10. Criminal Law § 33—

Defendant objected to the answer of a witness on the ground that it was not responsive to the solicitor's question and contained matter in the nature of a confession which might or might not have been voluntary. *Held:* Defendant's procedure to challenge testimony of a confession on the ground that it was not voluntary is upon the *voir dire* and the exception to the testimony cannot be sustained.

11. Homicide § 4c—

No fixed length of time is required for the mental processes of premeditation and deliberation constituting an element of the offense of murder in the first degree, it being sufficient if these mental processes occur prior to, and not simultaneously with the killing.

12. Criminal Law § 33—

The evidence in this case *is held* to disclose that the confessions testified to by the witnesses were made by defendant voluntarily and were not induced by hope or extorted by fear, and the testimony was properly admitted in evidence.

APPEAL by defendant from *Carr, J.*, and a jury, at April Term, 1940, of NORTHAMPTON. No error.

The defendant was charged with the murder of Hampton W. Elliott on 15 November, 1939.

Elliott and defendant went to Rocky Mount on 15 November, 1939, and sold some tobacco. The check for the tobacco was made to Elliott

and Hudson. The Planters' National Bank of Rocky Mount paid the check, which was endorsed Elliott and Hudson by H. W. Elliott. The defendant was a tenant of Elliott. Elliott was found dead about 4:00 o'clock in the morning of 16 November, in defendant's yard, about 35 or 40 feet from his front door. On the evening of the 15th, after selling the tobacco, Elliott went to his home, ate supper about 6:00 o'clock and went to a barber shop about a half mile away. At supper time, and before he went to the barber shop, he took no money out of his pocket.

J. Glenn Collier testified, in part: "I recall the evening of the night before Mr. Elliott was killed. He had been to the tobacco market in Rocky Mount that day, and Dollie Lee Hudson and Norman Bishop had gone with him. Mr. Elliott came to the barber shop when he got back that night. I don't know who came with him from his home, but he came in the barber shop. Mr. Elliott came in first, and Dollie Lee Hudson and Norman Bishop came in behind him. Q. Now, please state what you heard Dollie Lee Hudson say to Mr. Elliott while you were in there? A. Mr. Elliott was over there copying the tobacco sales slip from Fenner's Warehouse and handed the one he copied to Dollie Lee Hudson and Dollie Lee said he did not want that one, that he wanted the original that came from the warehouse, and Mr. Elliott said, 'I want to keep that in case I want to raise some tobacco next year.' Hudson started out the door. I saw Mr. Elliott with the piece of paper in his hand that I have here. I know Mr. Elliott's handwriting; he made the figures and did the writing on that paper. He laid the piece of paper on the stand for Hudson. When Mr. Elliott left the barber shop he went out the door with Dollie Lee Hudson and Norman Bishop. From the time he came to the barber shop and went out with those men Mr. Elliott did not make any payments to anybody of any sum of money. At the time he made out the copy of the tobacco sale he had the sale for the tobacco with him. . . . I have known Mr. Elliott a long time; have been in the barber shop with him for five years, and during that time saw him every day except Sunday. Q. If you know, will you tell his Honor and the jury where he carried his purse, his bill folder, where he kept his money, if you know? A. In his left hip pocket. . . . Mr. Elliott left the barber shop the night before around ten minutes to 7:00 o'clock. Mr. Elliott went out of the barber shop right behind the two Negroes. I don't know that Bishop was seated in the car when Mr. Elliott went out of the barber shop. I say they left the barber shop together. After 4:00 o'clock I did not see Mr. Elliott's body any more until they brought him home."

Juddy (Julius) Williams testified, in part: "I know Dollie Lee Hudson. I saw him the night that Mr. Hampton Elliott was killed. . . . Norman Bishop came in the store with Dollie Lee Hudson.

Hudson bought a drink and drunk it up, a Pepsi-Cola, and started like he was going to hit me, then started like he was going out the door, and said. Q. Tell his Honor and the jury what you heard Dollie Lee Hudson say when he was going out of the store after drinking the Pepsi-Cola in Mr. Asa Modlin's store. A. He said when he was going out of the door, and near about to the door, 'I am going to kill me a man on the way home or home one and get in the woods.' "

Frances Hudson testified, in part: "I am the sister of Dollie Lee Hudson. Last November I was living with my brother, Dollie Lee Hudson at one place and he was farming Mr. Elliott's land. I recall November 15th, the time Mr. Elliott and Dollie Lee carried some tobacco to Rocky Mount. As near as I can guess at it Mr. Elliott and Dollie got back to our home that night about 7:30 or 8:00 o'clock. I was in the house with Dollie Lee's wife and children; her oldest child is three years old. I know when the car drove up. No one drove up in the car but Mr. Hampton Elliott and Dollie. The door to the house was shut; I could not hear any conversation; I could hear the talking but could not hear what was being said. The car drove up not far from the house, about eleven steps. When the car came up to the door the engine stopped. I saw Dollie Lee Hudson that night. Q. Tell what you heard Dollie Lee Hudson say, what you saw him do, and everything you did see him do. A. When the car first drove up we did not go to the door. The motor stopped running. I heard Dollie Lee say before he got to the house, 'You said you were not going to give me a God damned cent.' When we went to the door he was walking fast coming in the house. When Dollie got to the house he went on in the house and went to the bureau and got his gun, a single barrel gun. I don't know who the gun belonged to but he had it there. The gun that is here looks like the same gun. His wife got hold of the gun and he slung her away. After he got the gun and slung her away he got the shell out of the short bureau drawer, the same bureau that he had gotten the gun from behind. When he was trying to get the shell I held the drawer, pushed it, and he pushed me back, took the shell and went on out. I don't know exactly how many shells were in the drawer, or how many shells he carried out. After he had the gun and shells he went back out the door. After that we ran out the back door and after we got out the back door we heard the gun shoot, and after the gun fired we come around the other side of the house and went to the road. When we came around the front Mr. Edmund Elliott's car was sitting on the side of the road. I saw Mr. Hampton Elliott; he was lying on the ground about eleven steps from the front door of my brother's house; he was lying beside his car. Mr. Elliott and his car were about the same distance from the house. Then Dollie's wife and I went on out to the road and left. . . . I

heard some talking but it did not sound like angry voices until I heard completely what Dollie said, then his voice sounded like he was angry or mad. After Dollie came in the house and got the gun and shell we left. As he went out the front door we went out the back."

E. Frank Outland testified, in part: "I am Chief of Police of the town of Rich Square. I have known Hampton Elliott ever since I was about six years old. I have seen him write a number of times in his brother's shop and am familiar with his handwriting. The handwriting on check dated November 15, 1939, for $81.90 is the handwriting of Hampton Elliott. . . . When we got to Hudson's house, we found Mr. Elliott lying face down and I turned him over. He was lying on his stomach with his face down. Mr. Nelson went to the body with me. I got one 50c piece, a dime and a penny out of one of his pockets, the right front pocket if I remember correctly. Nothing else was taken from his person by anyone when we were there. I examined the wounds of Mr. Elliott. He was shot in the neck on the left side. The shotgun made a hole about the size of a silver dollar in his neck. His face was bruised all over, his nose was broken, eyes were bruised. There was one little red place on his chin about the size of a dime. I do not now recall any other scars about his face. . . . We then came back to Rich Square and telephoned to Williamston and Raleigh and had it broadcast. In consequence of the broadcast I went to Robersonville first, then went to Petersburg that night getting there between 8:00 and 9:00 o'clock. I think Petersburg is a little over sixty miles from Rich Square. That was the night of November 16th. I knew Mr. Elliott's car and found it in the storage room of a garage in Petersburg, but I do not know the name of the place. I knew the license number of his car, 'North Carolina 1939, 525-842.' I examined the car and found some drops of blood on both sides of the door on the outside and on the inside on the upholstering. The car had one door on either side, and found blood on the outside of both doors. . . . I have seen Hudson since I found the car in Petersburg with bloodstains on it. I saw him in Raleigh and had some conversation with him. I did not threaten him in any manner or offer him any reward or hope of reward. Hudson made the statement to me that he shot Mr. Elliott, and after he shot him he went on back in the house and put the gun up. He told me he beat him before he shot him, and he was lying down in front of the car when he went in the house to get the gun; that he beat him from one side of the car to the other and in front of the car lights, then went in the house and got the gun and shot him. He said he did not do anything to Mr. Elliott after he shot him. . . . Q. Mr. Outland, you testified as to the conversation you had with Dollie Lee Hudson—what statement, if any, did he make to you in regard to what he did with the car when he took it? A.

He said after he shot him he went in the house, changed clothes and left, took the car and went to Petersburg; said he parked the car on a log camp or sawmill lot, and locked it and left the keys on the running-board. . . . It was about two weeks after then, around the first of December, that Dollie Lee Hudson told me in Raleigh about shooting Mr. Elliott and driving his car away. He said he left the car in Petersburg on a sawmill lot back off where they kept logs. We did not find Hudson in Petersburg."

Dr. J. C. Vaughan testified, in part: "I am a practicing physician in Rich Square; have been practicing medicine for 25 years. (Court holds Dr. Vaughan is a medical expert.) I knew Hampton Elliott. I examined the head, face and neck of Mr. Elliott after he was brought to the undertaker's establishment in the morning between 8:00 and 9:00 o'clock. He had a small laceration across the bridge of his nose, nose fractured and broken in, and bruises about his forehead and between the eyes. He had a wound in the side of his neck on the left that struck the corner of his lower jaw, tore the skin away slightly and penetrated the whole of his neck and shot it out. I have an opinion satisfactory to myself that Mr. Elliott's death was caused by the shotgun wound in his neck."

It was in evidence by an expert, from examination, that it was human blood on the car of Elliott found in Petersburg, Va.

Edward Elliott testified, in part: "I left town on Wednesday night around 7:00 o'clock and went down to Hudson's house which is a little better than 2 or 2½ miles from town. Before that I had seen the car which Mr. Elliott drove; he had driven out to the field where we were picking peas. The old car had been sitting in Hudson's yard. I did not notice any other car there that night. When I drove up beside the road and blew my horn, one of the women, his sister or wife, answered me. In consequence of what she said to me and being called, Dollie Lee Hudson came from towards the house to my car. Q. What did he say to you? A. He said, 'You came after the package you sent me for,' and I said 'Yes.' He said, 'I have the stuff you sent after here' and he had it with him when he came to the car. At that time he delivered to me three pints of whiskey, A.B.C. store whiskey, one pint for me and the other two pints for two other people. . . . I did not hear the sound of any shotgun at the time. The only conversation I had with Dollie Hudson he told me he had the stuff I sent after. Q. What did he say? A. He said he looked for me in passing to give it to me but did not see me, that Mr. Elliott said he would bring him home but he stopped to eat supper and he drove Mr. Elliott's car home and had to carry it back. At that time the car was standing in his yard. I don't know where he got the packages from when he came to the car with them. I did not stay there over three or four minutes, left and drove back toward Rich Square. I heard no shotgun fire."

Sheriff J. C. Stephenson testified, in part: "Nobody offered him any reward or threatened him in any way, or made him any inducement to make any statement. Mr. Tyler told Dollie Lee he better keep his mouth shut and pray. Dollie Lee made the statement in Mr. Outland's presence that he beat up Mr. Elliott, ran in the house and got the gun and came out and shot him, and never touched him after he shot him."

Defendant testified, in part: "This happened to me on November 15, 1939, and I was not of myself and I do not know whether I killed Mr. Elliott or not. When I came to myself I was in the house and I heard Mr. Edward Elliott call out and I ran out the back door scared to death, and do not know anything about the shooting or anything. When Mr. Edward Elliott came up I went out to the road where he was, and he asked did I bring his stuff and I told him I did. I brought one package for C. A. Vaughan, one for Mr. Frank Rome and one for him and I gave them to him and he went on back to town. . . . I went to the bank with Mr. Elliott; went down the street the bank was on and went to the bank and he went in. I went in the bank with him but he has never showed me the bill or check or anything. When he paid me for the tobacco grading he paid me $10.35, if I am not mistaken. He gave me the $10.35 in the bank after the tobacco was sold. . . . I asked Mr. Elliott how much the grading come to and he said $10.35 to the best of my remembrance and he gave me $10.35 and said, 'Well, you are out of debt.' I asked him about letting me have some money to get my little boy some underwear. He ran his hand in his pocket and gave me $5.00 out of his pocketbook. . . . Mr. Elliott gave me a little, small piece of paper and handed it to me and said, 'Here is your memorandum' and I did not take it. I said, 'That is not fair, you had the check and have not let me see the bill,' and he said, 'I want to keep it in case I want to raise some tobacco next year.' I said, 'You could let me have it and let my wife and sister see it, and know whether we are in debt or out of debt,' and he said, 'You are out of debt.' . . . He was still worried with me when we got to my house and Mr. Elliott said, 'Get out of this car and go and get my damned potato baskets.' I went to the house to get them and he came with his hand like this and it was dark. I ran around the house three times and told him I did not want any trouble and ran around the house then, and the next time he came around the house and met me, and I was so worried and so disgusted I do not know how it happened. I never did get to the baskets. That is the way it happened. I do not remember leaving my home that night in Mr. Elliott's car. It was 25 or 30 minutes before my right mind came to me a little bit enough to know what had happened. The baskets were in the house they have been calling the car shelter. I disremember how many baskets there were there, but seven, eight or more. I never

did get the baskets; he was chasing behind me and I did not even get my hands on the baskets. . . . In a few minutes Mr. Edward Elliott came up and called, and my wife and sister don't know a bit about it, only I ran into the house and burst the door scared to death, and do not remember getting the gun any more than you do. . . . I was scared and thought about what had happened, and was afraid they would catch me that night, and mob me up, and to the best of my knowledge I pulled out from there and went to Petersburg. . . . I surrendered myself to the officers in Newark, N. J. . . . While I was in Raleigh Mr. Tyler, Sheriff Stephenson and Mr. Outland came to see me. Mr. Outland did not say a thing to me, only asked what did I do with Mr. Elliott's money, and I did not get no money off of Mr. Elliott. . . . I had $15.00 when I left on Mr. Elliott's car. He gave me $5.00, and I had had $5.00 for two or three weeks that I made working for Mr. Rome, was keeping it to get some shoes when I went to sell the tobacco. . . . This gun is not my gun; it belongs to a Futrell boy but I have had it a long time. It is the gun I had in my house on the night Mr. Elliott was killed. I do not say I did not shoot Mr. Elliott; I do not know how it happened. The gun I had in my house that night had some shot in the stock. I have told as near as I can everything that happened from the time we got to Rocky Mount that day. After Norman Bishop got out of the car at his home is when Mr. Elliott and I got to fussing. Then my mind went completely blank and I do not know how it happened. I remember Mr. Elliott coming on me with his hand drawn back; I don't know what he had in his hand at the time. I did not say in the Halifax County jail in the presence of Sheriff Riddick and others that Mr. Hampton Elliott had his hand up and was coming toward me. I remember when Mr. Elliott was advancing on me and running around the house three times. To the best of my knowledge everything went blank to me then. I am not sure I fired the gun or got the shell. I don't remember that Mr. Elliott was lying on the ground when I delivered the three pints of liquor to Mr. Edward Elliott. . . . I don't know a bit more about what happened than a monkey. I have told to the best of my knowledge all I know. I am pleading for the mercy of the court if they can give it. . . . I have tried to tell all about it but I am not sure what happened. I don't remember beating him up, shooting him or anything; don't remember getting his automobile. I drove Mr. Elliott's car to Petersburg. . . . I am not sure what I said to Mr. Edward Elliott. I know I got the whiskey for him in Rocky Mount. I ain't for sure but I think I delivered it to Mr. Edward Elliott. . . . I cannot tell how human blood was on the car. I am not for sure that I took my fist and broke his nose, beat his face and threw him out of the car. Somebody else could

have put the blood on the car, in Petersburg maybe. . . . I am not sure about nothing I done to Mr. Elliott and whether I hit him after I shot him or not. I don't know whether I beat him first and then shot him. I don't know how long it was before I come to my right senses, or whether I hit him or not. I don't know why I don't remember making the statements my sister says I made when I was going to the house. I don't remember going to the house."

Cora Hudson, wife of defendant, testified for defendant, in part: "I was at home that day when my husband came from Rocky Mount. I was in the house and Dollie Lee Hudson came in the house. All I know he came in the house and got the gun, but what he done I don't know because I run out."

The jury returned a verdict: "Upon their oath, say that the said Dollie Lee Hudson is guilty of the felony and murder as charged in the bill of indictment, in the first degree."

The court below rendered judgment on the verdict: "In the manner provided by law, cause the said Dollie Lee Hudson to inhale lethal gas of sufficient quantity to cause death, and the administration of such lethal gas must be continued until the said Dollie Lee Hudson is dead—and may God have mercy upon his soul."

From the judgment pronounced on the verdict of guilty of murder in the first degree, 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.

E. N. Riddle for defendant.

CLARKSON, J. The law in reference to homicide is as follows: N. C. Code, 1939 (Michie), sec. 4200: "A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punishable with death. All other kinds of murder shall be deemed murder in the second degree and shall be punished with imprisonment of not less than two nor more than thirty years in the State prison."

Sec. 4614 is as follows: "In indictments for murder and manslaughter, it is not necessary to allege matter not required to be proved on the trial; but in the body of the indictment, after naming the person accused, and the county of his residence, the date of the offense, the averment 'with force and arms,' and the county of the alleged commission of the offense,

as is now usual, it is sufficient in describing murder to allege that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder (naming the person killed), and concluding as is now required by law; and it is sufficient in describing manslaughter to allege that the accused feloniously and willfully did kill and slay (naming the person killed), and concluding as aforesaid; and any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for murder or manslaughter as the case may be."

The bill of indictment is as follows: "The Jurors for the State upon their oath present, That Dollie Lee Hudson, late of the County of Northampton, on the 15th day of November, in the year of our Lord one thousand nine hundred and thirty-nine, with force and arms, at and in the County aforesaid, did unlawfully, willfully and feloniously, with premeditation and deliberation and of his malice aforethought kill and murder one Hampton W. Elliott, against the form of the statute in such case made and provided and against the peace and dignity of the State."

At the close of the State's evidence and at the close of all the evidence, the defendant in the court below made motions for judgment of nonsuit. N. C. Code, 1939 (Michie), sec. 4643. The court below overruled these motions, and in this we can see no error.

The evidence succinctly: The dead man, Hampton W. Elliott, was the landlord and defendant the tenant. Their tobacco was sold in Rocky Mount for $81.90 and check made to both of them, but cashed by Elliott. There was evidence to the effect that there was a dispute between them. The defendant testified, in part: "Mr. Elliott gave me a little, small piece of paper and handed it to me and said, 'There is your memorandum' and I did not take it. I said, 'That is not fair, you had the check and have not let me see the bill,' and he said, 'I want to keep it in case I want to raise some tobacco next year.' I said, 'You could let me have it and let my wife and sister see it, and know whether we are in debt or out of debt,' and he said, 'You are out of debt.' "

It was further in evidence: "He (defendant) said when he was going out of the door, and near about to the door, 'I am going to kill me a man on the way home or home one and get in the woods.' "

The chief of police of Rich Square testified, in part: "I did not threaten him in any manner or offer him any reward or hope of reward. . . . He said after he shot him he went in the house, changed clothes and left, took the car and went to Petersburg; said he parked the car on a log camp or sawmill lot, and locked it and left the keys on the running-board."

The sheriff testified, in part: "Nobody offered him any reward or threatened him in any way, or made him any inducement to make any

statement. Mr. Tyler told Dollie Lee he better keep his mouth shut and pray. Dollie Lee made the statement in Mr. Outland's presence that he beat up Mr. Elliott, ran in the house and got the gun and came out and shot him, and never touched him after he shot him."

The cause of Elliott's death was a "shotgun wound in his neck." There was evidence that Elliott and defendant drove in defendant's yard in the car and when defendant got to the house he went in the house and went to the bureau and got his gun, a single barrel gun. Defendant got some shells and went out of the door and shortly afterwards a gun shot was heard and Elliott was seen lying on the ground. Before defendant went into the house to get the gun "his voice sounded like he was angry or mad." In detail, the evidence, both direct and circumstantial, pointed to defendant—that he shot Elliott willfully, with premeditation and deliberation. Defendant testified: "I ran around the house three times and told him I did not want any trouble and ran around the house then, and the next time he came around the house and met me, and I was so worried and so disgusted. I do not know how it happened. I never did get to the baskets. That is the way it happened. . . . I don't know a bit more about what happened then than a monkey. I have told to the best of my knowledge all I know. I am pleading for the mercy of the court if they can give it."

The defendant excepted and assigned error to the following evidence: (1) "Q. Now, please state what you heard Dollie Lee Hudson say to Mr. Elliott while you were in there? A. Mr. Elliott was over there copying the tobacco sales slip from Fenner's Warehouse and handed the one he copied to Dollie Lee Hudson and Dollie Lee said he did not want that one, that he wanted the original that came from the warehouse, and Mr. Elliott said, 'I want to keep that in case I want to raise some tobacco next year." Hudson started out the door. (2) Q. If you know, will you tell his Honor and the jury where he carried his purse, his bill folder, where he kept his money, if you know? A. In his left hip pocket. (3) Q. Tell his Honor and the jury what he heard Dollie Lee Hudson say when he was going out of the store after drinking the Pepsi-Cola in Mrs. Asa Modlin's store. A. He said when he was going out of the door, and near about to the door, 'I am going to kill me a man on the way home or home one and get in the woods.' (4) (Testimony of Edward Elliott.) Q. What did he say to you? A. He said, 'You come after the package you sent for' and I said 'Yes.' He said, 'I have the stuff you sent after here' and he had it with him when he came to the car. At that time he delivered to me three pints of whiskey, A.B.C. store whiskey, one pint for me and the other two pints for two other people. . . . When I went to Dollie Hudson's house I parked my car beside the road, about 35 or 40 yards from the house to the road

where my car was parked. I did not hear the sound of any shotgun at the time. The only conversation I had with Dollie Hudson he told me he had the stuff I sent after. Q. What did he say? A. He said he looked for me in passing to give it to me but did not see anything of me, that Mr. Elliott said he would bring him home but he stopped to eat supper and he drove Mr. Elliott's car home and had to carry it back. At that time a car was standing in his yard. I don't know where he got the packages from when he came to the car with them. I did not stay there over three or four minutes, left and drove back toward Rich Square. I heard no shotgun fire."

As to the *first* contention: It tended to show motive and was some evidence, the weight was for the jury. Then again, the defendant testified to the same effect. In *Shelton v. R. R.,* 193 N. C., 670, at p. 674, we find: "It is thoroughly established in this State that if incompetent evidence is admitted over objection, but the same evidence has theretofore or thereafter been given in other parts of the examination without objection, the benefit of the exception is ordinarily lost." *Tillett v. R. R.,* 166 N. C., 515; *Beaver v. Fetter,* 176 N. C., 334; *Marshall v. Telephone Co.,* 181 N. C., 410.

As to the *second* contention: The charge of the court below is not in the record and the presumption is that the court below charged the law applicable to the facts. The bill of indictment alleges "Unlawfully, willfully, and feloniously, with premeditation and deliberation and of his malice aforethought." Under this bill it was competent on premeditation and deliberation to show that the motive was robbery, and there is circumstantial evidence to that effect.

As to the *third* contention: This regarded the alleged threat. It was made after the dispute over the tobacco sales. It was not too remote or indefinite under the facts in this case. Its weight was for the jury.

In *S. v. Bowser,* 214 N. C., 249 (253) (quoting from *S. v. Shouse,* 166 N. C., 306), it is said: "General threats to kill not shown to have any reference to deceased are not admissible in evidence, but a threat to kill or injure someone not definitely designated are admissible in evidence where other facts adduced give individuation to it," citing *S. v. Payne,* 213 N. C., 719. *S. v. Johnson,* 176 N. C., 722; *S. v. Wishon,* 198 N. C., 762; *S. v. Hawkins,* 214 N. C., 326.

As to the *fourth* contention: The exception to the testimony of Edward Elliott cannot be sustained. Testimony to the same effect appears in other parts of the record without objection from the defendant's own testimony.

Defendant contended that the before mentioned evidence "Was irrelevant as set out in all the above exceptions and the cause of the defendant was prejudiced by the admissions, in that it tended to excite the com-

miseration of the jury for the deceased and tended to lead them to act on sentiment and sympathy instead of proof. *S. v. Arnold,* 35 N. C., 184."

As stated, we think none of the contentions can be sustained. The rule stated in 1 Wharton, Criminal Evidence (11th Ed.), sec. 230, at p. 274, is as follows: "Facts tending to create sympathy or prejudice. Evidence which is offered solely for the purpose of creating sympathy for the accused, or which is offered for the sole purpose of improperly appealing to the prejudice of the jury against the accused, should be excluded. However, evidence which is otherwise competent and material should not be excluded merely because it may have a tendency to cause an influence beyond the strict limits for which it is admissible."

It should be noted that in the only case cited by the defendant in support of his position, the testimony was held to be competent and not calculated to prejudice the minds of the jury although the court did correctly state by way of *dicta* that evidence really irrelevant in point of law may have such a tendency, and that if it did, to admit it would be erroneous. *S. v. Arnold,* 35 N. C., 184.

The defendant further contends: "It was error to have denied the motion of the defendant that all evidence tending to show robbery as a motive be stricken from the record. The indictment alleges that the defendant, 'with force and arms, did unlawfully, willfully and feloniously, with premeditation and deliberation and of his malice aforethought kill and murder one Hampton Elliott.' By inserting in the bill of indictment the words 'premeditation and deliberation,' murder in the perpetration of a robbery was excluded therefrom. By omitting the words, 'With premeditation and deliberation,' from the bill of indictment, the defendant would have been put on notice that evidence tending to show that the murder committed in the perpetration of a robbery or any other felony would have been admissible, but by inserting the elements of premeditation and deliberation in the bill of indictment, the State forfeited its right to show anything but premeditated and deliberate murder. The bill of indictment itself dismissed from the mind of the defendant all idea of a defense against the robbery element." This contention cannot be sustained.

The bill of indictment alleged "Unlawfully, willfully and feloniously, with premeditation and deliberation and of his malice aforethought." This charge was sufficient, under the statute heretofore cited, if the facts justified it, to convict the defendant of first degree murder. The jury convicted him "Of the felony and murder as charged in the bill of indictment in the first degree." To be sure the bill did not charge that the murder was "committed in the perpetration or attempt to perpetrate . . . robbery . . . shall be deemed murder in the first degree and

shall be punishable with death." The circumstantial evidence as to killing to rob was some evidence on the charge of premeditation and deliberation. The presumption, the charge not being in the record, is that the law on all the aspects of the evidence, was properly presented to the jury in the charge. The evidence relating to robbery was relevant for the purpose of establishing a motive for the killing. It is always competent to show the motive for the commission of a crime, although this does not constitute an element of the crime. *S. v. Grainger,* 157 N. C., 628; *S. v. Wilkins,* 158 N. C., 603; *S. v. Allen,* 197 N. C., 684. Thus, evidence of robbery would be admissible as part of the chain of evidence establishing murder in the first degree with premeditation and deliberation.

The defendant contends, lastly, that there was error in the following: "Q. Mr. Outland, you testified as to the conversation you had with Dollie Lee Hudson—what statement, if any, did he make to you in regard to what he did with the car when he took it? A. He said after he shot him he went in the house, changed clothes and left, took the car and went to Petersburg; said he parked the car on a log camp or sawmill lot, and locked it and left the keys on the running-board."

Defendant's contention is that the answer was erroneously admitted in that the following part was not in response to the solicitor's question and was in the nature of a confession which might or might not have been voluntary: "He said after he shot him he went in the house, changed clothes and left." The only objection, it will be noted, was made *before* the answer was given. No motion to strike the answer was made. The exception is untenable, in the first place, because the objection that the answer was unresponsive or improper in other respects was waived by failure to move that it be stricken.

In *Gilland v. Stone Co.,* 189 N. C., 783, at p. 786, the following statement appears: "If defendant deemed the statement of the witness, which was not in response to the question directed to him by counsel, but voluntarily made, incompetent and prejudicial, it should have directed its objection to the court, accompanied by a motion to strike the objectionable statement from the record, and by a request for an instruction, if desired, to the jury that the statement had been stricken from the record and should not be considered as evidence." *Luttrell v. Hardin,* 193 N. C., 266 (269); *S. v. Gooding,* 196 N. C., 710 (711). We think the evidence competent. If not voluntary, defendant should have shown it by evidence on the *voir dire.*

In *S. v. Hammonds,* 216 N. C., 67 (75), it is written: "In *S. v. Steele,* 190 N. C., 506 (511-12), *Varser, J.,* for the Court said: 'The requirement, in first degree murder, in order to constitute "deliberation and premeditation" does not require any fixed time beforehand. These

mental processes must be prior to the killing, not simultaneous, "but a moment of thought may be sufficient to form a fixed design to kill,"' " citing numerous authorities to the same effect. The record discloses two voluntary confessions made by defendant that he killed with premeditation and deliberation.

In *S. v. Grier,* 203 N. C., 586 (589), it is said: "But every confession must be voluntary. The test is whether it was made under circumstances that would reasonably lead the person charged to believe that it would be better to confess himself guilty of a crime he had not committed. It is expressed in various ways. The confession is inadmissible if 'the defendant was influenced by any threat or promise,' or if it is 'induced by hope or extorted by fear,' or if 'fear is excited by a direct charge or hope is suggested by assurance,' or if extorted by 'threats, promises, or any undue influence,' or if 'wrung from the mind by the flattery of hope or the torture of despair,' or by 'actual force' or the 'hope of escape,' or the statement, 'It will be lighter on you.' *S. v. Roberts, supra* (12 N. C., 259); *S. v. Lowhorne, supra* (66 N. C., 638); *S. v. Howard, supra* (92 N. C., 772); *S. v. Whitfield,* 70 N. C., 356; *S. v. Myers,* 202 N. C., 351; *S. v. Livingston, ibid.,* 809." The confession in the present case was not characterized by any of these or similar circumstances, therefore competent.

The defendant in most particulars admitted the material evidence of the State, but as to the actual killing said, "I don't know a bit more what happened than a monkey." After Cain killed Abel, it is written: "And the Lord said unto Cain, 'Where is Abel, thy brother?' And he said, 'I know not, Am I my brother's keeper?' " (Gen. 4:9.)

We can find no prejudicial or reversible error on the record.

No error.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION, v. CAROLINA SCENIC COACH COMPANY.

(Filed 9 October, 1940.)

1. Utilities Commission § 4—

Petitioner has the right to appeal to the Superior Court from the denial of its petition for the removal from its franchise of a restriction prohibiting it from transporting passengers between two cities along its route in purely local traffic between the said cities. C. S., 1097.

2. Same—Petitioner's exceptions held to raise issues of fact, and appeal was properly transferred to civil issue docket for trial by jury.

Petitioner filed petition requesting the removal from its franchise of a restriction prohibiting it from transporting passengers between two cities

along its route in purely local traffic between the said cities. The Utilities Commissioner denied the petition upon his findings, among others, that the present service between the two cities furnished by another carrier is ample, that there was no necessity for permitting petitioner to furnish service between the two cities, and that the removal of the restriction was not demanded by the public interest. *Held:* The exceptions raise issues of fact to be determined by a jury, a high degree of formality in separating findings and conclusions of fact from conclusions of law not being required, and the appeal was properly transferred to the civil issue docket and tried before a jury. Michie's Code, 1097, 1098.

3. Same—

On appeal from the denial of a petition to remove certain restrictions from petitioner's franchise, the point at issue is the removal of such restrictions, upon the attendant facts; and exceptions to the commissioner's findings upon which his order is predicated raise issues of fact for the determination of the jury.

4. Utilities Commission § 1—

The Utilities Commission is a State administrative agency of original and final jurisdiction, and its orders require no confirmation by any court to be effective.

5. Utilities Commission § 4—

Appeals from the Utilities Commissioner are analogous to appeals from a justice of the peace rather than appeals from a referee, and since the trial in the Superior Court is *de novo* upon issues of fact raised by the exceptions, the Superior Court properly refuses to pass upon appellant's exceptions to the findings of fact *seriatim*.

6. Same—

The provision of statute that the decision of the Utilities Commissioner shall be deemed *prima facie* just and reasonable, Michie's Code, sec. 1098, merely raises a presumption of law, and places the burden of going forward with the proof upon the party appealing from the decision, but even if the statute should be construed to raise a presumption of fact, an instruction that the findings and decision of the commissioner were *prima facie* just and reasonable gives appellee the benefit of a presumption of fact when the evidence fully apprises the jury of the substance and purport of the order.

7. Same—Upon appeal from the denial of a petition the question for decision is whether petitioner is entitled to the relief sought.

Petitioner filed petition requesting the removal from its franchise of a restriction prohibiting it from transporting passengers between two cities along its route in purely local traffic between said cities. Upon appeal to the Superior Court from the denial of the petition, the carrier intervening and opposing the granting of the petition, objected to the refusal of the court to submit an issue as to whether the public interest demanded additional transportation facilities between the two cities and objected to the submission of the issue as to whether the public convenience and necessity required the removal of the restriction from the petitioner's franchise, contending that the sole question within the Superior Court's jurisdiction was whether the public convenience and necessity required

additional service, and that upon an affirmative finding to this issue in the Superior Court the matter should be remanded to the commissioner in order that he might select the person or corporation to which he would award the franchise for such additional service. *Held:* The question for decision in the Superior Court upon appeal is whether petitioner should be given the relief prayed and not whether the commissioner should be sustained in his ruling, and the Superior Court has jurisdiction to determine the matter and grant the relief prayed for upon an affirmative finding by the jury upon the issue submitted.

8. Courts § 1—

The Superior Court is a court of final jurisdiction and has power to completely determine a controversy properly before it, and its judgment is final as to all matters of fact established in accordance with procedure and is subject to appeal and review only on matters of law. Const. of N. C., Art. IV, sec. 12; C. S., 1439, 639.

9. Constitutional Law § 4d—

The distribution and allotment of the powers of government to existing agencies or those created by statute is the function of the legislative branch of the Government, and the courts have no power to interfere therewith as long as the General Assembly acts within constitutional limitations.

STACY, C. J., dissenting.

BARNHILL and WINBORNE, JJ., concur in dissent.

APPEAL by Atlantic Greyhound Corporation from *Armstrong, J.*, at April-May Term, 1940, of HENDERSON. No error.

This proceeding originated before the Commissioner of Public Utilities by petition of the plaintiff for a removal of certain restrictions provided in its franchise for operating a passenger motor vehicle between points south of the North Carolina State Line and Asheville, North Carolina, within said State.

The franchise referred to was obtained 10 July, 1933, for the operation of motor vehicles from the South Carolina Line south of Hendersonville, through Hendersonville *via* Mills River Section, to Asheville, North Carolina. In this franchise the petitioner was prohibited from taking on passengers in Hendersonville destined to Asheville, and from taking on passengers in Asheville destined to Hendersonville.

The petition sets up that the population, respectively, of Hendersonville and Asheville, had greatly increased since the granting of the franchise; that both cities were popular resort cities in a mountainous portion of the State much resorted to for its scenic beauty; and that during the summer months the population of both cities was vastly increased.

It was further alleged that the schedule adopted and followed by the only other franchise carrier operating between these cities did not afford sufficient facilities for passengers either way between the city of Hender-

sonville and the city of Asheville; that a large part of the population was denied facilities of transportation between the two points, according to any schedule to which they might conform without great disadvantage and inconvenience to themselves. The petition further pointed out that generally the traveling public has become accustomed to more immediate and better transportation facilities, which resulted in those thus denied them raising a clamor, and producing a strong pressure to be taken on petitioner's cars, which petitioner with difficulty resisted.

The petition pointed out that there was a great necessity for improvement in such conditions, which might be easily met by the facilities at the command of the petitioner, but which petitioner was not allowed to furnish because of the restrictions imposed upon it in its franchise. Petitioner prayed that these restrictions be removed and that it be permitted to take on passengers at the designated points, going to either city.

The matter came to a hearing before the Honorable Stanley Winborne, Utilities Commissioner, in the city of Raleigh, on 31 August, 1938. The record discloses that at that time counsel appeared for the petitioner, Carolina Scenic Coach Company, and also for "the protestant," Atlantic Greyhound Corporation. We assume that the Atlantic Greyhound Corporation, operating motor vehicles between the cities mentioned, had been permitted to intervene and to protest the granting of the relief prayed for by the petitioner.

At this hearing the Commissioner found certain facts, amongst them that the schedules maintained by the Atlantic Greyhound Corporation afforded sufficient facilities for the traveling public over the route designated, and that no further service was needed; and that if any further service was needed the Atlantic Greyhound Corporation was ready, willing, and able to provide the service. Upon what evidence the latter finding was made does not appear in the record.

The Commissioner denied the prayer of the petitioner, and the petitioner appealed to the Superior Court, setting up certain exceptions both to the order of the Commissioner and to the findings of fact upon which it was predicated, and to the conclusions of law reached by the Commissioner, amongst them that the removal of the restriction was not in the public interest. These were overruled.

Following the statute, the Commissioner made up the appeal, or report, and forwarded the same to the Superior Court of Henderson County.

After the matter had been docketed in the Superior Court, the protestant, Atlantic Greyhound Corporation, claiming to do so as a result of notice duly and properly given it by the Utilities Commission, appeared and filed a written motion to have the appeal dismissed, upon several grounds: First, because the Utilities Commission had no authority to

entertain the petition, or enter an order removing the restriction; and, second, because "no appeal lies to the Superior Court from an order denying the prayer of the petitioner." This motion was allowed by Judge Rousseau at the May-June Term, 1939, of Henderson Superior Court, to which the appeal had been certified, in an order dismissing the appeal, and the petitioner appealed to the Supreme Court. Upon the hearing in the Supreme Court, the judgment of Rousseau, J., was reversed. The case is reported as *Utilities Commission v. Coach Co.*, 216 N. C., 325.

Before the introduction of evidence at the trial with which the present appeal is concerned, the Utilities Commission and the Atlantic Greyhound Corporation filed a written motion "that the appeal be heard by the presiding judge in chambers, under the provisions of section 1097, C. S., for that the petitioner has not excepted to any findings of fact in the order of the Utilities Commissioner of the State of North Carolina, from which the petitioner appealed." This motion was denied and both the Utilities Commission and the Atlantic Greyhound Corporation excepted.

The trial was *de novo* and much evidence was introduced regarding the necessity for the service contended for by the petitioner, as bearing upon the propriety, reasonableness, and necessity of removing the restrictions placed upon the petitioner, which prohibited it from taking on and carrying passengers from Hendersonville to Asheville and from Asheville to Hendersonville, points in its route, covered by a schedule represented as convenient and necessary to meet the reasonable demands of passenger traffic and travel between these points. There was evidence *contra* on the part of the protestant.

The Utilities Commission and the protestant, Atlantic Greyhound Corporation, tendered the following issue: "Does public convenience and necessity require additional intrastate service by bus between Hendersonville and that part of Asheville east of the French Broad River? Answer: ....." The court refused to submit this issue and the Utilities Commission and the Atlantic Greyhound Corporation excepted.

The court submitted the following issue: "Does public convenience and necessity require additional intrastate service by bus between Hendersonville and Asheville by the removal of the restrictions in the petitioner, Carolina Scenic Coach Company's franchise, as alleged in the petition? Answer ....." Both the Utilities Commission and the Atlantic Greyhound Corporation objected and excepted.

The jury answered the issue submitted by the court "Yes," and, thereupon, judgment was entered ordering that the restrictions placed upon petitioner's franchise be removed, and that it be permitted to accept passengers at Hendersonville and at Asheville and transport them

between these cities. From this judgment the Utilities Commission and the Atlantic Greyhound Corporation appealed. The Utilities Commission, however, did not perfect its appeal and is not a party here.

There were numerous exceptions on the part of the Utilities Commission and the protestant to the instructions given to the jury. They are not reproduced here in detail, because their discussion is not essential to the decision.

In addition to the exceptions noted, the trial judge was requested by the Utilities Commission and the Atlantic Greyhound Corporation to review the exceptions taken to the findings and conclusions of the Utilities Commissioner and pass upon them *seriatim,* which the court refused to do. This resulted in numerous exceptions by the Utilities Commission and the Atlantic Greyhound Corporation, alike in purport, and addressed to this phase of the case.

I. M. Bailey, H. G. Hudson, and L. B. Prince for Atlantic Greyhound Corporation, appellant.

M. M. Redden, J. W. Pless, Sr., and C. D. Weeks for Carolina Scenic Coach Company, appellee.

SEAWELL, J. As appears from the foregoing statement, this case came here at the Fall Term, 1939, upon an appeal from an order dismissing the plaintiff's appeal to the Superior Court, upon the contention by the Utilities Commission and the Atlantic Greyhound Corporation that no appeal lay from the order of the Utilities Commissioner. The court was of the contrary opinion, holding that such an appeal was proper under the express wording of the statute, cited by appellant in the case at bar—C. S., 1097; Michie's 1935 Code: "From all decisions or determinations made by the Utilities Commission, any party affected thereby shall be entitled to appeal." Also by virtue of chapter 134, Public Laws of 1933, section 12, providing that the Utilities Commissioner and his Associate Commissioners "shall hear and determine such matter, thing, or controversy in dispute, pass upon and determine the issues of fact raised thereon, and the questions of law involved therein, and make and enter their findings and conclusions thereon as the judgment of the said Utilities Commissioner of North Carolina. *From the decision of the said Utilities Commissioner, or the said Utilities Commission, any party to said proceeding may appeal to the Superior Court at term, as designated in and under the procedure required by sections 1097, 1098, 1099, 1100, 1101, and 1102, Consolidated Statutes,*" etc.

The principal questions raised here may be summarized: The appellant no longer questions the right of appeal, but contends that the appeal in the instant case is upon matters of law altogether, and should have

been decided by the judge without intervention of a jury; that it was the duty of the judge to pass upon all of petitioner's exceptions separately, and rule upon each of them, as in the practice relating to the reports of referees; that if the matter was triable at all before the jury, the sole question to be determined by the jury was whether or not convenience and necessity required the additional public service which petitioner had pointed out, and that if the affirmative was made to appear by the verdict of the jury, the whole matter should be returned to the jurisdiction of the Utilities Commissioner for him to award the franchise for such service to such person or corporation as he might deem best. Section 1098, Michie's Code.

We do not think the contention of the appellant that no question or issue of fact was raised by the petitioner's exceptions to the findings and conclusions, and to the order of the Utilities Commissioner, can be sustained. While it may be true that the exceptions confuse findings and conclusions of fact with conclusions of law, the findings and conclusions of the Utilities Commissioner are also informal. Petitioner seems to have made a fairly good pattern on the target presented to it. Indeed, in common practice it is often difficult to separate conclusions of fact from conclusions of law. The statute, however, does not require any high degree of formality in this respect, and it is not the practice of this Court to allow mere form to defeat substantial justice, or to disregard pertinent matter for want of proper labeling.

A fair analysis and comparison of the Commissioner's findings and petitioner's exceptions does show that the Commissioner found that the present service rendered by the Atlantic Greyhound Corporation is ample, and that there was no necessity for the service pointed out in the petition, and that the removal of the restrictions from petitioner's franchise was not demanded by the public interest. (We omit matters of inducement and argument leading up to the decision.) The exceptions are sufficient to challenge these findings and, as required by the statute, petitioner directly excepted to the order.

We are not inadvertent to the argument that the reasonableness of the Commissioner's order is the real point at issue, and that this should be regarded and determined as a question of law. The question of reasonableness, in its relation to the relief demanded by petitioner, depends upon the factual situation developed in the *de novo* trial in the Superior Court, and must be independently considered.

In view of the broad language of the statute—sections 1097-1098, Michie's Code—we are unable, on principle, to distinguish the particular exercise of power here challenged from those which, under precedents established respecting agencies to which the Utilities Commission is successor in jurisdiction and function, were held appealable and referable

to jury trial. *Corporation Commission v. R. R.*, 140 N. C., 239, 52 S. E., 941; *S. v. R. R.*, 161 N. C., 270, 76 S. E., 554; *R. R. Connection Case*, 137 N. C., 1, 49 S. E., 191, 206 U. S., 1, 17, 51 L. Ed., 933; *S. v. R. R.*, 145 N. C., 495, 59 S. E., 570; *Corporation Commission v. R. R.*, 185 N. C., 435, 117 S. E., 563; *Corporation Commission v. Water Co.*, 190 N. C., 70, 128 S. E., 465; *Corporation Commission v. R. R.*, 197 N. C., 699, 150 S. E., 335. The case was, therefore, properly placed upon the civil issue docket and tried before a jury. Sections 1097-1098, Michie's Code.

The exceptions of the protestant, for that the trial judge did not take up the exceptions of the petitioner and rule upon them *seriatim*, after the practice relating to a referee's report, are untenable. Those exceptions were probably taken in support of the contention that the appeal presented only questions of law. But they involve also the suggestion that the Utilities Commissioner had acted upon some derivative authority, and that his action required confirmation by the court, or some other body, to make it effectual.

The Utilities Commission, or the Utilities Commissioner, with whose order we are concerned, is a State administrative agency of original and final jurisdiction (subject to appeal), and the findings and orders of the Commissioner require no confirmation by any court or other body as they do in the case of a referee. He has no more power to make a reservation of his jurisdiction upon an appeal than the Superior Court has to recognize it, and, in fact, he made none. The statute makes none for him.

Of more significance is the fact that upon appeal the whole matter is heard *de novo*, and any competent evidence bearing upon the controversy may be heard, regardless of the proceeding before the Commissioner. Issues to which the trial court must look forward have relation both to the pleadings and to the evidence; *Clinard v. Kernersville*, 217 N. C., 686; *Coletrane v. Laughlin*, 157 N. C., 282, 72 S. E., 961; and the ruling of the court separately upon exceptions taken to findings of fact by the Commissioner on evidence presented to him, on a totally different and superseded hearing, would not only be futile but erroneous. The question before the Court is not whether the Commissioner shall be sustained in his ruling, but whether the petitioner shall be given the relief prayed for, upon the facts as they are developed *de novo* in the Superior Court. The proceeding on appeal and the subsequent hearing is more analogous to that from a justice of the peace, at least where issues of fact are involved, as we find them to be here, leaving to the appellate court the unconditioned jurisdiction to find and declare the truth, through its own established procedure.

We think the "protestant" had full benefit of the instruction to the jury that the findings and decision of the Utilities Commissioner were *prima facie* just and reasonable, and the evidence was such as to fully apprise the jury of the substance and purport of the order. We see no harm which could come to appellant from this source.

The language used in section 1098 is quite different from section 16 of the Federal Act to regulate commerce (see Act of 4 February, 1887, and amendments), considered in *Meeker v. Lehigh Valley Railroad Co.*, 236 U. S., 412, 430, 59 L. Ed., 644. The latter provides that the "findings and order of the Commissioner shall be *prima facie* evidence of the facts therein stated." The statute here considered provides only that the "rates fixed, or the decision or determination made by the Commissioner, shall be *prima facie* just and reasonable." It makes no mention of the use either of the findings or of the determination made by the Commissioner as evidence in the cause. Even if it did, we fail to find error in the trial on this exception. We think the provision that the determination of the Commissioner should be *prima facie* just and reasonable is of the nature of a legal presumption, which requires only that the petitioner must introduce substantial evidence in support of his case, or run the risk of an adverse verdict. It serves also to put the "laboring oar"—the duty of going forward with the evidence—in the hands of the real "actor," the petitioner, since in the statute the natural position of plaintiff and defendant is reversed, and the State, on relation of the Utilities Commission, is made formal plaintiff. But if there should be created by this statute a situation by which a presumption of fact remains with the jury until their final action, appellant had full benefit of that view. *Gallup v. Rozier,* 172 N. C., 283, 90 S. E., 209.

Both in appellant's oral argument and in the brief it is urged that the sole question to be determined by the jury, if the case got that far, was that of convenience and necessity involved in the additional service suggested—an abstract question to which the litigant parties might or might not have some relation upon some subsequent hearing before the Commissioner after the jury had reached its verdict. A rather poor compensation this, for the trouble taken by the petitioner and the expense to which it has been put, under encouragement of the statute, which, presumably, and we think on its face, gives it the right to appeal, not *pro bono publico,* or to the ultimate advantage of its adversary, but in its own individual interest.

In this State the right of appeal exists only by statute, and neither the litigant parties nor the court itself may take any step that is not authorized by the statute, or a fair inference therefrom. The Superior Court, to which appeals from the orders of the Utilities Commission lie, has its own well understood legal incidents. It is a court of final juris-

diction and of final resort on matters of fact and, subject to appeal and review on matters of law, its decisions are completely determinative of the controversy properly before it, and its judgments apply both to the subject matter and to the parties of record and their privies. Constitution of North Carolina, Article IV, section 12; C. S., 1439; C. S., 638; *Rhyne v. Lipscombe,* 122 N. C., 650, 29 S. E., 57; *Coletrane v. Laughlin, supra; Armfield v. Moore,* 44 N. C., 157.

There is no provision in the general law nor in the specially applicable statutes by which the Superior Court could be justified in segregating the question of convenience and necessity, or divorcing it from its relation to the litigant parties, and making of it a floating island to be subsequently captured by the Utilities Commission. Such procedure would make the Superior Court an adjunct to the administrative body, or an intermediate agency in the proceeding before it, so that the verdict of its juries and its judgments might be subordinated to the Utilities Commission for its subsequent final action. For this there is neither law nor precedent.

If petitioner's application could be considered as an original application for a certificate of convenience and necessity, which we doubt, and if upon the hearing the Utilities Commissioner had affirmatively found necessity for the service, he might have awarded the franchise to one party or another, as in his judgment might be best in the public interest. But the Commissioner found to the contrary, and, as the statute permits, actively presented this view in the Appellate Court. The verdict of the jury was adverse to his contention. The question had then become incidental to the rights of petitioner upon its appeal, and had become merged therein. The real question before the board, and before the court, from beginning to end, was whether or not the restrictions ought to be removed from petitioner's franchise in the interest of the public service required. This question was properly heard according to the statute, and the practice of the court, and the verdict and judgment thereupon is final.

In view of the fact that the Utilities Commission has abandoned its appeal and no longer defends its jurisdiction in this respect, if it had any, we question the right of the protestant appellant to bring forward this question on appeal, since it has only a moral probability, no legal assurance, that it may be selected to perform the public service which it has consistently denied to be necessary.

On our construction of the law regulating appeals from the Utilities Commissioner, many of the arguments addressed to the Court raise questions that are political rather than juridical. We have no power to interfere with the Legislature in its distribution and allotment of the powers of government to agencies already created—as, for instance, a

jury—or those created by it, so long as it acts within constitutional limitations.

Other exceptions of appellant have been considered. Some of them are incidentally involved in the foregoing discussion. Others we do not consider of sufficient merit to justify us in disturbing the result reached in this case.

We find

No error.

STACY, C. J., dissenting: The right of the petitioner to appeal from the decision or determination of the Utilities Commissioner, in the circumstances disclosed by the record, was affirmed at the Fall Term, 1939, 216 N. C., 325. This is now "water over the dam." Our present concern is with the procedure in the Superior Court on such appeal—not perforce with what the procedure should be generally, but with what it ought to be on the record in this case.

It is provided by C. S., 1097 and 1098, that on exceptions to the facts as found by the Commissioner, if overruled and appeal taken therefrom, the appeal "shall be to the Superior Court in term" and there placed on the civil issue docket for preferential trial. *Corp. Com. v. Mfg. Co.*, 185 N. C., 17, 116 S. E., 178; *S. v. R. R.*, 161 N. C., 270, 76 S. E., 554. But if there be no exceptions to any facts as found by the Commissioner, the appeal "shall be heard by the judge at chambers at some place in the district." The manner of hearing the appeal, then, whether at term or in chambers, is to be determined by the character of the exceptions filed. It is further provided that by consent of all the parties, "the appeal" may be heard and determined at chambers before any judge of a district through or into which the line may extend, or any judge holding court therein, or in which the person or company does business. C. S., 1099. Obviously, the appeal is to conform to the statutes granting the right and regulating the procedure. See 2 N. C. L., 69, for valuable discussion of the subject, and McIntosh on Procedure, 819.

Conceding that the exceptions in the instant case may be sufficient to raise an issue of fact—though this is seriously challenged by the appellant—it does not follow that the Superior Court was thereby empowered to go beyond the case as presented to the Utilities Commission, and enter an order which in effect amounts to the issuance by the court of a franchise certificate which the Commission has never had an opportunity to consider, on the facts as finally determined, and withhold or grant as the statute provides. The court is confined to its derivative jurisdiction. *Corp. Com. v. R. R.*, 196 N. C., 190, 145 S. E., 19.

The following applicable provision of The Bus Law, Michie's Code of 1939, sec. 2613 (1), subsection (f), is especially significant in the case:

"The commission may refuse to grant any application for a franchise certificate where the granting of such application would duplicate, in whole or in part, a previously authorized similar class of service, unless it is shown to the satisfaction of the commission that the existing operations are not providing sufficient service to reasonably meet the public convenience and necessity and the existing operators, after thirty days' notice, fail to provide the service required by the commission."

It appears from the record that the granting of plaintiff's request will result in a duplication of bus service between Hendersonville and Asheville. The Utilities Commissioner found that such additional service was not necessary. But even upon a contrary finding, either by the Commission or by the court, it is still a matter for the Commission to determine, within the terms of the statute, how and by whom the additional service shall be performed. This is the clear meaning and intent of the enactment.

It follows, therefore, that the issue submitted to the jury was in excess of the matters presented by the exceptions to the *facts* as found by the Commissioner. Upon the finding that "public convenience and necessity require additional intrastate service by bus between Hendersonville and Asheville," the cause should have been remanded to the Utilities Commission for further proceedings as to justice appertains and the rights of the parties may require. Such procedure fully accords with the purpose of the General Assembly as expressed in the statutes on the subject. See concluding paragraph of opinion in *Service Co. v. Power Co.*, 179 N. C., 330, 102 S. E., 625.

It is not to be overlooked that we are considering the regulation of a public service, which is primarily an administrative matter. The court's jurisdiction in the premises is neither original nor wholly judicial in character. *Corp. Com. v. R. R.*, 151 N. C., 447, 66 S. E., 427; *Prentis v. R. R.*, 211 U. S., 210. As a consequence, in assuming to act with finality in the circumstances, the authority of the Commission has been cut short and the rights of the appellant disregarded. The "thirty days' notice" provision of the statute seems to have been ignored or treated as if it were not there. The administrative features of the law are not to be set at nought by an appeal to the Superior Court. *R. R. Com. v. Oil Co.*, 310 U. S., 573.

To the Utilities Commission, and not to the court, has been committed the duty of selecting the operator in a case like the present which involves a duplication of service. At least the initial selection is to be made by the Commission. The authority to make this selection in the first instance is nowhere vested in the court. Its jurisdiction is entirely derivative. Indeed, it may be doubted whether the statute contemplates

any appeal from such selection except for arbitrariness or abuse of discretion. At any rate, there was error in the issue submitted and in the judgment rendered on the verdict.

BARNHILL and WINBORNE, JJ., concur in dissent.

GRAHAM HARTWELL PARKS, BY HIS NEXT FRIEND, G. H. PARKS, v. BERTHA MARIE BOWMAN PARKS, AND ARTHUR W. MEWSHAW, GUARDIAN AD LITEM FOR BERTHA MARIE BOWMAN PARKS.

(Filed 9 October, 1940.)

1. **Marriage § 2a—**

The marriage of a party under the minimum age required by statute is voidable and not void.

2. **Marriage § 2c—Plaintiff held to have ratified marriage and is not entitled to annulment on ground that at time of ceremony he was under age.**

Plaintiff and defendant were residents of North Carolina. The parties were married in the State of Virginia, plaintiff being a boy sixteen years of age and defendant being a girl twenty years of age. Subsequent to the marriage the parties returned to North Carolina and plaintiff and defendant cohabited as man and wife. This action was instituted to annul the marriage on the ground that plaintiff was under the minimum age prescribed by the law of the State of Virginia, Code of Virginia, sec. 5090, as amended. *Held:* Plaintiff being of marriageable age under the provision of our law, Michie's Code, sec. 2494, his act in cohabiting with defendant in this State was a ratification of the voidable marriage and he is not entitled to a decree of annulment.

STACY, C. J., concurring.

WINBORNE, J., joins in concurring opinion.

APPEAL by plaintiff from *Pless, J.*, at February Term, 1940, of SURRY. Affirmed.

The complaint is as follows:

"1. That plaintiff and defendants are residents of Surry County, North Carolina, and were such at the time of the institution of this action.

"2. That plaintiff, Graham Hartwell Parks, is a minor under the age of 17 years, and was under the age of 17 years at the times hereinafter set forth and complained of.

"3. That the defendant, Bertha Marie Bowman Parks, is a minor under the age of 21 years, she being about 20 years of age. That Arthur W. Mewshaw has been appointed guardian *ad litem* for said Bertha Marie Bowman Parks.

"4. That on or about the 20th day of May, 1939, plaintiff and defendant, Graham Hartwell Parks, and Bertha Marie Bowman, by an attempted agreement among themselves, had an undertaken marriage ceremony performed in the County of Carroll, and State of Virginia, thereby having undertaken the celebration of an attempted marriage.

"5. That said attempted marriage contract and ceremony are invalid and of no effect and subject to be declared invalid and of no effect and to be annulled, under the laws of the State of Virginia, on account of the fact that the plaintiff, an attempted contracting party, was, at the time of the attempted marriage contract and ceremony, to wit: on or about the 20th day of May, 1939, under the age of 17 years, and under the laws of the State of Virginia, was incapable of contracting a marriage, and plaintiff is informed and believes that said attempted marriage is voidable and subject to be annulled upon the application of the party aggrieved. That the said Graham Hartwell Parks desires to have the said attempted ceremony annulled, vacated and set aside and the marriage contract declared and adjudged invalid and of no effect.

"Wherefore, plaintiff prays: (1) That judgment be entered in this cause annulling, vacating and declaring invalid and of no effect the attempted marriage contract and the attempted marriage ceremony referred to in the complaint. (2) That plaintiff and defendant be declared absolutely freed from each other. (3) For such other and further relief as plaintiff may be entitled to."

The answer of the guardian *ad litem,* who was duly appointed, was as follows:

"1. That the allegations contained in paragraph 1 of the complaint are admitted. And it is further alleged that the defendant, Bertha Marie Bowman Parks, is a minor and that A. W. Mewshaw has been duly appointed guardian *ad litem.*

"2. That the defendant does not have sufficient information and belief as to the matters alleged in paragraph 2 of the complaint and, therefore, upon information and belief, denies same.

"3. That the allegations contained in paragraph 3 as therein stated are denied. This defendant alleging that on or about the 20th day of May, 1939, that the plaintiff and defendant were duly married in the County of Carroll, State of Virginia, and lived together as man and wife thereafter.

"4. That the defendant does not have sufficient information in regard to the matters and things alleged in paragraph 4 and, therefore, denies same.

"Wherefore, the defendant having fully answered, prays that the action be dismissed and that he recover of the plaintiff his costs and for such other and further relief as defendant may be entitled to."

The amended answer, setting forth a further defense (estoppel), we think is immaterial.

The plaintiff testified, in part: "My name is Graham Hartwell Parks and I am the plaintiff in this action. I live at Pilot Mountain, North Carolina, and have lived there for three or four years. I was born in Stokes County, North Carolina, and lived there from my birth until I moved to Pilot Mountain with my parents. G. H. Parks is my father. I was seventeen years of age on the 20th day of September, 1939. Bertha Marie Bowman and I entered into a marriage in Hillsville, Virginia, on the 20th day of May, 1939. At that time my home was in Pilot Mountain, North Carolina. . . . When we arrived in Hillsville, Virginia, we went before the clerk of the circuit court and I signed a certificate that I was twenty-one years of age, and took an oath before the clerk to that effect, I suppose. Then we went to the minister's home and were married, and then we came back to Mount Airy. . . . We came back to her home that Saturday night after we were married and I remained there with her about an hour and a half, and then I went to my home, leaving my wife at her home. I came back the next night to see her, and stayed with her three or four hours. I remember when Mr. Boles came there and found me and my wife in bed together, and that was on Sunday night following our marriage on Saturday. Q. You and your wife lived there that night as man and wife? You had intercourse with her? Ans.: Yes. Q. You had intercourse with her a number of times? Ans.: A few. Q. Well, then, after Sunday night, when did you come back to see your wife? Ans.: I came back Monday night. Q. How long did you stay there then? Ans.: About two hours, I suppose. Q. Did you have intercourse with your wife at that time? Ans.: Yes, attempted to. . . . The court: At the time you say there was cohabitation between you and your wife on Sunday night and Monday night, where did that take place? Was that in her home in Mount Airy, Surry County, North Carolina? Ans.: Yes, sir; it was."

The following is the pertinent act of the General Assembly of Virginia:

"An Act to Amend and Re-Enact Section 5090 of the Code of Virginia, Relating to Marriage or Persons under the Age of Consent.

"Approved March 24, 1932.

"1. Be it enacted by the General Assembly of Virginia, That section five thousand and ninety of the Code of Virginia, be amended and re-enacted so as to read as follows:

"Section 5090. The age of consent for marriage.—The minimum age at which minors may marry, with consent of the parent or guardian, shall be seventeen for the male and fifteen for the female. Provided, however, that in case of the pregnancy of a female by a male, either of

whom is under the age of consent, the clerk authorized to issue marriage licenses in the county or city wherein the female resides, shall issue proper marriage license with the consent of the parent or guardian of the person or persons under the age of consent only upon representation of a doctor's certificate showing he has examined the female and that she is pregnant, which certificate shall be filed by the clerk, and such marriage consummated under such circumstances shall be valid. Nothing herein contained shall be construed to prevent clerks from issuing a marriage license under circumstances mentioned in section 4414 of the Code of Virginia, or to prevent persons under circumstances mentioned therein from marrying. The above is a true copy of Chapter 300 of the Acts of the General Assembly of Virginia for 1932, and is still in full force and effect. E. Griffith Dodson, Clerk of the House of Delegates and Keeper of the Rolls of the State. Richmond, Virginia, August 31, 1939."

The judgment in the court below was as follows: "This cause coming on to be heard, and being heard, before Honorable J. Will Pless, Jr., Judge presiding, and a jury, at the February Term, 1940, of the Superior Court of Surry County, and at the close of the plaintiff's evidence, the defendant having moved for judgment as of nonsuit, and the court being of the opinion that said motion should be granted: Now, therefore, it is considered, ordered and adjudged by the court that this action be and the same is hereby nonsuited; that the plaintiff take nothing by this action, and that the defendant go without day and recover her costs herein expended. J. Will Pless, Jr., Judge Presiding."

To the signing of the foregoing judgment and to the granting of the motion for judgment as of nonsuit, the plaintiff excepted, assigned error and appealed to the Supreme Court.

Badgett & Badgett and Folger & Folger for plaintiff.
Snow & Snow, E. C. Bivens and R. B. White for defendant.

CLARKSON, J. At the close of plaintiff's evidence, the defendant in the court below made a motion for judgment as in case of nonsuit. C. S., 567. The court below sustained the motion and in this we can see no error.

The plaintiff, Graham Hartwell Parks, was under 17 years of age and the defendant Bertha Marie Bowman Parks was 20 years of age when they were married in Hillsville, Virginia, on 20 May, 1939. The plaintiff alleged in his complaint that he was under 17 years of age at the time of the attempted marriage contract and "under the laws of the State of Virginia, was incapable of contracting a marriage, and plaintiff is informed and believes that said attempted marriage is voidable and subject to be annulled upon the application of the party aggrieved.

That the said Graham Hartwell Parks desires to have the said attempted ceremony annulled, vacated and set aside and the marriage contract declared and adjudged invalid and of no effect."

The plaintiff and defendant were both residents of North Carolina. N. C. Code (1939), Michie, sec. 2494, in part, is as follows: "All unmarried male persons of sixteen years, or upwards, of age, and all unmarried females of sixteen years, or upwards, of age, may lawfully marry, except as hereinafter forbidden," etc.

Under the law of Virginia plaintiff was under the marriageable age and defendant was of marriageable age. They came back to North Carolina and lived as man and wife. Under the law of North Carolina, the plaintiff, who was a resident of North Carolina, was of marriageable age.

In *Koonce v. Wallace,* 52 N. C., 194, it is held: "Where, at the time of a marriage, the female was under the age of fourteen, and the parties continued to live together as man and wife, after she reached that age, it was held that there is nothing in the statute, Rev. Code, ch. 69 (68), sec. 14 (N. C. Code, 1939 [Michie], sec. 2495), to abrogate the rule of common law, that such living together as man and wife, after the age of consent, amounted to a confirmation of the marriage."

In 18 R. C. L., "Marriage," sec. 69, p. 440, is the following: "While it is true that ordinary contracts entered into in violation of positive law are nullities and unenforceable, the rule has not, at least not by a uniform trend of decisions, been held applicable to marriage contracts, for the sacred nature of the relation, and obvious reasons of sound public policy, forbid that the person who enters into a marriage contract, though prohibited by law, may arbitrarily, and without a decree of dissolution, determine for himself the validity of the contract and reject or perform it at his pleasure. . . . (p. 441) The rule which generally prevails in jurisdictions where the marriage relation is regulated by statute is that a marriage where one of the parties is under the age of statutory consent but who is competent by the common law is not void, but merely voidable, in the absence of any provision expressly declaring that it shall be absolutely void, and it is valid for all civil purposes, until annulled by a judicial decree. . . . (Sec. 79, p. 448) Even where a marriage was at the time it was contracted absolutely void the courts are inclined to hold that it may be ratified and become a lawful and binding marriage as soon as the cause for its invalidity is removed." See *Pridgen v. Pridgen,* 203 N. C., 533 (537), 104 A. L. R., 7.

In *S. v. Kennedy,* 76 N. C., 251, it is held: "A marriage, solemnized in a State whose laws permit such marriage, between a Negro and a white person domiciled in this State and who leave it for the purpose of evading its law and with intent to return, is not valid in this State."

This decision is founded on the fact that the law of this State makes such a marriage void *ab initio,* not merely voidable, as was the instant case.

In *Sawyer v. Slack,* 196 N. C., 697 (700), we find: "It has been held by the court that a marriage which is not void, *ab initio,* but merely voidable, because one of the parties thereto was at its date under the age at which he or she might lawfully marry, may be ratified by the subsequent conduct of the parties in recognition of the marriage. *S. v. Parker,* 106 N. C., 711, 11 S. E., 517; *Koonce v. Wallace,* 52 N. C., 194."

In *Watters v. Watters,* 168 N. C., 411, this Court in passing upon Rev. 2083 (now C. S., 2495), pointed out that the only *void* marriages in North Carolina are (1) interracial marriages (white-Negro, white-Indian), and (2) bigamous marriages; all other marriages are at most only *voidable.* Hence, it follows that the instant marriage, being voidable only, was subject to confirmation and ratification by the husband, and the evidence shows such confirmation and ratification resulting in a valid marriage. The plaintiff alleges that under the law of Virginia the "attempted marriage is voidable." S. 5090, Va. Code of 1936 (Michie); *Payne v. Payne,* 295 Fed., 970, 972. The position here taken is supported in whole or in part by the following authorities: *DeFur v. DeFur,* 156 Tenn., 634, 4 S. W. (2d), 341; *Portwood v. Portwood* (Texas, 937), 109 S. W. (2d), 515; *Jiminez v. Jiminez,* 93 N. J. Eq., 257, 116 A., 788; *Bays v. Bays,* 174 N. Y. S., 212.

Plaintiff, being under 17 years of age, under the law of North Carolina, if he had married the defendant, who was 20 years of age, in North Carolina, the marriage would be valid. The laws of this State allowed him to marry at 16 years. The parties, after marrying in Virginia, came back to this State and cohabited as man and wife. The plaintiff by so doing ratified the voidable marriage which took place in Virginia, and thus became a valid marriage. Under the North Carolina statute plaintiff had the right and was of sufficient age to marry defendant in North Carolina and when he cohabited with defendant it was a ratification of his prior voidable marriage in Virginia. If a child had been born under the facts and circumstances of this case, it would have been a harsh decision to have declared the child illegitimate. From the view we take of this case, the exceptions and assignments of error as to cohabitation in this State cannot be sustained. For the reasons given, the judgment of the court below is

Affirmed.

STACY, C. J., concurring: The substantive rights of the parties are to be determined by the laws of Virginia and North Carolina; those

relating to the remedy, by the law of the forum alone. Under the law of this State the plaintiff is not entitled to the relief sought. C. S., 2494. See *Tieffenbrun v. Flannery,* 198 N. C., 397, 151 S. E., 857.

WINBORNE, J., joins in this opinion.

MARY MADGE BARNES SHOEMAKER, ORIGINAL PLAINTIFF, AND ALLEN MOYE, SUBSTITUTED PLAINTIFF, v. LILLIE BARNES COATS AND HUSBAND, G. H. COATS.

(Filed 9 October, 1940.)

1. Wills § 33a—

The cardinal rule in the construction of a will is to ascertain and give effect to the intent of the testator as expressed in the language used, and technical rules will not be applied to defeat the intention which substantially appears from the entire instrument, although accepted canons of construction, which have become settled rules of law and property, cannot be disregarded.

2. Wills § 34—Will held to disclose that words "in fee simple" were not used in technical sense, but that testatrix intended to devise only life estate.

Husband and wife executed reciprocal wills. The wife predeceased her husband and this action was instituted after the death of the husband. The wife owned the *locus in quo* and devised same to her husband "in fee simple, my entire estate as long as he lives, he to use only the rents and interest which may accrue on said estate," and by later item provided, "at my beloved husband's death I give and devise" to one of their two daughters "the balance of my estate." *Held:* The husband took only a life estate in the land, it being apparent from the construction of the instrument as a whole that the words "in fee simple" were not used in their technical sense, but that testatrix intended to convey to her husband only a life estate, and the daughter took the fee in the remainder under the devise of the "balance of my estate," the term "estate" in lands meaning any interest therein; but *held further,* if it should be construed that the husband took the fee simple, the said daughter acquired the fee simple under the corresponding item in his will.

STACY, C. J., concurring.

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

APPEAL by substituted plaintiff, Allen Moye, from *Thompson, J.,* at April Civil Term, 1940, of JOHNSTON. Affirmed.

This is a special proceedings for partition, brought by plaintiff, Mary Madge Barnes Shoemaker, against defendant, Lillie Barnes Coats, for an actual division of 152.8 acres of land in Johnston County, N. C., claiming a one-half interest in said land. N. C. Code, 1939 (Michie), sec.

3215. Defendant set up the plea of sole seizin. On the issue of fact it was transferred to the Superior Court. Mary Madge Barnes Shoemaker sold her interest in the land to Allen Moye, who was substituted plaintiff.

The last will and testament of Bettie J. Barnes, deceased, was as follows:

"North Carolina—Johnston County.

"I, Mrs. Bettie J. Barnes, of the aforesaid County and State, being of sound mind but considering the uncertainty of my earthly existence do make and declare this my last will and testament:

"First, My executor hereinafter named shall give my body a decent burial suitable to the wishes of friends and relatives, and pay all expenses for funeral together with all my just debts out of the first moneys which may come into his hands belonging to my estate.

"Second: I give and devise to my beloved husband, Chas. L. Barnes, in fee simple, my entire estate as long as he lives, he to use only the rents and interest which may accrue on said estate.

"Third: At my beloved husband's death, I give and devise to my beloved daughter, Mary Madge Barnes, five ($5.00) Dollars to be paid by my executor within two years.

"Fourth: At my beloved husband's death, I give and devise to my beloved daughter, Lillie L. Coats, wife of G. H. Coats, the balance of my estate, to be paid by my executor within two years.

"Fifth: I hereby constitute and appoint my trusted friend, G. Herman Coats, my lawful executor to all intents and purposes to execute this my last will and testament, according to the true intent and meaning of same and every part and clause thereof revoking and declaring utterly void all other wills and testaments by me heretofore made.

"In Witness whereof, I, the said Mrs. Bettie J. Barnes, do hereunto set my hand and seal, the 3rd day of August, 1920.

"MRS. BETTIE J. BARNES (Seal).

"Signed, sealed and published and declared by the said Mrs. Bettie J. Barnes, to be her last will and testament, in the presence of us, who, at her request and in her presence (and in the presence of each other) do subscribe our names as witnesses hereto.

"HUGH FERRELL
W. F. WEATHERS.

"Admitted to probate February 10, 1932, and docketed in Will Book 9, page 509, in the office of the Clerk of the Superior Court of Johnston County."

The judgment of the court below was as follows:

"This cause regularly coming on to be heard at this term of the court, before the undersigned Judge Presiding, all parties being personally present before the court and/or represented by counsel, and it appearing to the court and the court finding from the records presented and the admissions of counsel:

"1. That this action was originally instituted by Mary Madge Barnes Shoemaker, as plaintiff, against Lillie Barnes Coats and husband, G. H. Coats, the latter of whom is now dead.

"2. That in Item 3 of the Will of Isaac W. Jones, Sr., which is duly recorded in Will Book No. 4, page 365, office of the clerk of this court, the testator's daughter, Mary Ann Elizabeth Barnes, was devised in fee simple the tract of land referred to in paragraph 3 of the complaint, and minutely described as follows: Lying and being in the County of Johnston and State of North Carolina, adjoining the lands of Billie Jones, Mack Jones Hall, *et als.,* and lying and being in Clayton Township, Johnston County, North Carolina, and being the lands formerly owned by the late Isaac Jones, and being the same farm through which the Southern Railroad running between Raleigh and Goldsboro passes and upon which the station known as Powhatan Station, and being the same lands referred to in the Will of Isaac Jones, deceased, to which said Will reference is here made for a more complete description, containing 152.8 acres, more or less.

"3. That Martha Ann Elizabeth Barnes intermarried with Charles L. Barnes, and there were two children born of the marriage, viz.: (A) The plaintiff, Mary Madge Barnes, who intermarried with one Shoemaker, now deceased, and (B) The defendant, Lillie Barnes, who intermarried with G. H. Coats, now deceased, as above stated.

"4. That Martha Ann Elizabeth Barnes, the wife of Chas. L. Barnes, is the identical person who duly executed the Will signed in the name of Bettie J. Barnes, which was dated August 3, 1920, and duly probated and is of record in Will Book No. 9, page 509, in the office of the Clerk of the Court.

"5. That the Mary Madge Barnes referred to in the third item of the Will of Martha Ann Elizabeth Barnes, *alias* Bettie J. Barnes, is the same person as the original plaintiff herein, and Lillie L. Coats referred to in the fourth item of said Will is the same person as the *feme* defendant herein, *i.e.,* Lillie Barnes Coats.

"6. That the testatrix, Bettie J. Barnes, died on the 3rd day of February, 1932, leaving her surviving, her husband, Charles L. Barnes, and two children, mentioned in paragraph 3, *supra,* viz.: Mary Madge Barnes Shoemaker and Lillie Barnes Coats.

"7. That the said Charles L. Barnes died testate on the 4th day of

May, 1938, leaving him surviving the said two children, Mary Madge Barnes Shoemaker and Lillie Barnes Coats.

"8. That the last Will and testament of said Charles L. Barnes was dated on the 3rd day of August, 1920 (being the same date as the date of the Will of his deceased wife—see paragraph No. 4, *supra*). That said Will was duly probated and is of record in Will Book No. 11, page 325, office of the Clerk of this Court.

"9. That G. H. Coats, husband of Lillie Barnes Coats, was in the possession of the lands aforesaid during the years 1932 and 1933, and paid to the original plaintiff herein, Mary Madge Barnes Shoemaker, an amount equal to one-half of the net value of the rents from said lands for each of said years.

"10. That the original plaintiff herein, Mary Madge Barnes Shoemaker, duly executed and delivered to Allen Moye a deed dated December 30, 1939, which was duly filed for record on January 24, 1940, and is duly of record in Book 412, page 53, office of the Register of Deeds of Johnston County, which deed is sufficient in form to convey any and all interest in the lands described in said deed, which was owned by the grantor.

"11. That said Allen Moye was duly substituted as plaintiff herein.

"From the foregoing facts, the court concludes, orders and adjudges that the defendant, Lillie Barnes Coats, is sole seized in fee of the lands described in the complaint and that neither the original plaintiff herein, Mary Madge Barnes Shoemaker, nor the substituted plaintiff, Allen Moye, has any title to or interest in any aforesaid lands.

"It is further adjudged that the plaintiffs and L. J. Grady, the surety on their prosecution bond, pay the costs of the action to be taxed by the Clerk.

"It is further ordered and decreed that this judgment be recorded in the office of the Register of Deeds of Johnston County and the Clerk of this Court is directed to make an entry, upon the margin of the record of the deed in Deed Book 412, page 53, referring to this Judgment and the Book and page of its recordation. C. E. Thompson, Judge Presiding."

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

Louis I. Rubin, Sutton & Greene, Chas. F. Rouse, and J. A. Jones for substituted plaintiff.

Lyon & Lyon for defendant.

CLARKSON, J. The substituted plaintiff's exceptions and assignments of error are: "(1) For that the court erred in refusing to enter judg-

ment in favor of the substituted plaintiff upon the pleadings, exhibits and the admissions of counsel. (2) For that the court erred in entering a judgment as set out in the record." We think these exceptions and assignments of error cannot be sustained.

The land in controversy was willed in fee simple by Isaac W. Jones, Sr., to his daughter, Martha Ann Elizabeth Barnes. Martha Ann Elizabeth Barnes intermarried with Charles L. Barnes, and there were two children born of the marriage, viz.: (1) The plaintiff, Mary Madge Barnes, who intermarried with one Shoemaker, now deceased, and sold her interest to Allen Moye, substituted plaintiff, and (2) the defendant, Lillie Barnes, who intermarried with G. H. Coats.

Martha Ann Elizabeth Barnes (will signed Bettie J. Barnes) died on 3 February, 1932, leaving her surviving her husband, Charles L. Barnes, and their two children before mentioned: Mary Madge Barnes Shoemaker and Lillie Barnes Coats.

The said Charles L. Barnes died testate on 4 May, 1938, leaving him surviving the said two children, Mary Madge Barnes Shoemaker and Lillie Barnes Coats.

The last will and testament of the said Charles L. Barnes was dated on 3 August, 1920 (being the same date as the date of the will of his deceased wife, Bettie J. Barnes). The original plaintiff herein, Mary Madge Barnes Shoemaker, duly executed and delivered to Allen Moye a deed dated 30 December, 1939, which was duly recorded, which deed is sufficient in form to convey any and all interest in the lands described in said deed, which was owned by the grantor.

(1) This appeal involves the construction of two wills, each containing similar language, and it presents this question: Did Charles L. Barnes take a life estate under Item 2 of the will of Bettie J. Barnes? We think so.

In Items 2, 3 and 4 of Bettie J. Barnes' will is the following:

"Second. I give and devise to my beloved husband, Chas. L. Barnes, in fee simple, my entire estate as long as he lives, he to use only the rents and interest which may accrue on said estate.

"Third: At my beloved husband's death, I give and devise to my beloved daughter, Mary Madge Barnes, Five ($5.00) Dollars to be paid by my executor within two years.

"Fourth: At my beloved husband's death, I give and devise to my beloved daughter, Lillie L. Coats, wife of G. H. Coats, the balance of my estate, to be paid by my executor within two years."

In *Williamson v. Cox, ante,* 177, the rule as to the construction of wills is thus stated by *Devin, J.*, for the Court: "The cardinal principle in the interpretation of wills is that the intention of the testator as expressed in the language of the instrument shall prevail, and that the

application of technical rules will not be permitted to defeat an intention which substantially appears from the entire instrument. *Heyer v. Bulluck,* 210 N. C., 321, 186 S. E., 356; *Smith v. Mears, post,* 193. However, accepted canons of construction which have become settled rules of law and property cannot be disregarded. As was said in *May v. Lewis,* 132 N. C., 115, 43 S. E., 550: 'It is our duty, as far as possible, to give the words used by a testator their legal significance, unless it is apparent from the will itself that they were used in some other sense.' 4 Kent's Com., 231."

We think it clearly appears that the words "in fee simple," in Item 2, were not used in their legal or technical sense, for immediately after them is the following, "My entire estate as long as he *lives,*" then further, *"he to use only the rents and interest* which may accrue on said estate." Also to be noted in Item 3 and 4 is the language "at my beloved husband's death," showing only a life estate was given.

(2) If Charles L. Barnes took a life estate under Item 2 of the will, did Lillie Coats, the defendant, appellee, take a fee simple under Item 4 of this will? We think so.

Charles L. Barnes, having taken a life estate under Item 2, Item 4, we think, in clear language gives to Lillie (Barnes) Coats, the defendant, *"the balance of my estate."*

Black's Law Dictionary (3rd Ed., p. 682) defines "Estate": "The interest which anyone has in lands, or in any other subject of property . . . (citing authorities). An estate in lands, tenements and hereditaments signifies such interest as the tenant has therein. 2 Bl. Comm., 103." The degree, quantity, nature and extent of interest which a person has in real property is usually referred to as an estate, and it varies from absolute ownership down to naked possession. *Nicholson Corp. v. Ferguson,* 243 P., 195, 200, 114 Okla., 10. Black, *supra.*

(3) From our construction of the will of Bettie J. Barnes, we think the land in controversy went to Lillie Barnes Coats, the defendant. But, if Charles L. Barnes took a fee simple under Item 2 of the will of Bettie J. Barnes, did Lillie Barnes Coats, the defendant, appellee, take a fee simple under Item 4 of the will of Charles L. Barnes? We think so.

In Item 4 of Charles L. Barnes' will is the following: " 'Fourth,' at my beloved wife's death I give and devise to my beloved daughter Lillie L. (Barnes) Coats, wife of G. H. Coats, the *balance of my estate* to be paid by my executor within two years."

We think the language is clear. The third item in both wills only gave five ($5.00) dollars to Mary Madge Barnes (now Shoemaker), and her assignee, Allen Moye, substituted plaintiff, from the construction we place on the will, has no interest in the land in controversy.

We think the case of *Barco v. Owens,* 212 N. C., 30, easily distinguishable from the present action. Having construed Item 2 to give only a life estate, the case of *McDaniel v. McDaniel,* 58 N. C., 351, and like cases are not applicable. For the reasons given, the judgment of the court below is

Affirmed.

STACY, C. J., concurring specially: The intent of the testator, as gathered from the language used by him, is to govern in the interpretation of his will, unless contrary to some rule of law or at variance with public policy. *Heyer v. Bulluck,* 210 N. C., 321, 186 S. E., 357.

One rule of law is, that technical terms are to be given their legal significance, unless it appear from the will itself that they were used in some other permissible sense. *Goode v. Hearne,* 180 N. C., 475, 105 S. E., 5; *May v. Lewis,* 132 N. C., 115, 43 S. E., 550. Another is, that a restraint on alienation, though for a limited time, annexed to a devise in fee, is void. *Williams v. McPherson,* 216 N. C., 565, 5 S. E. (2d), 830; *Douglass v. Stevens,* 214 N. C., 688, 200 S. E., 366; *Wool v. Fleetwood,* 136 N. C., 460, 48 S. E., 758. Still another, that where real estate is devised in fee simple, a subsequent clause in the will disposing of the remainder or what is left of the property after the death of the devisee is not to defeat the devise, nor limit it to a life estate. *Heefner v. Thornton,* 216 N. C., 702, 6 S. E. (2d), 506; *Barco v. Owens,* 212 N. C., 30, 192 S. E., 862. And still another, that the law favors the fee construction. *Lineberger v. Phillips,* 198 N. C., 661, 153 S. E., 118.

For example, in *Bank v. Dortch,* 186 N. C., 510, 120 S. E., 60, a devise to James Maynard of one-third of testator's Reedy Creek land, "his lifetime only, and then to his bodily heirs," was held to be a fee under the rule in *Shelley's case,* notwithstanding the express limitation, "his lifetime only." The subsequent use of technical terms was held to overcome the prior limitation. And in *Douglass v. Stevens, supra,* a restraint on alienation, though clearly intended by the testator, was disregarded as repugnant to the original devise. And further, in *Barbee v. Thompson,* 194 N. C., 411, 139 S. E., 838, an indefinite devise was held to be a devise in fee.

So, here, if we give to the words "in fee simple" their legal significance, the devise is to Chas. L. Barnes in fee simple with an attempted restraint on the use, which attempted restraint is to be disregarded as void. *Barco v. Owens, supra.*

No case has been found to support a different interpretation. Indeed, it is provided by C. S., 4162, that when real estate is devised to any person, the same shall be held and construed a devise in fee simple, unless such devise shall, in plain and express language show, or it shall

be plainly intended by the will, or some part thereof, that the testator intended to convey an estate of less dignity. *Jolley v. Humphries,* 204 N. C., 672, 167 S. E., 417.

When a testator uses the words "in fee simple" he is supposed to know what they mean. At least, we cannot assume that he was ignorant of their meaning. He used them to express his intent. *Leathers v. Gray,* 101 N. C., 162, 7 S. E., 657. It is not to be overlooked that in the quest for the intent of the testator, it is "not the intention that may have existed in his mind, if at variance with the obvious meaning of the words used, but that which is expressed by the language he has employed." *McIver v. McKinney,* 184 N. C., 393, 114 S. E., 399. See, also, *Hodges v. Stewart, post,* 290.

It appears, however, that Bettie J. Barnes predeceased her husband. Hence, the reciprocal devise to her lapsed, C. S., 4166, not being applicable, *Farnell v. Dongan,* 207 N. C., 611, 178 S. E., 77; *Beach v. Gladstone, ibid.,* 876, 178 S. E., 546, and Lillian L. Coats takes the property under Item 4 of her father's will. Perhaps it should be noted that this view of the case was not considered in the court below and the parties have not been heard in respect thereof.

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

STATE v. A. P. STEPHENSON.

(Filed 9 October, 1940.)

1. Criminal Law § 52b—

A motion for judgment as of nonsuit should be denied if there is any evidence tending to prove the fact in issue, or which reasonably conduces the conclusion of guilt as a fairly logical and legitimate deduction, but evidence which merely raises a suspicion or conjecture of the fact of guilt is insufficient to be submitted to the jury. C. S., 4643.

2. Perjury § 1c—Elements of offense of making false or fraudulent claim upon insurance policy.

The gravamen of the offense defined by C. S., 4369, as rewritten in Public Laws of 1937, chapter 248, is the willfully and knowingly presenting a false or fraudulent proof of claim for a loss upon a contract of insurance; and in a prosecution thereunder the burden is upon the State to prove that the claim for loss was false, that defendant knew it was false, and, with such knowledge, proceeded to make the claim.

3. Criminal Law § 2—

The word "willfully" as used in a criminal statute means more than an intention to commit the offense; it implies committing the offense pur-

posely and designedly in violation of law; and the word "knowingly" means that the defendant with knowledge of what he is about to do proceeds to do the act proscribed; and the phrase "willfully and knowingly" means intentionally and consciously committing the offense.

4. Perjury § 3—Evidence held to raise only conjecture or suspicion that defendant willfully and knowingly made false claim on fire insurance policy.

The evidence tended to show that defendant stated he had 4,600 sticks of his tobacco burned, while in his complaint in his civil action against insurer on the contract of fire insurance, which complaint was admitted in evidence in the criminal prosecution without objection, defendant alleged that the barn that was burned contained approximately 10,100 sticks of tobacco of the reasonable market value of "not less than" the amount of his claim. *Held:* Since the complaint alleged that the 10,100 sticks had a market value of "not less" than the amount claimed, without evidence as to how much more the tobacco in the barn was worth, the evidence raises a mere speculation or conjecture that the claim of the value of the tobacco burned was false, that defendant knew it was false, and with such knowledge proceeded to make the claim, and defendant's motion to nonsuit should have been granted.

5. Criminal Law § 57—

Defendant moved to set aside the verdict for that the jury, without defendant's consent, took into its room the complaint in a civil action relating to the subject matter of the prosecution, which had been admitted in evidence without objection, C. S., 533, and typed notes of the argument of counsel for the prosecution containing reference to defendant's failure to testify, C. S., 1799. *Held:* In the absence of defendant's consent, it was error to permit the jury to take such papers into the jury room and retain same while in its deliberations, and defendant's motion to set aside the verdict should have been allowed.

APPEAL by defendant from *Thompson, J.*, at June Term, 1940, of JOHNSTON.

Criminal prosecution tried upon indictment found at March Term, 1940, of Superior Court of Johnston County, charging the defendant in separate counts with (1) willfully and knowingly presenting a false and fraudulent claim, and false and fraudulent proof of such claim, for the payment of a loss upon a contract of fire insurance on cured leaf tobacco, C. S., 4369, as amended by Public Laws 1937, chapter 248; and (2) feloniously burning his tobacco packhouse with fraudulent intent to collect insurance.

To each charge the defendant pleaded "Not guilty."

Upon the trial below, at the close of evidence for the State, motion of defendant for judgment of nonsuit on the second count was allowed, C. S., 4643, and the trial continued as to the charge in the first count, to wit:

That defendant "did unlawfully and willfully, wantonly and feloniously, knowingly present and caused to be presented a false and fraudu-

lent claim and false and fraudulent proof of claim, in support of said claim, upon the payment of a loss on a fire insurance contract of insurance and did subscribe and make affidavit to a false and fraudulent proof of loss, in writing, with intent that the same should be presented and used in support of such claim to the profit of the said A. P. Stephenson, said claim for loss being for destruction by fire of certain leaf tobacco alleged in said claim and proof to be of the value of $2,882.79 . . ."

Evidence offered by the State in regard to the first count tended to show substantially these facts: On 1 August, 1939, defendant obtained from Allemania Insurance Company of Pittsburgh, Pa., through its agency at Dunn, N. C., a policy of fire insurance for $3,000.00 covering cured leaf tobacco, grown, and in pack barn on lands owned by him and his wife, in Johnston County. The packhouse and contents were destroyed by fire about 11:30 p.m. on 16 August, 1939. The policy of fire insurance was in effect at that time. On the morning of 17 August, about 8:30 o'clock, defendant went to office of agent of insurance company and reported the loss and "said he had already consulted three attorneys to look after his claim and he meant business."

On 5 October, 1939, defendant made proof of loss to the insurance company, in which among other things not essential to consideration of this appeal, he stated that there has been no change in ownership or assignment of the tobacco except 2,536 sticks to I. B. McLamb; and that the cash value of the tobacco at the time of fire, and loss and damage, were $2,882.79. The proof was sworn to and subscribed by defendant before a justice of the peace.

The State offered further evidence: The witness Willard Gordon, who was visiting daughters of defendant at his home at the time fire was discovered, testified: "We all went to it . . . the building was on fire all over when I first saw it. . . . I did not see any tobacco in the packhouse. . . . There were three doors to the packhouse and they were open during the fire. . . ." Then on cross-examination, he continued: "I did not see any tobacco in the packhouse at the time of the fire because you couldn't tell whether there was any tobacco in the house or not due to the fire and smoke. I don't know how much tobacco was in the barn when it burned."

The witness Sam McGee, who went to the fire, testified: "The whole building was on fire at that time and I could not tell whether there was any tobacco in the barn or not. . . . I could not tell anything about how much if any tobacco was in the barn during the fire, for you couldn't see for the smoke and fire." He further testified that while the fire was raging he heard the defendant "say that he had lost the best of his crop of tobacco, and as best I can remember he said there were 4,600 sticks of his crop burned."

The witness Willard Gordon swore that he heard defendant make such statement to McGee.

The State's evidence also tended to show that at the time of the fire defendant had two tobacco barns full of tobacco curing near the fire. There was evidence also to the effect that defendant "had 15 or 16 acres of good tobacco that year," as Gordon expressed it. McGee's opinion was, "15 acres of fair tobacco that year," and again, that he "had a good crop of tobacco and might have had 16 acres." Neither of the witnesses for the State knew how many times defendant had barned, but each knew that McLamb had hauled some tobacco away, three or four loads McGee thinks, but does not know how many sticks were carried to the load.

Also the witness Willard Gordon, when first on the stand, testified: "I do not recall hearing Myrtle Stephenson say that there wasn't any tobacco in the packhouse, and Purvis replying to keep her damn mouth shut about that." But, on being recalled, he stated: "I heard a conversation between Purvis Stephenson and Myrtle Stephenson in which Myrtle said: 'There wasn't much tobacco in the barn,' and Purvis Stephenson, the defendant, replied: 'Keep your mouth shut about that.'"

State's witness Clyde Andrews testified that he worked with defendant that year and on having trouble left on 5 August; that defendant had 15 acres of tobacco and he had one; that when he left "we had barned four times and put it all in the packhouse with the exception of what Mr. I. B. McLamb hauled and one load carried to Smithfield to be graded; that he had 575 sticks in the barn when he left; that defendant's "girls also had an acre and they packed theirs in the barn too," but that he did not know how much tobacco was in the barn at the time of the fire.

The State also introduced without objection the verified complaint which defendant had filed on 25 November, 1939, in a civil action instituted by him in Superior Court of Johnston County against the Allemania Fire Insurance Company of Pittsburgh, seeking to recover on the policy of fire insurance and in which it is alleged "that said barn contained approximately 10,100 sticks of cured tobacco, and which was stored in said barn, all, belonging to the plaintiff, and being the identical tobacco described in said insurance policy; that the tobacco described was of high quality, and the average weight of each stick was not less than one and three-fourths pounds; that at the time said tobacco was destroyed by fire the reasonable market value for the same was not less than $2,882.79, based on the market average, at the time, in this part of the State. That the tobacco destroyed consisted of the entire crop grown on fifteen acres of land except 2,536 sticks of primings which was stored with I. B. McLamb in the town of Benson."

At close of evidence for the State, motion of defendant for judgment of nonsuit on both counts, C. S., 4643, was allowed as to second count of burning packhouse, but denied as to the first count. Exception by defendant.

Defendant offered evidence tending to show that he had 16 acres of "good, 'unusually good' tobacco," that would average "about 1,000 pounds to the acre" "at least"; that Clyde Andrews had one acre and defendant's daughters one acre; that he had two barns in which to cure his tobacco—one a "16-foot barn" that would take care of about 800 sticks, and the other a "20-foot barn" that would take care of about 1,200 sticks; that he had barned six times when the fire occurred and was "through with the exception of the tips," which were put in another barn; that as fast as the tobacco was cured it was put in the packhouse; that at the time of the fire all of defendant's tobacco crop, as well as that of daughters and of Clyde Andrews, was in the packhouse with the exception of 4,426 pounds which had been delivered to I. B. McLamb, and hauled to Smithfield.

Charles Beasley, witness for defendant, who after testifying that he had been helping defendant barn tobacco for two or three weeks, said: "I know that all his tobacco was in the packhouse the night of the fire with the exception of 4,000 pounds Mr. McLamb got. On the evening of the fire I went into the pack barn to eat my lunch and all his crop of tobacco was in there. I know that it was not moved before the fire and was burned in the fire. I do not know exactly how many sticks was there but to the best of my judgment I am sure there was as much as 6,000 sticks. I know that Mr. Stephenson didn't burn the barn because I was there that night when he come."

I. B. McLamb, testifying in behalf of defendant, said: "I furnished the labor for handling the crop. The tobacco I received averaged about 18c per pound, and it was not as good as the balance of his crop as it was the first primings, or sand lugs."

Defendant rested his case and renewed motion for judgment of nonsuit at close of all the evidence. Motion denied. Exception.

Verdict: "Guilty as charged in first count of said indictment."

In addition to moving to set aside the verdict on grounds that it is contrary to law and the evidence, defendant moved that the verdict be set aside for that, without his knowledge and consent, or that of the court, the jurors carried to their room and used in their deliberation the complaint in the civil action, which had been offered in evidence by the State, and a yellow sheet of paper on which was typed a synopsis of the argument of counsel for private prosecution, and the State's contention forming or being a basis for a part of the State's case under C. S., 4369. The court considered the same and heard testimony of two jurors

to the effect, *inter alia,* that the complaint was referred to by the jury. The notes of counsel, after giving synopsis of his argument on evidence offered by the State, and his own calculations thereon and deductions therefrom, concludes with the statement: "The man who knows it all has not taken the stand." Then after his synopsis of evidence as to "fraud as shown wholly by defendant's witnesses," and further calculations and deductions, concludes with the statement: "7. Man who knows did not open his mouth. Truth flows; would get on house top."

The court finds that at the close of argument of counsel, who was prosecuting the case on behalf of the State, he inadvertently handed to the jurors, or one of the jurors who was trying the case, the documents in question, and that the jury, after hearing the charge of the court, carried them to the jury room; and that while some members of the jury examined the complaint, and one may have read one paragraph of it, the jury gave no consideration to the other papers and did not take into consideration any part of the exhibits in arriving at the verdict. Motion to set aside verdict denied. Exception.

Judgment: Confinement in the Johnston County jail, to be assigned to work on the public roads for a period of 18 months. Defendant appeals to Supreme Court and assigns error.

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

J. R. Barefoot and Wellons & Wellons for defendant, appellant.

WINBORNE, J. Defendant, in the main, stresses for error, and properly so, the refusal of the court: (1) to grant his motions under C. S., 4643, for judgment of nonsuit on the first count; and (2) to set aside the verdict for that the complaint in civil action and synopsis of argument of counsel, who was prosecuting the case on behalf of the State, were handed to and taken by the jury to its room upon retiring to deliberate upon the case.

1. In considering motion for judgment of nonsuit under C. S., 4643, the general rule as stated in *S. v. Johnson,* 199 N. C., 429, 154 S. E., 730, and in numerous other decisions of this Court is that "if there be any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury." But where there is merely a suspicion or conjecture in regard to the charge in the bill of indictment against defendant, the motion for judgment of nonsuit will be allowed. *S. v. Johnson, supra,* and cases cited.

The charge in the first count is made under the provisions of C. S.,

4369, as rewritten in Public Laws 1937, chapter 248. This statute prescribes punishment for "Any person who shall willfully and knowingly present or cause to be presented a false or fraudulent claim, or any proof in support of such claim, for the payment of a loss, or other benefits, upon a contract of insurance; or prepares, makes or subscribes to a false or fraudulent account, certificate, affidavit or proof of loss, or other document or writing, with intent that the same may be presented or used in support of such claim. . . ." The gravamen of an offense under this statute is the "willfully and knowingly" presenting "a false or fraudulent claim," or false or fraudulent proof of claim "for the payment of a loss, upon a contract of insurance."

The word "willfully" as used in this statute means something more than an intention to commit the offense. It implies committing the offense purposely and designedly in violation of law. *S. v. Whitener,* 93 N. C., 590; *Foster v. Hyman,* 197 N. C., 189, 148 S. E., 36. The word "knowingly" as so used, means that defendant knew what he was about to do, and, with such knowledge, proceeded to do the act charged. These words combined in the phrase "willfully and knowingly" in reference to violation of the statute, mean intentionally and consciously. As used in the present indictment it means that defendant for purpose of collecting insurance intentionally made a false claim as to the value of the tobacco burned, with knowledge and conscious of the fact that the claim was false and fraudulent. The burden was on the State to offer evidence tending to show, or from which the jury might reasonably infer, that the claim for the value of the tobacco burned was false, and that defendant knew it was false, and, with such knowledge, proceeded to make claim for payment of insurance thereon.

Applying these principles, does the evidence offered meet these requirements? We do not think so. We are of opinion that the evidence does not rise above the dignity of conjecture or suspicion—if so much may be conceded.

In the proof of loss filed by defendant he asserted that the cash value of the tobacco burned was $2,882.79. In the complaint in the civil action, though forbidden by statute to be used against defendant, C. S., 533, yet admitted in evidence, without objection, defendant alleges that the value of the tobacco burned was $2,882.79. It is true that there is oral testimony to the effect that defendant said that "there were 4,600 sticks of his crop burned," and that in the civil complaint he alleges "that said barn contained approximately 10,100 sticks of cured tobacco," of the reasonable market value of "not less than" $2,882.79.

From this evidence the State argues that if 10,100 sticks of tobacco had reasonable market value of $2,882.79, then 4,600 sticks would have been worth only a proportionate part of that amount, and that if the

jury should find that defendant's statement that 4,600 sticks is the amount he had, the jury might reasonably find that defendant knew he was making a false claim. This argument loses sight of the allegation that the market value of the "approximately 10,100 sticks" had the reasonable market value of "not less than" $2,882.79. As to how much more, there is no evidence. These are contentions that may be logical in the debate on the trial of the civil action, but are not of sufficient certainty to justify the conviction of the crime charged against defendant.

2. In regard to the exception of defendant to the action of the court in refusing to set aside the verdict because of the fact that the jury took into its room the complaint in the civil action, and a sheet of paper on which was typed a synopsis of the argument of counsel for the State, as indicated in the statement of facts, even though the decision here turns on another point, we deem it opportune to call attention to these pertinent decisions of this Court: *Watson v. Davis,* 52 N. C., 178; *Burton v. Wilkes,* 66 N. C., 604; *Williams v. Thomas,* 78 N. C., 47; *Posey v. Patton,* 109 N. C., 455, 14 S. E., 64; *Nicholson v. Lumber Co.,* 156 N. C., 59, 72 S. E., 86; *S. v. Caldwell,* 181 N. C., 519, 106 S. E., 139; *Brown v. Buchanan,* 194 N. C., 675, 140 S. E., 749.

These cases settle the principle that without consent of parties it is error to permit the jury to take such papers into the jury room, and to retain same while in its deliberations. In the present case the papers taken have especially objectionable features: (1) The statute, C. S., 533, provides that "No pleading can be used in a criminal prosecution against the party as proof of fact admitted or alleged in it." Though the complaint was admitted in evidence, without objection, which amounted to waiver of objection thereto, *S. v. Mitchell,* 119 N. C., 784, 25 S. E., 783; *S. v. Hartsfield,* 188 N. C., 357, 124 S. E., 629; *Cameron v. McDonald,* 216 N. C., 712, 6 S. E. (2d), 497, it was not permissible for the jury to take it into the jury room without the consent of defendant, or of his counsel. (2) The notes of the argument of counsel were not evidence and, in fact, contained memoranda or argument bearing upon the failure of defendant to testify. C. S., 1799.

The judgment below is

Reversed.

BEULAH THOMAS GETTYS v. TOWN OF MARION, A MUNICIPAL CORPORATION.

(Filed 9 October, 1940.)

1. Municipal Corporations § 14—

A municipality is required to exercise due care to keep its streets, sidewalks and grass plots between sidewalks and curbs in a reasonably safe condition for the purposes of travel for which they are respectively intended.

2. Same—

A municipality is not liable for injury caused by water hydrants, gas plugs, and other necessary obstructions unless they are negligently constructed or maintained or are in an improper place.

3. Same—

A municipality is not an insurer of safety of pedestrians and travelers along public ways but is liable only for defects or obstructions of which it has actual or constructive notice and from which injury may be reasonably anticipated in the exercise of reasonable care and prudence.

4. Same—

The mere fact of injury to a traveler or pedestrian along public ways of a municipality does not raise the presumption of negligence, the doctrine of *res ipsa loquitur* not being applicable.

5. Same—Evidence held insufficient to show that meter box was improperly constructed or maintained or that city had actual or constructive notice of any defect.

Plaintiff's evidence tended to show that the defendant municipality maintained a water meter in the grass plot between the curb and the sidewalk, that the ground sloped from the curb to the sidewalk so that it was about 18 inches higher at the curb, that the top of the water meter was about two inches below the surrounding ground, that sand had blown over the lid, that plaintiff, in returning to the sidewalk from a car at the curb, saw the depressed place in the ground before she stepped in it but did not realize that it was a water meter box, that the lid slipped or turned causing plaintiff to fall, to her injury. *Held:* The doctrine of *res ipsa loquitur* does not apply, and the water meter box being located in the usual place and there being no evidence that the top slipped by reason of faulty construction or negligent maintenance, nor any evidence that the city had any actual or constructive notice of the alleged defect, defendant municipality's motion for nonsuit was properly allowed.

6. Trial § 22d—

In granting defendant's motion for nonsuit it is not error for the court to refuse to incorporate in its judgment an excerpt from the minutes disclosing defendant's grounds for the motion, or in refusing to insert in detail the grounds upon which the nonsuit is granted.

CLARKSON, J., concurs in result.

APPEAL by plaintiff from *Armstrong, J.*, at February Term, 1940, of McDOWELL. Affirmed.

Civil action in tort to recover damages for personal injuries.

Plaintiff walked from the building in which she was employed across a sidewalk of the defendant to a car parked at the curb for the purpose of getting a lunch box. As she turned and started back to the building she stepped on the lid or cap of a water meter. The lid turned or slipped and she fell, suffering physical injuries. The water meter box was located on the grass or tree plot between the paved portion of the sidewalk and the curb.

The meter box consists of a hollow cylinder constructed of iron or steel about 10 inches in diameter and about 24 inches in length and is set perpendicular in the ground so that the top is slightly lower than the surrounding ground. It has a cap or lid about 11 inches in diameter which covers the top of the water meter. The ground between the curb and the sidewalk is about 18 inches high at the curb and gradually slopes down to the paved portion of the sidewalk. When the lid is off it leaves a hollow in the ground about 10 inches in diameter and about 2 feet deep. The top of the water box was 1½ or 2 inches below the dirt which had been piled around it and sand had blown over the lid where there was no grass to protect it. Plaintiff saw the depressed place in the ground before she stepped in it but did not realize that it was a meter box.

The plaintiff alleges negligence on the part of the defendant in that it placed the meter box in a dangerous place; that the meter box was negligently constructed and placed below the level of the surrounding ground where the ground was on an incline and where foreign substances accumulated at the edges and around the upright end of the water meter; that the defendant negligently failed to maintain the meter box at the top in a proper and safe condition so that the lid would not and did not fit securely; and that the town failed to properly inspect.

At the conclusion of plaintiff's evidence the defendant moved to dismiss as of nonsuit. The motion was allowed and the judgment was entered accordingly. The plaintiff excepted and appealed.

Roy W. Davis and G. F. Washburn for plaintiff, appellant.
Robert W. Proctor and E. P. Dameron for defendant, appellee.

BARNHILL, J. While it is alleged that the upright end of the hollow cylinder composing the meter box has a groove about 1½ to 2 inches deep on its upper end in which the lid or cap is supposed to fit when placed thereon, there is no evidence that the cap was not in fact properly placed in the groove or that it was otherwise defective in construction or in maintenance. The plaintiff relies upon the happening of the event as evidence tending to show that the meter box top was not properly placed or was in defective condition by reason of the sand which had

washed or blown on it, coupled with the fact that the meter box was placed between the paved portion of the sidewalk and the curb where the land sloped from the curb to the sidewalk. She saw the depression in the ground where the meter box was located before she stepped thereon but could not tell the condition in which the meter box and top was by reason of the sand which had blown over it.

Under the circumstances of this case does *res ipsa loquitur* apply? If not, the judgment below must be affirmed.

The grass plot or tree space between the sidewalk and curb is a part of the street which a municipality is bound to keep in a reasonably safe condition. 43 C. J., 989, sec. 1772; see also L. R. A., 1915 F, 797. In each case the way is to be pronounced sufficient or insufficient as it is or is not reasonably safe for the ordinary purpose of travel under the particular circumstances which exist in connection with that particular case. An obstruction or defect in a sidewalk causing an injury, to be actionable, must be such a one as to make the walk at the point of the accident dangerous or unsafe for a pedestrian using it with due care for his own protection. If the obstruction is of that character municipal responsibility follows upon competent proof of the essential elements of liability . . . obstructions which do not render the sidewalk obviously dangerous or unsafe present municipal negligence as a question of fact. . . . Necessary obstructions, such as water hydrants, gas plugs, etc., where the cause of injuries, do not make the municipality liable, provided they are not negligently constructed or maintained and are not in an improper place. 7 McQuillin Municipal Corp. (2d), sec. 2976.

The liability of a municipal corporation for injuries from defects or obstructions in its streets is for negligence and for negligence only; it is not an insurer of the safety of travelers, and it is required to exercise ordinary or reasonable care to maintain its streets and sidewalks in a reasonably safe condition for travel for those using them in a proper manner, 43 C. J., 998, but the municipality will not be liable for every defect or obstruction, however slight or trivial or little likely to cause injury, or for every mere inequality or irregularity in the surface of the way; it is only against danger which can or ought to be anticipated, in the exercise of reasonable care and prudence, that the municipality is bound to guard. 43 C. J., 1010.

The rule prevailing in this jurisdiction is well stated by *Hoke, J.*, in *Fitzgerald v. Concord,* 140 N. C., 110, as follows: "The town, however, is not held to warrant that the condition of its streets, etc., shall be at all times absolutely safe. It is only responsible for negligent breach of duty, and, to establish such responsibility, it is not sufficient to show that the defect existed and an injury has been caused thereby. It must

be further shown that the officers of the town might have discovered the defect, and the character of the defect was such that injuries to travelers therefrom might reasonably be anticipated." *Alexander v. Statesville,* 165 N. C., 527, 81 S. E., 763; *Brown v. Durham,* 141 N. C., 252; *Revis v. Raleigh,* 150 N. C., 348, 63 S. E., 1049; *Johnson v. Raleigh,* 156 N. C., 269, 72 S. E., 368; *Bailey v. Winston,* 157 N. C., 253, 72 S. E., 966; *Foster v. Tryon,* 169 N. C., 182, 85 S. E., 211; *Sehorn v. Charlotte,* 171 N. C., 540, 88 S. E., 782; *Bailey v. Asheville,* 180 N. C., 645, 105 S. E., 326; *Gasque v. Asheville,* 207 N. C., 821, 178 S. E., 848; *Houston v. Monroe,* 213 N. C., 788, 197 S. E., 571; *Watkins v. Raleigh,* 214 N. C., 644, 200 S. E., 424.

The happening of an injury does not raise the presumption of negligence. There must be evidence of notice either actual or constructive. *Seagroves v. Winston,* 167 N. C., 206, 83 S. E., 251; *Alexander v. Statesville, supra; Love v. Asheville,* 210 N. C., 476, 187 S. E., 562. The existence of a condition which causes injury is not negligence *per se. Sehorn v. Charlotte, supra.* The doctrine of *res ipsa loquitur* does not apply in actions against municipalities by reason of injuries to persons using its public streets. *City of Natchez v. Cranfield,* 124 Sou. Rep., 656.

The rules governing the liability of municipalities for personal injuries as herein stated have been applied by this and other courts in water meter cases; *Sehorn v. Charlotte, supra; Bailey v. Asheville, supra; City of Wichita Falls v. Lipscombe,* 50 S. E. (2d), 867 (Tex.); *Gatz v. City of Kerrville,* 36 S. W. (2d), 277 (Tex.); *Carvin v. St. Louis,* 52 S. W., 210 (Mo.); *Atlanta v. Hampton,* 77 S. E., 393; and in similar cases; *City of Natchez v. Cranfield, supra; Foster v. Tryon, supra; City of Covington v. Rosenberg,* 197 S. W., 786; 7 McQuillin Municipal Corp. (2d), 2976.

It is a matter of common knowledge that municipalities ordinarily place water meter boxes between the paved portion of the sidewalk and the curb and there is nothing in the evidence to warrant an inference that the meter box, upon which plaintiff stepped, was improperly placed or that its position was rendered insecure or that its top slipped out of position on this occasion by reason of faulty construction or negligent maintenance. Nor is there any evidence that the defendant had any notice, either actual or constructive, of any alleged defect in its condition. This being true, this Court would not be justified in holding that the trial court erred in entering judgment of nonsuit.

The record discloses that the minute docket in the office of the clerk of the Superior Court of McDowell County contains the following entry:

"At close of plaintiff's evidence, defendant demurs to evidence and moves to dismiss on two grounds;

"(1) No evidence of claim filed with town,

"(2) That plaintiff is guilty of such contributory negligence as will defeat her recovery.

"Motion is allowed and plaintiff excepts."

Plaintiff excepts to the refusal of the court to insert in its judgment in detail the reasons upon which the nonsuit is granted or to insert therein the excerpt from the minutes. This exception is without merit.

The judgment below is

Affirmed.

CLARKSON, J., concurs in result.

ERNEST K. SANDERSON v. ÆTNA LIFE INSURANCE COMPANY.

(Filed 9 October, 1940.)

1. Appeal and Error § 2—

Defendant's appeal from an order continuing its motion to dismiss is premature, since the order disposes of no substantial right. C. S., 638.

2. Judgments § 35—

The plea of *res judicata* is an affirmative defense which must be taken by answer and supported by competent evidence, and the defense is not available on motion to dismiss.

3. Insurance § 34f—Fact that complaint alleges two different dates as the inception of disability is not fatal.

In this action on a disability clause in a life insurance policy, defendant insurer demurred to the complaint for that the complaint in one paragraph alleged that the disability claimed began on a certain date while in the proof of claim set out in another paragraph, the disability was alleged to have begun on a date some three years prior thereto. *Held:* The discrepancy is not sufficient to defeat recovery and the demurrer was properly overruled, it being sufficient if the complaint alleged total, permanent disability for a period of time entitling plaintiff to some benefits under the terms of the policy and that notice thereof was given insurer or was waived.

APPEAL by defendant from *Hamilton, J.*, at April Term, 1940, of WAYNE. Affirmed.

Plaintiff brought action to recover upon an insurance policy which contained a permanent disability provision in which the defendant, under certain conditions, most of which are not pertinent to this inquiry, agreed to pay certain benefits to the insured upon total and permanent disability arising by bodily injuries or disease.

When other conditions necessary to entitle the insured to benefits

exist—not in controversy here—the policy provides: "In such a case, benefits shall accrue from the expiration of the said ninety days, but not from a date more than six months prior to the date that evidence of such disability satisfactory to the Company is received at its Home Office." The ninety days referred to is a period of time to elapse before the disability can be considered permanent, provided, "satisfactory evidence has not been previously furnished that such disability is permanent."

The plaintiff made and filed his complaint, stating amongst more formal matters the provisions of the policy referred to, and alleged that on or about the first day of January, 1938, while the policy of insurance was still in force and an existing contract between the plaintiff and defendant, and while all the premiums then due the defendant by the plaintiff had been paid, the plaintiff became totally and permanently disabled by bodily injuries or disease, and was thereby prevented from performing any work or conducting any business for profit. In this allegation the plaintiff was following substantially the wording of the contract as theretofore set up in the complaint.

The plaintiff proceeds to allege that he furnished the defendant, at its home office, proof of such total and permanent disability in the manner required by the contract of insurance, and that the plaintiff had done all things required of him by the contract of insurance except such things as the defendant, by its own act or conduct, had waived, and that defendant had failed and refused the plaintiff any part of the stipulated benefit, to wit, $50.00 per month, because of such total and permanent disability. Plaintiff demands payment to him of the sum of $800.00, which he alleges is due him under the contract of insurance, and prays for an order to issue directly to the defendant to pay the plaintiff $50.00 for each calendar month thereafter.

Upon the filing of this complaint the defendant demurred thereto on the ground that it fails to state a constituted cause of action, namely, (a) the plaintiff fails to set out the insurance policy sued on, or a copy thereof, and fails to quote the full relevant provisions thereof; (b) the complaint fails to set out the proof of loss or a copy thereof or to summarize its provisions or give full information relative thereto; (c) the complaint fails to set out the statement of the physician or a copy thereof or to summarize its provisions or give full information relative thereto; and (d) the complaint fails to state other facts sufficient to constitute a cause of action.

This demurrer was heard by Stevens, Jr., Resident Judge of the Sixth Judicial District, on 13 January, 1940, and a consent order was entered requiring the plaintiff to file a copy of the notice and proof of disability referred to in his complaint, as exhibited by an amendment; thereafter, the defendant was allowed thirty days in which to file answer or demurrer.

The amendment to the complaint was filed in apt time and the notice and proof of disability were set up in "paragraph 7A," the complaint alleging that it was the notice and proof of claim forwarded to the defendant.

This document is upon a form supplied by the insurance company and is too long to be printed in this statement. The part thereof pertinent to this appeal relates to the allegations concerning the time at which the total disability supervened.

It appears in the proof of claim that the plaintiff consulted a physician with regard to his ailment on 12 January, 1935; he had an abscess on the neck, with complications, and the date last worked was 12 January, 1935. In this statement he declares that he had been continuously and totally disabled from 12 January, 1935. As to this date, the statement of the physician accompanying the proof of claim is in corroboration.

To the complaint, so amended, the defendant filed a demurrer, in which it points out, amongst other things, that upon the face of the complaint, and fairly considered, it fails to allege any disability commencing on 1 January, 1938, or that proof of such disability has ever been furnished the defendant, and that, therefore no disability benefits have accrued; that neither the proof of claim nor the statements of the physicians mention a disability beginning on 1 January, 1938, but refer entirely to the disability commencing on 12 January, 1935, and are not, therefore, any claim, proof, or evidence of the disability such as is alleged in the complaint.

This demurrer was heard before Hamilton, S. J., presiding at the April Term, 1940, of Wayne County Superior Court, and the demurrer was overruled. To this the defendant excepted.

Thereupon, the defendant made a motion to dismiss, based upon various and sundry suits and judgments thereupon alleged to have been had in the Superior Court of Wayne County, at which, as is asserted in the motion, the claims of the plaintiff, based upon permanent and total disability, had been adjudicated against him and in favor of this defendant. These suits are alleged to cover a large part of the period between 12 January, 1935, when the disability was alleged to have commenced, and the commencement of this action.

This motion came on to be heard at the April Term, 1940, after the demurrer had been overruled, and the judge presiding continued the same, pending appeal. To this defendant excepted.

Upon these two exceptions the present appeal is based.

J. Faison Thomson for plaintiff, appellee.

Royall, Gosney & Smith and James Glenn for defendant, appellant.

SEAWELL, J. 1. Defendant's appeal from the order continuing its motion to dismiss is premature, since the order disposes of no substantial right. C. S., 638. Moreover, the defendant cannot be hurt by the mere continuance of a motion in which it cannot hope to prevail.

In its motion to dismiss plaintiff's action the defendant merely attempts to assert the conclusiveness of prior judgments supposedly affecting the matters in controversy. *Res judicata* is an affirmative plea in bar which must be taken by answer and supported by competent evidence. When properly raised, the issue will be determined according to the practice of the Court, but the defense is not available on a motion to dismiss. *Williams v. Hutton & Bourbonnais Co.,* 164 N. C., 216, 80 S. E., 257; *Redmond v. Coffin,* 17 N. C., 437; *Bear v. Comrs. of Brunswick County,* 124 N. C., 204, 32 S. E., 558. There was no error in continuing this motion.

2. The demurrer points out a variance or discrepancy in the complaint as to the time when plaintiff's total permanent disability began. In paragraph 7 it is alleged to have begun on or about the first day of January, 1938. In the proof of claim set out in paragraph 7A of the amended complaint it is stated to have begun 12 January, 1935.

The discrepancy is not sufficient to defeat recovery and, therefore, not fatal to the complaint. It is sufficient if the total permanent disability, of which notice is alleged, has existed for such a period of time as will entitle the plaintiff to some benefits under the contract of insurance.

Untenable, also, are the other stated grounds of demurrer.

The judgment is

Affirmed.

DAVID T. VANCE v. BENJAMIN PRITCHARD AND RUTH PRITCHARD, HIS WIFE, AND SENIA PRITCHARD, WIDOW OF JOHN PRITCHARD.

(Filed 9 October, 1940.)

1. Boundaries § 13—

The statute empowering the Superior Court to order a court survey of land in dispute in a pending action, C. S., 364, vests in the court a sound discretion within the limits defined.

2. Same—Denial of motion for court survey held not error upon the facts found.

In this action in ejectment, plaintiff claimed title to the mineral rights in a certain described tract of land and defendants claimed title to three small tracts. Upon plaintiff's motion for a court survey of the tract claimed by him, the trial court found facts to the effect that reasonable grounds existed for belief that the three small tracts are within the boundaries of the larger tract claimed by plaintiff, and that plaintiff was unable to prove the location of all the boundary lines of the tract claimed

by him by survey or witnesses, and that a court survey would affect the rights of large numbers of persons and landowners not parties to the action. *Held:* The case, as constituted, does not involve the location of boundary lines between the land of plaintiff and defendants, and the court's denial of the motion for a court survey is not held for error upon the facts found. The ruling of the court does not prevent plaintiff from having a survey made for the purpose of obtaining evidence in support of his cause of action.

APPEAL by plaintiff from an order entered by *Bobbitt, J.*, at April Civil Term, 1940, of AVERY. Affirmed.

Following the decision of this Court in *Vance v. Pritchard,* 213 N. C., 552, 197 S. E., 182, the plaintiff submitted to a voluntary nonsuit and subsequently instituted this action against Benjamin Pritchard and wife, and Senia Pritchard, widow of John Pritchard. Pleadings were filed wherein plaintiff alleged title to the mineral rights in a tract of 2,180 acres of land, and alleged that the defendants were wrongfully claiming and mining the minerals under a portion of said land. The defendant Benjamin Pritchard answered, denying plaintiff's title and alleging title in himself to the land and minerals contained in three small tracts of 25.9, 26½ and 16 acres, respectively.

Thereafter the plaintiff caused to be served on fifty-six persons, not parties to the suit, notice of motion for a court survey of the 2,180 acres, the mineral rights in which are claimed by him in his complaint in this action. A substantial number of these persons, entering special appearance for that purpose, opposed the granting of an order for a survey of this land. The court below, upon the affidavits presented, found the facts, and thereupon entered order denying plaintiff's motion, as follows:

"1. This is an action in ejectment in which the plaintiff alleges ownership of the minerals and mineral rights, together with rights of ingress, egress, and regress, in respect of the tract of 2,180 acres described in the complaint, and further alleges that the defendants are wrongfully mining certain portions of said 2,180 acres and are trespassers.

"2. The defendants, after denying plaintiff's alleged ownership in respect of said 2,180 acres, allege their ownership of three tracts of twenty-five and nine-tenths (25.9) acres, twenty-six and one-half (26½) acres, and sixteen and five-eighths (16⅝) acres, respectively, particularly described in their answer.

"3. In a former action by this plaintiff against these defendants, tried in the Superior Court of Avery County and heard in the Supreme Court of North Carolina, upon appeal, and decided as reported in *Vance v. Pritchard,* 213 N. C., 552, subsequent to which decision a judgment of voluntary nonsuit was entered in the Superior Court of Avery County, surveys and maps were made of the boundaries of each of the three

tracts particularly described in the defendants' answer herein and these surveys and maps are now available for use by the plaintiff. (Findings of fact set forth in this paragraph three are based on admissions of counsel in open court during the argument.)

"4. No boundary line as between lands of the plaintiff and lands of the defendants is drawn in dispute by the pleadings herein and this action is not for the purpose of establishing any boundary line as between lands of the plaintiff and lands of the defendants herein.

"5. The purpose of the survey for which the plaintiff applies for an order of survey in this cause is to locate all or certain of the lines and boundaries of the 2,180-acre tract and the immediate purpose, so far as this action is concerned, is the obtaining of such survey and the data to be obtained therefrom for use or possible use as evidence upon the trial of this action.

"6. There exists reasonable ground for the belief on the part of the plaintiff that the three tracts particularly described in the answer are within the boundaries of the 2,180-acre tract.

"7. The plaintiff up to now has been unable to locate a survey or surveys or a witness or witnesses by which or by whom the plaintiff can prove the location of all of the boundary lines of the 2,180-acre tract. The plaintiff has made diligent efforts to locate such survey or witness but without success up to now.

"8. The plaintiff must locate the lines and boundaries of the 2,180-acre tract in order to maintain this action and to do so must locate a survey or surveys already made or a witness or witnesses having knowledge of the lines and boundaries or have made now a survey of certain of the lines and boundaries of the 2,180-acre tract.

"9. The three tracts particularly described in the answer, if located within the 2,180-acre tract at all, constitute a very small portion of said boundary; a large number of persons, who are not parties to this action, own lands or interests in land within the 2,180-acre tract and just outside the 2,180-acre tract, and said persons have interests and rights with reference to the making of any survey of said 2,180-acre tract and will be affected by the entry of a surveyor upon lands necessary to be entered for the purpose of making such survey.

"10. A large number of persons have been notified of the plaintiff's motion that an order of survey be entered in this cause in accordance with the notice appearing in the record. A substantial number of such persons, to wit: twenty-seven (27) under a special appearance, through their counsel of record, have protested the making of such order of survey in this cause.

"11. No person, so far as the record herein discloses, has obstructed or otherwise interfered with any effort on the part of the plaintiff to have made a private survey of the 2,180-acre tract.

And the court being of the opinion that it is not necessary or proper to make an order in this cause for a survey of all or certain of the boundary lines of the 2,180-acre tract, which would or might prejudice or affect a large number of persons who are not parties hereto or involved in the controversy herein, and being further of the opinion that the plaintiff by procedure other than by order herein can establish the boundaries of said 2,180-acre tract or of the lands owned by the plaintiff, and being further of the opinion that any order of survey made by the court herein would not be legally binding on persons not parties to this action but would in appearance and form pretend to clothe the surveyor named in such order with rights of ingress, egress and regress upon and through their lands and to such extent would or might prejudice or affect their rights.

"Accordingly, it is now ordered, adjudged, and decreed that the plaintiff's motion for order of survey herein be, and it is hereby, denied."

From the order denying his motion for survey, plaintiff appealed.

J. V. Bowers, McBee & McBee, and Harkins, Van Winkle & Walton for plaintiff, appellant.

Charles Hughes and Burke & Burke for defendants, appellees.

DEVIN, J. The question presented by this appeal is whether, upon the facts found by the judge below, the plaintiff was entitled as a matter of law to the order of survey of plaintiff's land as prayed.

Under the circumstances of this case, as they appear from the record, and the findings of the court, we are not inclined to hold for error the denial of plaintiff's motion. The ruling complained of was made pursuant to the opinion of the court below, based upon the facts found, that it was not necessary or proper to order a court survey of the boundaries of plaintiff's 2,180 acres of land.

It is provided in C. S., 364, that, "When in any suit pending in the Superior Court the boundaries of land are drawn in question, the court may, if deemed necessary, order a survey of the land in dispute, agreeable to the boundaries and lines expressed in each party's title." The statute further provides that for such surveys the court shall make proper allowance to the surveyor or surveyors to be taxed among the costs of the suit. The statute vests in the court a sound discretion within the limits defined.

It appears here that plaintiff desires a court survey of 2,180 acres of mountain land, affecting the rights of a large number of persons and landowners who are not parties to the action, for the purpose of providing evidence to establish his title and to show that defendant's three small tracts of land aggregating 69 acres are embraced within the bound-

aries of plaintiff's deed. The case, as it is now constituted, does not appear to involve the location of boundary lines between the lands of the plaintiff and defendants.

The ruling of the court below does not prevent plaintiff from having a survey made, and obtaining the evidence which he is informed can be made available thereby.

Judgment affirmed.

SARAH GOOD HOSIERY MILLS, INC., SUCCESSOR TO GOOD-McCURRY HOSIERY MILLS, v. CAROLINA, CLINCHFIELD & OHIO RAILWAY.

(Filed 9 October, 1940.)

Carriers § 8—Railroad company is under duty to exercise due care to locate loading facilities so they will not unnecessarily damage others.

Plaintiff's complaint alleged that defendant railroad company located loading facilities for a stone and lime quarry directly across its tracks from plaintiff's mill, that plaintiff's machinery and plant were damaged by the clouds of dust thrown into the air from the operation of the loading facilities, and that the loading facilities could have been located without inconvenience to defendant or its shippers at a place where they would have caused no injury to plaintiff. *Held:* Defendant's demurrer to the complaint was properly overruled, since a railroad company is required to exercise due care in the selection of sites for loading facilities so as not to unnecessarily inconvenience or damage others, and if more than one site is reasonably available it should select the one which will cause less inconvenience and damage.

APPEAL by defendant from *Bobbitt, J.*, at July Term, 1940, of McDOWELL.

This case has been before us upon an appeal from a refusal to grant a petition for removal to the United States District Court. 216 N. C., 474. It is now before us upon an appeal from a judgment overruling a demurrer upon the ground that the complaint fails to state facts sufficient to constitute a cause of action.

Jordan & Horner and E. H. McMahan for plaintiff, appellee.

James J. McLaughlin, J. W. Pless, and Robert W. Proctor for defendant, appellant.

SCHENCK, J. The gravamen of the complaint is that the defendant wrongfully, arbitrarily and negligently located its loading facilities at a site where it knew, or by the exercise of reasonable care should have known, that injury and damage would result to the plaintiff from the

use thereof, when there were other sites available and equally convenient to the defendant and its customers for the location of such loading facilities where no injury nor damage would result to the plaintiff or others from the use thereof, and that by so locating such facilities the defendant created a nuisance, which proximately caused damage to the property of the plaintiff.

The allegations are to the effect that the plaintiff owned a hosiery mill which had been located for many years near the railroad track of the defendant at Sevier, North Carolina, and that a rock quarry and lime deposit were discovered near by, and in order to furnish loading facilities for customers of the defendant who desired to ship the crushed stone and pulverized lime over its railroad the defendant constructed a ramp or raft at Sevier directly across its track from the plaintiff's hosiery mill, and that when the trucks of the customers ran upon the ramp or raft and dumped the crushed stone and pulverized lime to be precipitated by gravity into the cars of the defendant, great clouds of dust and dirt were caused to arise and settle in the mill of the plaintiff greatly damaging its delicate machinery and costly materials therein.

The complaint alleges: "That as hereinbefore alleged, the rights and property rights of this plaintiff had long been situate at Sevier, and its rights and property rights had attached, and it was the duty of the defendant railway company, in the ordinary use of its facilities, to use reasonable care and diligence not to injure and destroy the property and property rights and the business of this plaintiff; that at all times there was sufficient and ample room to accommodate the customers hereinbefore referred to, to wit: the owners and operators of said rock quarry and lime deposit, at a distance away from the mill of this plaintiff, but that the said loading facilities were negligently, carelessly, arbitrarily and unnecessarily placed where they were, and where they would and were obliged to in the ordinary and common use of the same create a nuisance and utterly destroy the machinery and the material and the business of this plaintiff; that in the exercise of ordinary care the same could have been placed at a much more convenient spot both for the convenience of the customers and this plaintiff and without injury to either, but to the contrary thereof, the defendant negligently, carelessly, willfully, wantonly, and in an arbitrary manner, so located, or permitted, allowed, suffered and directed its customers to so locate its ramps, rafts, inclines and so forth, and extended its sidetracks to accommodate the same, at a place where the ordinary operation of the same was compelled to create a nuisance to and did destroy the property, property rights and business of this plaintiff."

The holding with us, and of other jurisdictions which we have investigated, is that railroads while they may have the right to locate, construct

and maintain loading facilities for their customers, or permit such customers to so locate, construct and maintain such facilities, in the selection of the sites for such facilities, as well as in the construction and maintenance thereof, they are required to exercise due care not to unnecessarily inconvenience and damage others, and if more than one site is reasonably available for such location the site that will the less inconvenience or damage others should be chosen.

In *Taylor v. R. R.,* 145 N. C., 400, it is written: "While we hold that a railway lawfully operated with reasonable care, however disagreeable it may be to the residents of the neighborhood, is not an actionable nuisance, we are far from holding that it cannot be so operated and conducted as to become one."

". . . the limitation (upon the doctrine of immunity of railroads from liability for damage to others from their operation) is always annexed, that the right be exercised 'in a lawful way,' that is, in respect to those who suffer damage, with due care for their rights. When done negligently, and without due regard for such rights, there is *damnum et injuria,* that is, in contemplation of the law *injuria,* which is always actionable. We find the same limitation imposed upon the doctrine in all of the cases, from other jurisdictions, cited in defendant's brief." *Thomason v. R. R.,* 142 N. C., 300. See, also, Annotations, 6 A. L. R., 729, *et seq.*

In *Thomason v. R. R., supra,* is cited with approval *R. R. v. Baptist Church,* 108 U. S., 317, 27 Law Ed., 739, which was an action to recover damage for the wrongful and negligent location of its work shops near the church of the plaintiff by a railroad which was authorized by Congress to construct its tracks and necessary works in the District of Columbia, wherein it is said: "Whatever the extent of the authority conferred, it was accompanied with this implied qualification: that the works should not be *so placed* as by their use to unreasonably interfere with and disturb the peaceful and comfortable enjoyment of others in their property. Grants of privileges or powers to corporate bodies, like those in question, confer no license to use them in disregard of the private rights of others, and with immunity for their invasion. The great principle of the common law, which is equally the teaching of Christian morality, so as to use one's property as not to injure others, forbids any other application or use of the rights and powers conferred. . . ."

"Nor could such authority be invoked to justify acts, creating physical discomfort and annoyance to others in the use and enjoyment of their property, to a less extent than entire deprivation, if *different places* from those occupied could be used by the corporation for its purposes, without causing such discomfort and annoyance."

We are of the opinion, and so hold, that the judgment of the Superior Court overruling the demurrer should be sustained, and it is so ordered.

Affirmed.

STATE v. LESLIE HOWELL.

(Filed 9 October, 1940.)

Homicide §§ 16, 27h—Where defendant does not admit killing deceased, jury should be instructed as to circumstances under which it may return verdict of not guilty.

Defendant entered a plea of not guilty to the charge of murder and did not testify in his own behalf or offer any evidence. *Held:* Notwithstanding sufficient evidence tending to show defendant's guilt of murder in the first degree, including testimony of a confession made by defendant that he shot and killed deceased, upon the plea of not guilty the burden rested upon the State to show that defendant shot deceased and that deceased died from the wound thus inflicted, since the weight and credibility of the evidence lies within the province of the jury, and an instruction which fails to charge the jury as to the circumstances under which it might render a verdict of not guilty is error, the presumption arising when a killing with a deadly weapon is admitted or established not relieving the State of the burden of showing an unlawful killing.

APPEAL by defendant from *Thompson, J.*, at April Term, 1940, of WAYNE. New trial.

Criminal prosecution tried on a bill of indictment which charged the defendant with the murder of one H. C. Wiegand.

On the night of 7 March, 1940, defendant and his wife were quarreling and cursing each other. She started down the street presumably to call officers. The defendant, having a shotgun in his hand, followed her to the corner and they went back to the house still cursing and quarreling. After they returned to their home the difficulty continued and she went out on the porch and called to neighbors to get the officers. One of the neighbors went for the officers. When the officers came defendant's wife was on the porch and he was in the house. When the deceased and other officers started in the door to arrest the defendant a gun fired and the deceased received a mortal wound in his right side. One witness testified that he saw the defendant fire the gun and there was other circumstantial evidence tending to so show. After his arrest the defendant admitted to the officers that he shot the deceased. There was also evidence that the defendant had threatened to kill the first officer that came into his house.

The defendant, upon being arraigned, entered his plea of not guilty. He did not testify in his own behalf or offer any other witness, but, at the conclusion of the evidence for the State, moved for judgment as of nonsuit and excepted to the refusal thereof. The jury returned for its verdict "guilty of murder in the first degree." Thereupon, the court pronounced judgment of death by asphyxiation. Defendant excepted and appealed.

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

N. W. Outlaw for defendant, appellant.

BARNHILL, J. The defendant's primary assignment of error is directed to the failure of the court to charge the jury as to its right to return a verdict of not guilty. This assignment of error must be sustained.

The defendant did not testify in his own behalf and at no time admitted that he killed the deceased. His plea denied that he was guilty of any unlawful killing and challenged both the weight and credibility of the evidence offered by the State. On this plea the burden rested upon the State to show beyond a reasonable doubt that the defendant had committed an unlawful killing before any verdict of unlawful homicide could be returned. While it is a rule with us that when it is proven or admitted that a defendant intentionally killed another with a deadly weapon certain presumptions arise which cast the burden upon the defendant to mitigate the killing or to excuse it altogether on the grounds of accident, misadventure or self-defense, this does not, and it has never been interpreted to, mean that the burden of showing an unlawful killing does not rest with the State throughout the trial.

The assumption by the court that it was admitted or proven that the defendant unlawfully killed the deceased permeates the whole charge except in one paragraph which was as follows:

"Now, Gentlemen of the Jury, the defendant says and insists that he is not guilty of any charge and, before you could find him guilty of any offense, the State must have satisfied you from the evidence, beyond a reasonable doubt, he is guilty of the offense as to which you find him guilty."

But the court had charged the jury: "The State in this case asks at your hands against the accused, Leslie Howell, a verdict of guilty of murder in the first degree. The defendant has pleaded not guilty to that charge." And further—elaborating thereon—that the defendant says and insists that he did not kill with premeditation and deliberation; that he did not kill with malice; that he did not kill intentionally; that all he wanted to do was to get the officers out of his house on that occa-

sion; and that his passion, which had already been aroused on account of the altercation with his wife, suddenly became so aroused that what he did was done in the heat of passion. It further charged: "He says and insists therefore . . . that (manslaughter) is the most that you can render against him, and the one contention of counsel in his argument was that that was all the verdict that could be rendered"; and again, "the accused in this case does not contend that he is not guilty of some offense. His counsel in his argument to you did not contend that you ought not to return a verdict of guilty against the defendant, but his counsel did contend that the most you should return against the defendant in this case would be a verdict of guilty of manslaughter."

At no time did the court instruct the jury that it could or should under any circumstances return a verdict of not guilty. Nor did the court require the jury to find, as an essential element of the crime charged, that the deceased fired the shot which inflicted the fatal wound or that the deceased died from the wound inflicted.

There is no exception to the quoted excerpts from the charge. However, consideration thereof serves but to emphasize the fact that the inadvertence of the court in the respects indicated deprived the defendant of a substantial right and was prejudicial and harmful. *S. v. Helms,* 181 N. C., 566, 107 S. E., 228; *S. v. Castle,* 133 N. C., 769, 46 S. E., 1; *S. v. Maxwell,* 215 N. C., 32, 1 S. E. (2d), 125; *S. v. Redman,* 217 N. C., 483. Under the charge as given the jury must have felt that a verdict at least of guilty of manslaughter was imperative.

There is ample evidence in the record to sustain the charge of murder in the first degree and it may be that upon a retrial the same result will be reached. And yet it is important that a defendant, however humble or defenseless he may be, shall not suffer the penalty of death until he has been convicted in a trial in which there has been a scrupulous observance of constitutional and statutory safeguards protecting and preserving his rights. When there is a general plea of not guilty and no admission of an unlawful killing the death penalty will be exacted only upon the verdict of a jury which has been given full opportunity to pass upon the weight and credibility of the evidence and only after it has been instructed as to its right to return, and the conditions upon which it should render, a verdict of not guilty.

New trial.

R. E. VAN DYKE, ADMINISTRATOR OF THE ESTATE OF THE LATE CHARLES VAN DYKE, DECEASED, v. ATLANTIC GREYHOUND CORPORATION AND L. M. ROBINSON.

(Filed 9 October, 1940.)

1. Appeal and Error § 40e—

On appeal from judgment dismissing the action as of nonsuit, the Supreme Court will review the evidence tending to support plaintiff's cause of action and consider it in the light most favorable to him.

2. Automobiles § 18c—Evidence held to disclose contributory negligence as a matter of law on part of cyclist turning in front of bus on highway.

The evidence tended to show that intestate was riding a bicycle and that the corporate defendant was operating two buses on the highway, all three vehicles traveling in the same direction, that when the first bus approached and started to pass the bicycle the bus driver blew the horn and the cyclist turned to his right and rode his bicycle on the dirt shoulder, which at that point was about four feet wide, that corporate defendant's second bus was following the first bus at a distance of 100 feet to 100 yards, that the cyclist suddenly and without warning or notice of his intention to do so, turned to his left onto the hard surface of the highway when only about 15 feet in front of the second bus, that the driver of the second bus cut sharply to his left and ran the bus into the ditch on the left side of the highway in an effort to avoid striking the cyclist but that the right front corner of the bus struck the bicycle, causing the death of the cyclist. The testimony variously fixed the speed of the buses at from twenty-five to forty miles per hour, and there was some evidence that the second bus did not sound its horn until too late. *Held:* Considering the evidence in the light most favorable to the plaintiff and conceding that the evidence may tend to show some negligence on the part of the defendants, the evidence discloses contributory negligence on the part of the cyclist as a matter of law, which was the proximate cause or one of the proximate causes of the accident, and defendants' motion to nonsuit was properly granted.

3. Automobiles § 9d—

Under our motor vehicle statute a bicycle is deemed a vehicle, and the rider of a bicycle upon the highway is subject to the applicable provisions of the statutes relating to motor vehicles. Public Laws 1939, ch. 275.

4. Automobiles § 18e—Doctrine of last clear chance held not applicable upon the evidence in this case.

Evidence tending to show that a cyclist riding on the shoulder of a highway on his right suddenly and without giving notice of his intention to do so, turned to his left onto the hard surface portion of the highway immediately in front of defendants' bus, without evidence that the driver of the bus had any reason to apprehend that the cyclist was in a position of peril, is insufficient to invoke the doctrine of the last clear chance.

5. Negligence § 12—

Where a boy 14 years of age is shown by the evidence to be exceptionally smart, well grown and intelligent for his age, with good hearing and eyesight, he is amenable to the ordinary rules relating to contributory negligence.

APPEAL by plaintiff from *Carr, J.*, at June Term, 1940, of VANCE. Affirmed.

This was an action for damages for wrongful death of plaintiff's intestate alleged to have been caused by the negligence of the defendants. The defendants denied the allegations of negligence and set up as a further defense the contributory negligence of plaintiff's intestate. At the close of the evidence, motion for judgment of nonsuit was allowed, and from judgment dismissing the action, plaintiff appealed.

J. P. & J. H. Zollicoffer, A. A. Bunn, and J. H. Bridgers for plaintiff, appellant.

Douglass & Douglass and Gholson & Gholson for defendants, appellees.

DEVIN, J. The principal question presented by this appeal is addressed to the correctness of the ruling of the court below in allowing the motion for judgment of nonsuit. This renders it necessary to examine the evidence upon which plaintiff's asserted right to maintain his action depends, and to consider this evidence in the light most favorable for him.

Plaintiff's intestate, a boy 14 years of age, on the morning of 25 August, 1939, was riding a bicycle on the highway near the corporate limits of the city of Henderson, proceeding eastwardly on the Louisburg Road. The day was clear and the road was level and straight. The defendant, the Atlantic Greyhound Corporation, was operating two large buses on the highway, both proceeding in the same direction as plaintiff's intestate. The distance between the buses was testified to be 100 feet, though other witnesses estimated this distance at 100 yards. The evidence tended to fix the speed of the buses at from twenty-five to forty miles per hour. Plaintiff's intestate had delivered a paper to a house on the south side of the highway, and had ridden back to the highway.

As the first or front bus approached plaintiff's intestate he was riding upon the paved portion of the highway, and when the horn of the bus was sounded he rode off on the shoulder of the highway, which was four and a half feet wide at that point, and was riding three feet from the edge of the pavement. As the second bus, the one following in the rear of the first, approached, plaintiff's intestate suddenly, and without giving

any notice of his intention so to do, turned to his left on the paved portion of the road and immediately in front of the bus, where he was struck and killed. There was some evidence that the bus which struck the plaintiff's intestate did not sound the horn until too late, and that just as the boy came on the pavement immediately in front of the bus, a distance estimated at fifteen or twenty feet, the driver of the bus turned sharply to his left to avoid striking the boy, but "the extreme right front corner" of the bus "mashed in" the left side of the bicycle, causing the death of plaintiff's intestate. The bus ran off into the ditch on the left of the highway.

One of plaintiff's witnesses, a highway patrolman, testified that the driver of the second bus stated he blew his horn "and the boy on the bicycle suddenly and without any warning cut his bicycle to the left and ran squarely in front of the bus. . . . The boy shot directly in front of him (the driver of the bus) and he could not help it."

Another witness for plaintiff, an eyewitness, described the accident as follows: "The boy was on the dirt shoulder when the first bus passed him. The second bus did not blow. . . . The first bus went on by and just as the second bus got right close to him, while he was then on the shoulder, he cut from the shoulder in front of the oncoming bus. . . . He ran squarely on to the paved highway immediately in front of the oncoming bus . . . ran on the paved portion of the highway right immediately in front of the bus when the bus was right on him. . . . When the boy ran up on the paved portion of the highway in front of the bus (the bus) must have been not more than fifteen feet from him. If he had looked to the left at all before he went on the paved highway there was nothing to keep him from seeing the bus. . . . It was perfectly apparent to me then that there was no way to keep the bus from hitting him when he ran right immediately in front of it."

Another witness testified that the bus was traveling at the rate of thirty-five miles per hour, and that the bus struck the bicycle from the rear and the boy fell toward the center of the road. This witness could not say in which direction the boy was going, as he saw the boy, the bicycle and the bus at the same time, just as the bus was striking him.

It was also in evidence that plaintiff's intestate was an unusually smart boy, well grown for his age, highly intelligent, his hearing and eyesight good, that he was very active and "very quick in mind."

While the testimony relating to this unfortunate occurrence, taken in the light most favorable for the plaintiff, might tend to show some negligence on the part of defendants, a careful consideration of all the evidence offered by plaintiff leads us to the conclusion that the failure of plaintiff's intestate to exercise due care and precaution for his own

safety must be held to constitute the sole proximate cause, or at least a proximate contributing cause, of his injury and death. There was no evidence which would permit an inference other than that the boy, without signal or warning, and apparently without looking or seeing the oncoming bus, turned suddenly in front of the bus at a time when, in spite of the efforts of the driver, it was too late to avoid striking the bicycle. There are no circumstances here which would relieve the plaintiff's intestate of the conclusive imputation of contributory negligence. *Butner v. Speas,* 217 N. C., 83; *Smith v. Sink,* 211 N. C., 725, 192 S. E., 108; *Williamson v. Box Co.,* 205 N. C., 350, 171 S. E., 335; *Tart v. R. R.,* 202 N. C., 52, 161 S. E., 720; *Harrison v. R. R.,* 194 N. C., 656, 140 S. E., 598; *Meredith v. R. R.,* 108 N. C., 616, 13 S. E., 137.

It will be noted that under our motor vehicle statutes a bicycle is deemed a vehicle, and the rider of a bicycle upon the highway is subject to the applicable provisions of the statutes relating to motor vehicles. Public Laws 1939, ch. 275.

There was no evidence to support plaintiff's plea seeking to invoke the principle of last clear chance. *Morris v. Transportation Co.,* 208 N. C., 807, 182 S. E., 487; *Haynes v. R. R.,* 182 N. C., 679, 110 S. E., 56. There was no evidence that more than a fraction of a second elapsed after plaintiff turned on to the pavement before the collision between the bus and the bicycle occurred. Nor was there evidence that there was anything to indicate to the driver of defendant's bus that plaintiff's intestate was in a position of peril, or that he intended to turn to his left upon the pavement in front of the bus. *Rimmer v. R. R.,* 208 N. C., 198, 179 S. E., 753; *Redmon v. R. R.,* 195 N. C., 764, 143 S. E., 829; *Sherlin v. R. R.,* 214 N. C., 222, 198 S. E., 640.

While plaintiff's intestate was only fourteen years of age, the evidence as to his intelligence and capacity was sufficient to show that he was amenable to the ordinary rule of contributory negligence as a bar to the action. *Meredith v. R. R., supra; Baker v. R. R.,* 150 N. C., 562, 64 S. E., 506; *Tart v. R. R., supra; Haynie v. R. R.,* 206 N. C., 203, 173 S. E., 283.

Plaintiff's exception to the admission of the answer to a question propounded to one of defendants' witnesses, brought forward in plaintiff's assignments of error, cannot be sustained.

We conclude that the judgment of nonsuit entered in the court below should be

Affirmed.

MRS. MILDRED MAE LEE AND A. E. JERNIGAN v. HARVEY STEWART.

(Filed 9 October, 1940.)

1. Trespass § 1a—

Every unauthorized, and therefore unlawful, entry into the close of another is a trespass.

2. Trespass § 4—

Evidence showing a trespass is sufficient to defeat a motion for judgment as of nonsuit, since upon such a showing the party aggrieved is entitled to nominal damages at least.

3. Same—Evidence held to show unauthorized entry into the close of plaintiffs.

The evidence tended to show that defendant had been notified to stay off the *locus in quo*, that nevertheless he entered upon the land and went into a tobacco barn thereon. One plaintiff was the tenant of the other plaintiff. Defendant testified that before going on the premises he got the permission of the tenant's wife, but she testified that she did not give him permission to do so. It further appeared that the tenant was a share cropper. *Held:* The evidence is conflicting as to whether the tenant's wife consented to defendant's entry, and there was no evidence that she had authority to permit him to go on the premises, and therefore nonsuit on the ground that the entry was authorized, is error.

4. Same—Where evidence shows unauthorized entry, contention that nonsuit should be sustained for want of evidence of negligent injury is untenable.

The evidence tended to show an unauthorized entry by defendant upon the *locus in quo*, that defendant went into a tobacco barn on the land, moved the tobacco therein at a time when it was dry and brittle, placed tobacco of his own in the barn and renewed the fire, and that shortly thereafter the barn burned to the ground. Plaintiffs' evidence tended to show that when defendant moved the tobacco at least one stick fell and other tobacco shattered and fell about in the barn and on the flues. Defendant's evidence tended to show that he removed all shattered tobacco and left the flues clear. *Held:* Defendant's contention that the judgment as of nonsuit should be sustained for want of evidence of negligence is untenable, since proof of trespass entitles the aggrieved party to nominal damages at least, and further, the conflicting evidence as to damage inflicted is for the jury.

5. Trespass § 7—

A trespasser is liable for all damages which proximately result from his wrongful act, whether produced intentionally or through negligence, and the mere fact of wrongful entry entitles the party aggrieved to nominal damages at least, and therefore conflicting evidence as to whether the trespasser was guilty of negligence resulting in actual damage merely raises a question for the jury.

APPEAL by plaintiffs from *Thompson, J.*, at April Term, 1940, of JOHNSTON. Reversed.

Civil action to recover damages for trespass, *quare clausum fregit.*

Plaintiff Lee is the owner of a tract of farm land in Johnston County and the plaintiff Jernigan is the tenant living thereon and cultivating the same. On 6 August, 1939, plaintiff Jernigan had just completed curing a barn of tobacco. The tobacco was "killed out" and there was just enough fire in the furnace to burn three or four hours as the heat dropped. The defendant, a neighbor who had been notified to stay off of the land of the plaintiff and "not bother nothing on my place," in the absence of both plaintiffs, went to the tobacco barn, moved the tobacco about so as to make room for about 40 sticks of swell stem tobacco he wished to kill out. He then renewed the fire in the furnace. In moving the tobacco in the barn, which was dry from the heat of curing, it shattered and fell all about in the barn on the flues and at least one stick of tobacco fell. About 30 minutes after defendant left the barn fire was noticed in the barn which was completely consumed.

The defendant alleged in defense that before putting his tobacco in the barn of plaintiffs he procured the assent of the wife of plaintiff Jernigan; that he caused all leaves and foreign matter to be cleared off of the dirt floor of the barn around the flues and that the fire was not caused by any misconduct on his part.

At the conclusion of plaintiffs' evidence the defendant moved for judgment as of nonsuit. The motion was allowed and judgment of nonsuit was entered. Plaintiffs excepted and appealed.

Lyon & Lyon and L. L. Levison for plaintiffs, appellants.
E. J. Wellons for defendant, appellee.

BARNHILL, J. An invasion of the close of another . . . constitutes a trespass. 26 R. C. L., 939. An entry on land in the peaceable possession of another is deemed a trespass, without regard to the amount of force used. Neither the form of instrumentality by which the close is broken nor the extent of the damages is material. 26 R. C. L., 938. Thus every unauthorized, and therefore unlawful, entry into the close of another, is a trespass. *Dougherty v. Stepp,* 18 N. C., 371; *Brame v. Clark,* 148 N. C., 364; *Frisbee v. Marshall,* 122 N. C., 760.

Where a trespass is shown the party aggrieved is entitled at least to nominal damages. *Little v. Stanback,* 63 N. C., 285; *Lumber Co. v. Lumber Co.,* 137 N. C., 443; *Hutton v. Cooke,* 173 N. C., 496, 92 S. E., 355; *Lee v. Lee,* 180 N. C., 86, 104 S. E., 76; *Frisbee v. Marshall, supra; Dougherty v. Stepp, supra; Brame v. Clark, supra;* Cooley on Torts (2d), p. 70. 1 Joyce on Damages, sec. 8.

Thus it appears that there is ample evidence of a trespass by the defendant which would entitle the plaintiffs to nominal damages at least and defeat a motion for judgment as of nonsuit.

But the defendant contends that he had the assent of Mrs. Jernigan and that his entry was by permission and not unlawful. This contention must fail for two reasons: (1) Mrs. Jernigan testified that she did not give permission but that she told the defendant his conduct would be dangerous; and (2) even had she given her consent there is no evidence tending to show authority so to do. Furthermore, while it is not entirely clear, the record indicates that Jernigan was a share crop tenant. If so, his possession is the possession of the landlord. However this may be, both the landowner and the tenant are parties plaintiff.

The defendant further insists here that the judgment of nonsuit should be sustained for that there is no evidence of negligence. This position is taken upon the assumption that the complaint states two causes of action, one for trespass and one upon negligence. This is not the case. The plaintiffs allege, in effect, that the defendant committed a trespass and in furtherance thereof so negligently handled the tobacco in the barn and wrongfully renewed the fire as to materially enhance the damages caused by the trespass. The action remains one in trespass and the defendant is liable for all damages which proximately resulted from his illegal act. In law he is required to contemplate all damages which proximately resulted from his wrongful act whether or not produced intentionally or through negligence. "It is wholly immaterial whether the defendant in committing the trespass actually contemplated this, or any other species of damage, to the plaintiff." *Johnson v. R. R.,* 140 N. C., 574; *Brame v. Clark, supra.*

Considered in the light most favorable to the plaintiffs there is evidence tending to show that the defendant went to the tobacco barn of the plaintiffs and moved the tobacco therein at a time when it was dry and brittle; that the tobacco shattered and fell all about in the barn and on the flues and at least one stick fell; that the defendant then renewed the fire. Whether this was the proximate cause of the burning of the barn and the consequent loss is for the jury. True, the defendant asserts that he removed all of the shattered tobacco and left the flues completely clear thereof before adding additional fuel to the fire. Even so, this is in defense and is for the jury.

The judgment below is

Reversed.

MRS. LULA HODGES; MRS. SAM D. STONE (WIDOW); MRS. LESSIE STONE (WIDOW); ODELL COATS; PRENTICE COATS AND DUNCAN STEWART, THE LAST THREE BEING HEIRS AT LAW OF HATTIE STEWART COATS, v. JESSE COLEMAN STEWART, JAMES E. WILSON AND D. OLIVE.

(Filed 9 October, 1940.)

1. Wills § 34b—Devise held void for indefiniteness.

Testator devised to his son twenty-five acres out of the home tract of 82 acres, the land devised to include the "building and outhouses," and the will provided that the remainder of the real estate should be divided among all of testator's children, naming them, including the devisee of the twenty-five acres. *Held:* The will does not fix a beginning point or boundaries of the twenty-five-acre tract, or furnish any means by which the tract may be identified and set apart from the other land within the boundaries of the home tract, the mere reference to the "building and outhouses" being insufficient for this purpose, and the description is too vague to be aided by parol, nor does it refer to anything extrinsic by which the description might be made definite and certain, and the devise is void for indefiniteness, and the entire acreage must be equally divided among all the children of testator.

2. Boundaries § 3—

The description of land in a deed or will must be sufficiently definite to identify the property either within itself or by recurrence to something extrinsic to which the instrument refers, so that the description may be made certain under the principle *id certum est quod certum reddi potest.*

3. Wills § 33a—

Where a devise is void for indefiniteness of the description of the property, the devise cannot be given effect as an expression of testamentary intent, since it affords no legal evidence of an intention of testator to devise, and since the courts cannot make a will for testator by supplying provisions which are necessary to give the language used testamentary effect.

APPEAL by defendants from *Hamilton, Special Judge,* at April Term, 1940, of HARNETT. Affirmed.

D. J. Stewart died seized and possessed of two tracts of land, one containing 82 acres and known as the home tract, and the other containing 83 acres. By his will he devised to his son Jesse C. Stewart "twenty-five acres of the home tract of land including the dwelling and outhouses," and directed that the remainder of the land be equally divided among his five children, naming them, including Jesse C. Stewart. Petition for partition of the entire acreage of both tracts was filed by all the children and heirs at law except Jesse C. Stewart who, with his assignees, was made party defendant. Pleadings were filed and the matter came on regularly to be heard in the Superior Court.

Defendants claimed that under the will the twenty-five acres devised to Jesse C. Stewart should first be set aside, and the remainder divided. The plaintiffs contended that the devise of the twenty-five acres was void for uncertainty and that the entire amount of both tracts should be divided into five equal shares.

The court below held the devise to Jesse C. Stewart was void, and rendered judgment for plaintiffs. Defendants appealed.

R. L. Godwin for plaintiffs, appellees.
Parker & Parker and Neill McK. Salmon for defendants, appellants.

DEVIN, J. This appeal presents the question of the validity of the provision in the will of D. J. Stewart wherein he devised to his son, Jesse C. Stewart, twenty-five acres of land out of the home tract of 82 acres. The devise is expressed in the following words: "My son Jesse C. Stewart shall have to his use and benefit forever in fee simple twenty-five acres of the home tract of land including the building and outhouses, and the remainder of my real estate to be divided equally among all my children," naming them, including Jesse C. Stewart.

We are of opinion, and so hold, that the devise to the defendant Jesse C. Stewart of twenty-five acres out of a larger tract of 82 acres is void for vagueness and uncertainty in the description of the property attempted to be devised. The will furnishes no means by which the twenty-five acres can be identified and set apart, nor does the will refer to anything extrinsic by which the twenty-five acres can be located. The will fixes no beginning point or boundary. It is too vague and indefinite to admit of parol evidence to support it. There is nothing to indicate where or how the testator intended the twenty-five acres should be set apart out of the 82 acres in the home tract. The principle is firmly established in our law that a conveyance of land by deed or will must set forth a subject matter, either certain within itself or capable of being made certain by recurrence to something extrinsic to which the instrument refers. It is essential to the validity of a devise of land that the land be described with sufficient definiteness and certainty to be located and distinguished from other land. The language in which the devise to Jesse C. Stewart is expressed contains no reference to anything extrinsic which by recurrence thereto is capable of making the description certain under the principle *id certum est quod certum reddi potest.*

There are numerous cases in our reports which support the view here taken. *Deaver v. Jones,* 114 N. C., 649, 19 S. E., 637; *Harris v. Woodard,* 130 N. C., 580, 41 S. E., 790; *Kennedy v. Maness,* 138 N. C., 35, 50 S. E., 450; *Smith v. Proctor,* 139 N. C., 314, 51 S. E., 889; *Cathey v. Lumber Co.,* 151 N. C., 592, 66 S. E., 580; *Beard v. Taylor,* 157 N. C., 440, 73 S. E., 213; *Higdon v. Howell,* 167 N. C., 455, 83 S. E., 807;

Bissette v. Strickland, 191 N. C., 260, 131 S. E., 655; *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; *Johnston County v. Stewart,* 217 N. C., 334.

The mere reference to the land as "including the building and outhouses" may not be held sufficient to afford means of locating or identifying the twenty-five acres, or distinguishing them from other land within the boundaries of the home tract. Nor may these words be construed as a testamentary intention to which the law would give effect. This is upon the principle upheld in *McGehee v. McGehee,* 189 N. C., 558, 127 S. E., 549, and *Melchor v. Burger,* 21 N. C., 634, that an attempted invalid devise, one which the law decrees void, affords no legal evidence of an intention in the testator to devise. The court cannot make a will for the testator nor add to the valid portions of his will provisions which are not therein expressed. Having stricken down the devise as void, the court will not resurrect it and give it vitality in order to effectuate a purpose not expressed in the will.

It follows that if the devise of twenty-five acres to Jesse C. Stewart be void for uncertainty, the entire acreage of both tracts must be equally divided among the testator's five children. Thereby the defendants will receive the one-fifth share of Jesse C. Stewart upon terms of equality with each of the other children. The devise of twenty-five acres to Jesse C. Stewart being void, no effect can be given to it.

The judgment of the court below to this effect is

Affirmed.

LORENZA THOMAS, ADMINISTRATOR OF JOSEPH THOMAS, DECEASED, v. THE ATLANTIC & NORTH CAROLINA RAILROAD COMPANY, A CORPORATION.

(Filed 9 October, 1940.)

1. Pleadings § 15—

If the complaint states facts sufficient to entitle plaintiff to recover on any aspect of the case, or on any theory of liability, a demurrer thereto cannot be sustained.

2. Railroads § 10—

Complaint in this action to recover for death of intestate, a minor killed while under or around boxcars standing on a spur track near a grade crossing, *held* sufficient as against demurrer.

APPEAL by defendant from *Thompson, J.,* at April Term, 1940, of WAYNE. Affirmed.

J. Faison Thomson and Paul B. Edmundson for plaintiff, appellee.

Allen & Allen and W. A. Dees for defendant, appellant.

SEAWELL, J. This is an action to recover damages for the injury and death of plaintiff's intestate as the proximate result of defendant's negligence. It comes here on appeal from a judgment overruling defendant's demurrer to the complaint, as not stating a cause of action.

Whether plaintiff, in the main, bases his right of recovery on the theory of attractive nuisance, we need not stop to inquire, although defendant's argument is largely addressed to that phase of the case. But if plaintiff can recover on any aspect of the facts set up in the complaint, whatever theory may be stressed, the demurrer cannot be sustained. *Stroud v. Transportation Co.,* 213 N. C., 642, 197 S. E., 199; *Toler v. French,* 213 N. C., 360, 196 S. E., 312; *Meyer v. Fenner,* 196 N. C., 476, 146 S. E., 82; *Hoke v. Glenn,* 167 N. C., 594, 83 S. E., 807; *Caho v. R. R.,* 147 N. C., 20, 60 S. E., 894. See, also, *Enloe v. Ragle,* 195 N. C., 38, 141 S. E., 242. Without intending to pass upon other allegations of the complaint, favorably or unfavorably, we are of the opinion that in section 4 it does set up sufficient facts to justify an inference of negligence and to entitle the plaintiff to make proof thereof, if he can, to the jury. We quote: "4. That the said street, at a point which the spur track was located, for a long period of time had been used, by the public, both in the daytime and in the nighttime, under the continued observation of the defendant, its employees and officials, who knew, and in the exercise of reasonable care and prudence should have known, that the said streets were so continually used; that the defendant, its employees and officers knew, that at such times as boxcars were parked or left standing on the spur track and across the street, these, using the streets, including minors, were accustomed to go under the cars, or through the point of connection of cars. And the defendant, its officers and agent knew, and by the exercise of reasonable care should have known, that minor children of tender age were accustomed to play under and around the cars, on said spur track."

It is not our intention to "chart the course of trial," or to present any theory upon which it may be had, or to say that plaintiff's position may not be aided by other portions of the complaint. It is not necessary to make an extended analysis of the pleading, and, for that reason, it is not reproduced in full.

The judgment overruling the demurrer is

Affirmed.

FOREST CITY COTTON COMPANY ET AL. v. HENRIETTA MILLS.

(Filed 9 October, 1940.)

Trespass § 1a: Waters and Water Courses § 7—Plaintiff in action for trespass is entitled to recover nominal damages upon showing that defendant broke his close.

This action was instituted to recover damages to plaintiff's land resulting from the construction and operation of defendant's milldam. Plaintiff abandoned its cause of action for negligent construction and operation of the dam, and elected to stand solely on its cause of action for trespass. *Held:* Since plaintiff is entitled to recover nominal damages if he only show that the defendant broke his close, without reference to negligence or wrongful taking, an instruction to answer the issue of liability in the negative if the jury should find that defendant made no unreasonable uses of its riparian rights or, if reasonable, has not taken in whole or in part any of plaintiff's land, is error, as placing too heavy a burden on plaintiff.

APPEAL by plaintiff from *Armstrong, J.*, at April Term, 1940, of RUTHERFORD.

Civil action (1) for trespass, and (2) for negligent construction and operation of river dam.

It is alleged that thirty acres of plaintiff's land situate on Puzzle Creek have been sobbed and soured and the shrubbery thereon destroyed by the construction and negligent operation of the defendant's milldam on Second Broad River, which is several miles below plaintiff's property.

On the hearing, the plaintiff abandoned its allegations of negligence, and elected to stand solely upon its action for trespass.

On the issue of liability, the court instructed the jury as follows:

"The court instructs you that if you should find from the evidence in this case that the defendant in the construction, operation and maintenance of its dam at Caroleen, North Carolina, has not made any unreasonable use of its riparian rights, as the court has defined the law to you and explained what unreasonable use means, or if reasonable, has not taken in whole or in part any of the plaintiff's land as the court has heretofore instructed you, then you would answer the second issue 'No.'" Exception.

The jury answered the issue of liability in favor of the defendant. From judgment thereon, the plaintiff appeals, assigning errors.

Hamrick & Hamrick and Paul Boucher for plaintiff, appellant.
Oscar J. Mooneyham and Clarence O. Ridings for defendant, appellee.

STACY, C. J. The trial court seems to have fallen into error in instructing the jury to answer the issue of liability "No" if they should

find that the defendant "has not made any unreasonable use of its riparian rights, . . . or, if reasonable, has not taken in whole or in part any of plaintiff's land." The plaintiff had abandoned its allegations of negligence and was proceeding only in trespass. It was, therefore, entitled to have the cause submitted to the jury on the theory of trespass without reference to the allegations of negligence or wrongful taking. *Cline v. Baker,* 118 N. C., 780, 24 S. E., 516; *Chaffin v. Mfg. Co.,* 135 N. C., 95, 47 S. E., 226.

The challenged instruction placed too heavy a burden on the plaintiff. In trespass, the plaintiff is entitled to recover nominal damages if he only show that the defendant broke his close. *Lee v. Stewart, ante,* 287; *Chaffin v. Mfg. Co., supra; Little v. Stanback,* 63 N. C., 285.

New trial.

EDWIN TRIPP, ADMINISTRATOR OF ALICE LANGSTON, DECEASED, v. C. E. LANGSTON AND WIFE, ALMETA LANGSTON.

(Filed 16 October, 1940.)

1. Estoppel § 1—Grantor conveying substantial estate by full warranty deed is estopped to claim any interest in land as against grantee.

The owners of land executed a mortgage on same to secure a note. Thereafter they executed a deed to the husband of the mortgagee. Two years later the mortgagee and her husband executed and delivered full warranty deed for the premises in fee to the male mortgagor. *Held:* At the time of executing the warranty deed, the *feme* grantor owned an inchoate dower right and, as mortgagee, the legal title coupled with an interest, and was thus the grantor of a substantial estate, and the warranty deed estops her, and, upon her death, her administrator, from claiming any interest in the land by virtue of the mortgage, and further, the contention that she joined in the warranty deed merely for the purpose of releasing her inchoate dower is untenable, the deed being general in its terms. The equitable doctrine of feeding an estoppel through an after acquired title has no application.

2. Estoppel § 7—

Since, in this State, the common law disabilities of a married woman to contract, with certain exceptions, have been removed, she is bound by an estoppel the same as any other person.

3. Estoppel § 1: Mortgages § 17: Trial § 52—Even though warranty deed estops grantor from asserting claim under prior mortgage, it does not prevent her from asserting note as unsecured claim.

This action was instituted by the administrator to establish the existence of a note executed to intestate and to recover the amount due thereon, and to foreclose a mortgage executed as security for the payment of the note. Defendant mortgagors contended that subsequent to the

execution of the mortgage they conveyed the land to the mortgagee's husband, and that thereafter the mortgagee and her husband executed full warranty deed to the male mortgagor, and pleaded the warranty deed as an estoppel. The parties admitted the execution of the respective instruments and agreed that the court might determine the issue of estoppel before the introduction of evidence relating to the other issues raised by the pleadings. The court found in favor of defendants on the issue of estoppel and further adjudged that plaintiff recover nothing of defendant. *Held:* The warranty in the deed constituting the basis of the estoppel was against prior encumbrances, and while it estops plaintiff from claiming any right or interest under the mortgage, it does not estop him from asserting the note as an unsecured claim, and the parties not having agreed that the court might determine the issue of indebtedness, the portion of the judgment attempting to adjudicate the rights of the parties on the cause of action on the note is erroneous, and the judgment is modified accordingly.

APPEAL by plaintiff from *Bone, J.*, at March Term, 1940, of PITT. Modified and affirmed.

Civil action to recover amount alleged to be due on a promissory seal note and to foreclose mortgage securing same.

On 31 December, 1930, defendants executed a note in the sum of $2,935.00, payable to plaintiff's intestate. At the same time they executed a mortgage deed on a certain tract of land in Pitt County as security for the payment of the note. On 5 January, 1931, defendants executed and delivered to C. H. Langston, husband of plaintiff's intestate, a deed for the land described in the mortgage. On 3 January, 1933, C. H. Langston and his wife, plaintiff's intestate, executed and delivered to the defendant C. E. Langston, a deed for said premises in fee. The deed contained full covenants, including a warranty "that the same are free from all encumbrances."

Alice Langston, the mortgagee, having died, the plaintiff, as administrator, instituted this action 24 March, 1939. The complaint sets out two causes of action: (1) To establish the existence of the note, alleged to be lost, and to recover the amount due thereon; and (2) to foreclose the mortgage executed as security for the payment of the note. The defendants denied the indebtedness and pleaded the covenants of warranty contained in the deed dated 3 January, 1933, as an estoppel.

When the cause came on to be heard and after a jury had been impaneled "the plaintiff, through his counsel, suggested that the question of estoppel raised by the defendants' answer be determined preliminary to the introduction of evidence upon the other issues raised on the pleadings." For that purpose defendants admitted the execution of the mortgage dated 31 December, 1930, and the note secured thereby and the parties admitted the execution and delivery of the several instruments above recited and agreed that the tract of land described in each of the instruments is identical.

Upon a consideration of the mortgage and deeds admitted the court adjudged: (1) That plaintiff is estopped by the covenants contained in the deed dated 3 January, 1933, from asserting any right, title, interest or estate in said tract of land; and (2) that the plaintiff recover nothing of the defendants and that the plaintiff pay the cost. The plaintiff excepted and appealed.

J. B. James, Albion Dunn, and Louis C. Skinner for plaintiff, appellant.

J. A. Jones for defendants, appellees.

BARNHILL, J. Plaintiff's intestate was a party to the covenants contained in the deed dated 3 January, 1933, executed by her and her husband to the defendant C. E. Langston. She thereby covenanted that the premises in controversy were free from encumbrances. At the time she not only owned an inchoate right of dower but as mortgagee she owned the legal title coupled with an interest. Thus, she was the grantor of a substantial estate in the land and "a grantor of land with full covenants of warranty is estopped to claim any interest in the granted premises. And where he holds a prior mortgage on the premises he can assert no rights as mortgagee against his grantee." 10 R. C. L., 677; *Bechtel v. Bohannon,* 198 N. C., 730, 153 S. E., 316; *Bank v. Johnson,* 205 N. C., 180, 170 S. E., 658; 19 Am. Jur., 607. In this State the common law disabilities of a married woman to contract, with certain exceptions, have been removed and she is bound by an estoppel the same as any other person.

The plaintiff's contention that his intestate joined in the deed for the mere purpose of releasing her inchoate right of dower cannot be sustained. The deed is general in its terms. There is nothing therein to restrict her joinder to her dower interest any more than there is to restrict it to her interest as mortgagee. Furthermore, the equitable doctrine of feeding an estoppel through an after-acquired title has no application.

The court correctly adjudged that the plaintiff is estopped from asserting any claim of right, title, interest or estate in or to the lands in controversy by reason of the covenants contained in the deed to the defendant C. E. Langston.

But the court went further. It adjudged that the plaintiff recover nothing of the defendants. In so doing it apparently overlooked plaintiff's first cause of action. There was no waiver of a jury trial and no agreement to submit the issue of indebtedness to the court. The covenant was against encumbrances. It does not estop plaintiff from asserting the debt as an unsecured claim or discharge the liability, if any, of defendants on their note, the execution of which they admit.

It follows that so much of the judgment as attempts to adjudicate the issues raised on plaintiff's first cause of action was erroneous. The court was without authority to enter final judgment thereon or to dismiss plaintiff's first cause of action. The judgment below will be modified accordingly.

Modified and affirmed.

FOUR COUNTY AGRICULTURAL CREDIT CORPORATION v. F. G. SATTERFIELD, J. S. SATTERFIELD, WALKER STONE AND G. T. CUNNINGHAM, TRADING AS LIBERTY WAREHOUSE.

(Filed 16 October, 1940.)

1. Pleadings §§ 14, 18: Courts § 7—

Demurrer to the jurisdiction, C. S., 511, for that summons was issued out of a recorder's court to another county in an action *ex contractu* involving less than $200.00, Public Laws of 1939, chapter 81, is bad as a speaking demurrer, since the defect does not appear upon the face of the complaint.

2. Courts § 7a—

This action was instituted in a recorder's court against a warehouseman to recover the sum of $134.00 upon allegation that defendant had sold tobacco subject to plaintiff's chattel mortgage and paid the proceeds to the mortgagor. *Held:* Defendant's objection to the jurisdiction on the ground that the action was *ex contractu* for an amount less than $200.00, and that summons was issued out of the county, is untenable, since the complaint is sufficient to allege a cause of action for conversion.

3. Appearance § 2—

A demurrer on the grounds that the complaint fails to state a cause of action and that there is a defect of parties constitutes a general appearance and waives the defendant's right to object to the jurisdiction on the ground of invalid process.

4. Warehousemen § 4—

The public laws regulating warehousemen do not require them to receive and sell mortgaged property without the knowledge and consent of the mortgagee, nor relieve them of their common law liability to a mortgagee for such conversion.

5. Chattel Mortgages § 11—

This action was instituted by a mortgagee against a warehouseman alleging that the defendant sold tobacco subject to the registered chattel mortgage and turned over the proceeds of sale to the mortgagor. Defendant demurred for defect of parties upon his contention that plaintiff should follow the tobacco into the hands of the purchaser. *Held:* The demurrer was properly overruled, plaintiff being entitled to sue any party liable he deems responsible.

CREDIT CORP. *v.* SATTERFIELD.

APPEAL by defendants from *Thompson, J.*, at February Term, 1940, of HARNETT. Affirmed.

The plaintiff brought action in the Recorder's Court of Dunn for the recovery of $134.33, the value of certain tobacco upon which plaintiff claimed a chattel mortgage and agricultural lien securing a larger amount, which tobacco, it is claimed, was received by defendants as warehousemen, disposed of by them, and the proceeds paid to the makers of the chattel mortgage.

The defendants demurred to the complaint or declaration upon three grounds: (1) That the recorder's court acquired no jurisdiction of defendants on the subject matter, because chapter 81, Public Laws of 1939, relating to the issuance of summons by inferior courts, prohibits its summons from running outside of the county, unless the amount involved is more than two hundred dollars in matters arising out of contract, and more than fifty dollars in matters arising out of tort, whereas, the plaintiff sues in contract and the amount involved is less than two hundred dollars; (2) that defendants are public warehousemen, charged with the duty of selling the tobacco of all comers, under State control and regulation, and are, therefore, not liable to the plaintiff in either a public or private capacity; and (3) that they are not proper parties to the suit, since, as contended, it is the duty of plaintiff "to follow the tobacco grown upon the lands of G. O. Childress and wife, Jessie Childress," into the hands of the ultimate purchasers on the warehouse floor.

The demurrer was overruled and defendants appealed to the Superior Court. To the overruling of the demurrer in the Superior Court, defendants appealed to this Court.

I. R. Williams and C. G. Dunn for plaintiff, appellee.
B. I. Satterfield for defendants, appellants.

SEAWELL, J. The objection to the jurisdiction, since the defect does not appear on the face of the complaint (C. S., 511), but concerns the issuing and service of summons (chapter 81, Public Laws 1939), should have been made by motion to dismiss, under a special appearance. Treated as such (compare *Smith v. Haughton,* 206 N. C., 587, 174 S. E., 506), the plea is not good, since the allegations are sufficient to support an action for conversion of the property. But defendants did not protect themselves by a special appearance or confine the demurrer to an objection to the jurisdiction. They demurred also to the sufficiency of the complaint and the joinder of parties. Filing this demurrer had the effect of entering a general appearance and waiving any objection to the jurisdiction arising out of the issue and service of summons. *Motor Co. v. Reaves,* 184 N. C., 260, 114 S. E., 175.

The demurrer to the complaint as not stating a cause of action cannot be sustained. The particular objection based on defendants' immunity as public warehousemen has been decided adversely to them by this Court in *White v. Boyd,* 124 N. C., 77, 32 S. E., 387. See, also, *Burwell v. Cooperative Co.,* 172 N. C., 79, 89 S. E., 1064; *Nowell v. Basnight,* 185 N. C., 142, 116 S. E., 87; *Roebuck v. Short,* 196 N. C., 61, 144 S. E., 515; *Furniture Co. v. Clark,* 191 N. C., 369, 131 S. E., 567. From these cases it may be inferred that the public laws regulating warehousemen do not require them to receive and sell mortgaged property without the knowledge and consent of the mortgagee, and do not liquidate their common law liability for the conversion.

Going no further than the complaint, we cannot see that defendants are not proper parties to sue for relief. In "following the tobacco," plaintiff is not required to encircle the globe, but may make the first port of entry where both liability and responsibility may be found. *Goodrum v. Gin Co.,* 211 N. C., 737, 191 S. E., 25; *Womble v. Leach,* 83 N. C., 84.

The judgment overruling the demurrer is

Affirmed.

J. M. EDGERTON v. R. D. JOHNSON.

(Filed 16 October, 1940.)

1. Judgments § 45: Homestead and Personal Property Exemptions § 12— Judgment creditor is entitled to claim judgment as his personal property exemption so as to defeat right to set-off.

Plaintiff moved that the judgment rendered against him in this cause on defendant's counterclaim should be offset by a judgment subsequently obtained by plaintiff against defendant in a separate action, contending that defendant is insolvent. Defendant demanded that the judgment rendered in his favor upon the counterclaim in this cause be allowed to him as his personal property exemption. *Held:* To allow offset would amount to "final process" within the meaning of Article X, sec. 1, of the State Constitution, and defendant's demand that the judgment in his favor on the counterclaim be allowed him as his personal property exemption precludes plaintiff's right of offset.

2. Same—

A party may not demand that his claim be allowed him as his personal property exemption so as to defeat the adverse party's right of counterclaim or set-off prior to the rendition of the final judgment on his claim, since to permit the party to assert the exemption before judgment would enable him to obtain judgment in instances in which, if a balance were struck, nothing would be due him.

APPEAL by plaintiff from *Thompson, J.,* at June Term, 1940, of WAYNE.

Motion to offset defendant's judgment with judgment subsequently obtained by plaintiff, and for restraint of execution until the rights of the parties can be determined.

The defendant holds a judgment against the plaintiff in this cause for $385.00 which was recovered on a counterclaim for breach of warranty at the October Term, 1939, Wayne Superior Court, and affirmed on appeal. *Edgerton v. Johnson,* 217 N. C., 314, 7 S. E. (2d), 535. Judgment on the certificate was entered in the Superior Court at the April Term, 1940.

The plaintiff holds a judgment against the defendant for $316.47 which he recovered in an action on a promissory note on 9 May, 1940, in the county court of Wayne County.

Plaintiff alleges that the defendant is insolvent, and, for this reason, prays for a cancellation, *pro tanto,* of the defendant's judgment to the amount of the judgment held by plaintiff against the defendant as the only practical means of fairly adjusting their differences.

The defendant admits that the plaintiff obtained a judgment in the county court of Wayne County, as he alleges, but avers that an appeal was taken therefrom to the Superior Court of Wayne (presumably now pending).

The defendant further demands that the judgment rendered herein be allotted to him as his personal property exemption which he claims under the Constitution.

The court being of opinion that the defendant was entitled to have his judgment exempted from sale under execution, dismissed the motion. From this ruling the plaintiff appeals, assigning error.

Royall, Gosney & Smith and James Glenn for plaintiff, appellant.
Abell & Shepard for defendant, appellee.

STACY, C. J. The procedure here adopted finds support in the case of *Hogan v. Kirkland,* 64 N. C., 250. There a similar motion was made and allowed in the absence of a claim of exemption from sale under execution, such as the defendant is making here. This is the only essential difference between the two cases. It was intimated in the *Hogan case, supra,* however, that this difference might be vital. And so it is, because the motion has the same effect as an execution. It amounts to "final process" within the meaning of Art. X, sec. 1, of the Constitution, which provides that the personal property of any resident of this State, to the value of $500, to be selected by such resident, "shall be and is hereby exempted from sale under execution or other final process of any court, issued for the collection of any debt." *Curlee v. Thomas,* 74 N. C., 51; *Smith v. McMillan,* 84 N. C., 593.

Epitomizing the decisions on the subject, it is said in McIntosh on Procedure, page 876: "Where the plaintiff recovers a judgment against the defendant, and the defendant later recovers a judgment against the plaintiff in a different action, each has the right to have his judgment considered in determining his personal property exemption, and the court cannot direct that one judgment be set off against the other as a satisfaction, where the party claims his exemption."

It will be observed that the exemption is not available before judgment, so as to destroy the right of counterclaim or set-off. *McClenahan v. Cotten,* 83 N. C., 333. Otherwise, one could recover judgment when, on a balance struck, nothing would be due him. The exemption can only be claimed by the defendant in an execution. *Lynn v. Cotton Mills,* 130 N. C., 621, 41 S. E., 877.

The plaintiff asserts that the weight of authority favors the set-off as between the judgments, and that the conclusion here reached is in conflict with the equities of the case. Annotation: 121 A. L. R., 478. The opinions cited are from states which have no constitutional provision such as ours. In 25 C. J., 128, it is said: "According to the weight of authority a set-off cannot be allowed where it would defeat a debtor's exemption rights." And in 34 C. J., 707, the author appends the following footnote: "Two judgments held by adverse parties do not necessarily extinguish each other to the extent of the smaller, if one may be claimed as a personal property exemption; where it cannot be reached by attachment, execution or garnishment, it cannot be reached by set-off." See Annotations: 20 A. L. R., 276; 106 A. L. R., 1070; and 121 A. L. R., at page 501.

The defendant is within his constitutional rights in claiming the exemption. "It is confirmed by the Constitution and is inviolable." *Duvall v. Robbins,* 71 N. C., 218.

Affirmed.

J. Q. ADAMS AND WIFE, ZEBBIE ADAMS, v. D. W. CLEVE AND WIFE, CLYDE CLEVE; W. A. CLEVE AND WIFE, LUCRETIA CLEVE; A. J. WALL AND WIFE, SOPHRONIA WALL; AND H. C. SMITH.

(Filed 16 October, 1940.)

1. Pleadings §§ 20, 28—

Plaintiffs' demurrer to the answer and motion for judgment on the pleadings challenge the sufficiency of the matter set up in the answer to constitute a defense, admitting the facts alleged in the answer and relevant inferences of fact necessarily deducible therefrom and construing the allegations liberally in favor of the defendant.

2. Same: Process § 10—Facts as alleged in the pleading are to be taken as true upon demurrer or motion for judgment on the pleadings.

Plaintiffs' cause of action depended upon the validity of a judgment theretofore rendered in their favor. Defendants' answer alleged that the judgment was obtained without valid service of process. *Held:* While the return of the officer may not be collaterally attacked, this principle may not be invoked by demurrer or motion for judgment on the pleadings but should be presented by introducing in evidence the officer's return, and since the allegation of want of valid service must be taken as true, and may not be modified by findings of the court, the demurrer and motion should have been overruled.

3. Pleadings § 23—

Ordinarily, when a demurrer is sustained, the opposing pleader will be permitted to amend if he so desires. C. S., 515.

APPEAL by defendants from *Hamilton, Special Judge,* at May Term, 1940, of PITT. Reversed.

Julius Brown and J. B. James for plaintiffs, appellees.
Dink James for defendants, appellants.

DEVIN, J. Plaintiffs instituted this action to enforce the lien of a judgment upon land now in the possession of defendant Smith. In their complaint they alleged that in 1926 judgment was rendered in their favor and against the defendants Wall, constituting a lien on the land of defendant Sophronia Wall, and that upon this judgment execution was issued and the homestead of Sophronia Wall allotted in this land, in 1927. Plaintiffs further alleged that in 1938 Sophronia Wall and her husband conveyed the land to defendants Cleve, who in turn conveyed to defendant Smith, who is now in possession.

Defendants answered denying the validity of the judgment and of the homestead allotment, and alleging that the judgment was void for that no summons, or notice of any kind, was ever served on Sophronia Wall, who was at that time under the age of twenty-one years, and that no notice of execution or homestead appraisal or allotment was ever served or given her, and that if the alleged judgment ever had vitality, which was denied, it was now barred by the statute of limitations.

At the hearing plaintiffs demurred *ore tenus* to the answer and moved for judgment on the pleadings. The court below sustained the demurrer and allowed the motion for judgment on the pleadings. The ruling of the court was based upon certain findings of fact, in addition to those set out in the answer, which findings were incorporated in the judgment.

The plaintiffs' demurrer to the answer and motion for judgment on the pleadings challenged the sufficiency of the matters set up in the answer to constitute a defense to the plaintiffs' cause of action, *Pridgen v. Pridgen,* 190 N. C., 102, 129 S. E., 419; *Mitchell v. Strickland,* 207

N. C., 141, 176 S. E., 468; *Cody v. Hovey,* 216 N. C., 391; *Sills v. Morgan,* 217 N. C., 662; and in the consideration of the demurrer and motion the rule applies that the allegations of facts contained in the answer, and relevant inferences of fact necessarily deducible therefrom, are deemed admitted, and that the allegations are to be construed liberally in favor of the pleader. *Ballinger v. Thomas,* 195 N. C., 517, 142 S. E., 761; *Bessire & Co. v. Ward,* 206 N. C., 858, 175 S. E., 208; *Mitchell v. Strickland, supra; Ins. Co. v. McCraw,* 215 N. C., 105 1 S. E. (2nd), 369; *Parks v. Princeton,* 217 N. C., 361; C. S., 535.

Hence it would seem that the allegations in the answer that the judgment sued on was void for want of service of summons or other process on defendant Sophronia Wall who was then a minor, and that judgment was rendered without notice to her, must be held to constitute a defense, in the absence of any facts to negative the conclusion asserted. Service of summons is a jurisdictional requirement. *Stancill v. Gay,* 92 N. C., 462; *Guerin v. Guerin,* 208 N. C., 457, 181 S. E., 274; *Downing v. White,* 211 N. C., 40, 188 S. E., 815; *Denton v. Vassiliades,* 212 N. C., 513, 193 S. E., 737; *Groce v. Groce,* 214 N. C., 398, 199 S. E., 388.

While it is an established principle in this jurisdiction that a judgment based upon apparent service of process by a proper officer may not be collaterally impeached, the officer's return being deemed *prima facie* sufficient evidence of service (C. S., 921), and that in such case the correct procedure for rebutting the presumption and asserting failure of service is by motion in the cause (*Comrs. v. Spencer,* 174 N. C., 36, 93 S. E., 435; *Stocks v. Stocks,* 179 N. C., 285, 102 S. E., 306; *Caviness v. Hunt,* 180 N. C., 384, 104 S. E., 763; *Graves v. Reidsville,* 182 N. C., 330, 109 S. E., 29; *Dunn v. Wilson,* 210 N. C., 493, 187 S. E., 802; *Downing v. White, supra*), this principle is not available to the plaintiffs on the demurrer to the answer in this case. To sustain the demurrer the plaintiffs must call to their aid facts which do not appear in the answer. *Von Glahn v. DeRossett,* 76 N. C., 292; *Kendall v. Highway Commission,* 165 N. C., 600, 81 S. E., 995; *Sandlin v. Wilmington,* 185 N. C., 257, 116 S. E., 733; *Brick Co. v. Gentry,* 191 N. C., 636, 132 S. E., 800; *Glass Co. v. Hotel Corp.,* 197 N. C., 10, 147 S. E., 681; *Justice v. Sherard,* 197 N. C., 237, 148 S. E., 241; *Mack v. Marshall Field & Co.,* 217 N. C., 55; *Gaynor v. Port Chester,* 160 N. Y. S., 978; 49 C. J., 420; C. S., 517.

If it be that the summons in the original action showed proper service, that fact may be shown in evidence at the trial or set up by further pleading on the part of the plaintiffs, but not by a demurrer which admits the facts as alleged in the answer. The findings of other and additional facts by the court as the basis for its ruling on the demurrer do not affect the question of the sufficiency of the pleadings challenged by the demurrer. *Gaynor v. Port Chester, supra.*

Ordinarily, when a demurrer is sustained, the opposing pleader will be permitted to amend if he so desires, as pointed out in *Cody v. Hovey,* 216 N. C., 391 (395); *Scott v. Harrison,* 217 N. C., 319; *Johnston County v. Stewart,* 217 N. C., 334; *Morris v. Cleve,* 197 N. C., 253, 148 S. E., 253; C. S., 515.

The ruling of the court below in sustaining plaintiffs' demurrer to the answer and rendering judgment on the pleadings must be

Reversed.

CLYDE W. WILLIAMS v. FRANK WOODWARD ET AL.

(Filed 16 October, 1940.)

1. **Automobiles §§ 9c, 18h—Violation of statutory provisions prescribing that vehicles should be operated on right side of highway and that pedestrians be given proper warning is negligence per se.**

An instruction that the violation of statutes regulating the operation of motor vehicles and the conduct of pedestrians on the highway would constitute negligence *per se* and would be actionable if the proximate cause of injury, *is held* without error when it appears that the instruction was applied solely to the provisions of the Motor Vehicle Law prescribing that vehicles should be operated on the right-hand side of the highway and that warning should be given pedestrians, chapter 407, Public Laws of 1937, sections 108, 135, there being no reference in the charge to a violation of speed restrictions which the statute makes merely *prima facie* evidence that the speed is unlawful. Sec. 103.

2. **Negligence § 20: Appeal and Error § 39e—**

An instruction using the phrase "the reasonable man" instead of the phrase "the reasonably prudent man" in stating the standard of care required by law, *is held* not prejudicial upon the facts of this case.

APPEAL by defendants from *Pless, J.,* at March Term, 1940, of BURKE.

Civil action to recover damages for an alleged negligent injury.

Plaintiff was walking along Highway No. 70 between Marion and Morganton on the night of 17 December, 1939, when he was struck by the corporate defendant's truck, operated at the time by its agent or employee, Frank Woodward. It is in evidence that plaintiff was walking on his left side of the road facing traffic; that the defendant's truck was being operated on its left side of the road, or over the center line, traveling in the same direction with the plaintiff, and that the plaintiff was hit in the back and severely injured. The time was about 3:30 a.m.

The defendant denied liability and interposed a plea of contributory negligence.

The usual issues of negligence, contributory negligence and damages were submitted to the jury and answered in favor of the plaintiff. From judgment thereon, the defendants appeal, assigning errors.

Hatcher & Berry for plaintiff, appellee.
Mull & Patton for defendants, appellants.

STACY, C. J. The court instructed the jury that it was negligence *per se* for one to violate "the statute regulating the conduct and operation of motor vehicles on the public highways, and the conduct and behavior of pedestrians using the highways, but the element of proximate cause must also be shown." This instruction was taken from the case of *Holland v. Strader,* 216 N. C., 436, 5 S. E. (2d), 311, and is correct as applied to violations of the motor vehicle law, ch. 407, Public Laws 1937, save and except those provisions which relate to the speed limits mentioned therein, any speed in excess of which constitutes *"prima facie* evidence that the speed is not reasonable or prudent and that it is unlawful." Sec. 103; *Smart v. Rodgers,* 217 N. C., 560.

It is true there is allegation here of excessive speed, but the instruction which defendants assign as error was in reference to alleged violations of the motor vehicle law in driving on the wrong side of the road, sec. 108, and in failing to warn the plaintiff, who was a pedestrian. Sec. 135. These sections were called to the jury's attention immediately following the above instruction, and it is not thought the jury could have understood it as referring to a violation of the speed restrictions set out in sec. 103. This last section was not mentioned in the charge.

Exception is also taken to another expression in the charge. The court said to the jury that "negligence in general is defined to be the omission to do something which a reasonable man guided upon those considerations regulating the conduct of human affairs would do, or the doing of something which a reasonable man would not do." The objection to this instruction is, that it departs from the rule of "the reasonably prudent man" and adopts the rule of "the reasonable man," which the defendants say is too wide of the mark. *Cole v. R. R.,* 211 N. C., 598, 191 S. E., 353; *Diamond v. Service Stores, ibid.,* 632, 191 S. E., 358. Conceding that a reasonable man may not always be a prudent man, and that the accepted standard under varying conditions is the conduct of "the reasonably prudent man," *Mecham v. R. R.,* 213 N. C., 609, 197 S. E., 189, we are constrained to believe, and so hold, that, on this record, the inexactness of the statement, if, indeed, it may rightly be denominated as such, had no appreciable effect upon the jury and is not of sufficient importance to be regarded as erroneous. *Overman Wheel Co. v. Griffin,* 67 Fed., 659.

None of the assignments of error can be sustained. The verdict and judgment will be upheld.

No error.

STATE v. JOHN SAMIA.

(Filed 16 October, 1940.)

Constitutional Law § 26—

Where a prosecution for unlawfully selling intoxicating liquors is transferred from the recorder's court to the Superior Court, defendant may be there tried upon the original warrant without a bill of indictment. Public Laws of 1929, ch. 115, sec. 2.

APPEAL by defendant from *Bone, J.*, at February Term, 1940, of CRAVEN.

The defendant was charged with unlawful sale of intoxicating liquor. From judgment on verdict of guilty, defendant appealed.

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

J. A. Jones for defendant.

PER CURIAM. A witness for the State testified that he bought a pint of whiskey from the defendant. The defendant offered no evidence. The only question was the credibility of the State's witness. The jury was satisfied beyond a reasonable doubt of defendant's guilt and rendered verdict accordingly. In the trial we find

No error.

MOTION IN ARREST OF JUDGMENT.

In this Court defendant entered a motion in arrest of the judgment on the ground that the case was transferred from the Craven County recorder's court to the Superior Court for trial, and that defendant was there tried upon the original warrant without a bill of indictment. This procedure was authorized by statute, Public Laws 1929, ch. 115, sec. 2, and has been upheld by this Court in *S. v. Publishing Co.*, 179 N. C., 720, 102 S. E., 318; *S. v. Saleeby*, 183 N. C., 740, 110 S. E., 844. See, also, *S. v. Boykin*, 211 N. C., 407, 191 S. E., 18.

Motion in arrest of judgment denied.

JAMES McLAMB AND J. B. PARRISH v. CHARLES L. BEASLEY.

(Filed 30 October, 1940.)

1. Master and Servant § 21b—

The master is liable for a negligent injury inflicted on a third person by the servant when the servant is acting in the course of his employment and is at the time about the master's business, but is not liable for such injuries when the servant is acting outside of the legitimate scope of his authority and is engaged in some private matter of his own, it being necessary that the relation of master and servant exist at the time of, and in respect to the very transaction out of which injury arises.

2. Same—

As a general rule, the servant is not in the course of his employment while going to and returning from his work.

3. Automobiles § 24—Evidence held insufficient to be submitted to the jury on the issue of respondeat superior.

Defendant's truck driver, at the conclusion of the day's work, drove to a nearby town where he drank some whiskey, and while driving from the town to his home, negligently ran into the rear of a wagon on the highway, causing injury to both plaintiffs. Plaintiffs' evidence tended to show that defendant permitted the driver to keep or "store" the truck at his home at night and to use the truck in going to and from his work, but that there was ample parking space at defendant's store affording equal protection for the truck, that the driver had on occasion made deliveries on the way home but that no deliveries were made on the night in question, that no deductions were made from the driver's salary by reason of the fact that he was permitted to so use the truck, and defendant's bookkeeper, as a witness for plaintiffs, testified that if anything had to be delivered after the store was closed the driver would have been called upon to make the delivery, but that he had never known the driver to be so called, but that the driver was permitted to so use the truck solely as a matter of personal accommodation. *Held:* The evidence relating to deliveries after the close of the store merely indicates the loyalty of the employees and in nowise supports the inference that the driver was permitted to take the truck home in order to be able to make such deliveries, and the evidence discloses that the use of the truck by the driver in going to and from his work was gratuitous and not a part of the contract of employment, and, there being no contention of liability on any ground other than *respondeat superior*, defendant's motion for judgment as of nonsuit should have been granted.

CLARKSON, J., dissenting.

APPEAL by defendant from *Thompson, J.*, at February Term, 1940, of JOHNSTON.

Civil actions to recover damages for alleged negligent injuries, by consent consolidated and tried together, as the two actions arise out of the same state of facts.

William Hood, while driving a truck along the Smithfield-Angier highway on the night of 18 February, 1939, negligently ran into the rear of a wagon in which the two plaintiffs were riding and injured both of them. Hood was employed as a handy man around the defendant's store and was the regular driver of the delivery truck which he was using on the night in question. At the conclusion of the day's work, Hood drove the defendant's truck to Smithfield, there drank some liquor, and was on his way home when the accident occurred. He was drunk.

It is in evidence that Hood had customarily used the defendant's truck in going to and from his home; that he lived about three miles from the defendant's store; that he regularly kept the truck in his yard at night, and this with the knowledge and consent of the defendant; that the store furnished the gas and oil for the truck, and "there was usually enough in there for him to go home in the evening and come back in the morning"; that no deductions were made from his salary for the use of the truck; that Hood's use of the truck in going to and from his home was purely a matter of accommodation and gratuity to him, and that the defendant in no way benefited therefrom. "There was plenty of parking space at the store to keep the truck," where the other trucks were kept. "It was not more protected than it would have been down at the store." Hood had been keeping the truck in his possession at night for five years. "That storage place was known to Mr. Beasley," says the defendant's bookkeeper. "I never did get any instructions to change the storage place. I have known Hood to make deliveries on his way home." No deliveries were made on the night of the accident. The truck was empty at the time. The bookkeeper further testifies: "Hood's employment was driving that truck. After he finished he was permitted to go home in the truck and come back to his work in the morning. The use of the truck after the store closed in going to his house was just purely a matter of permission and accommodation to him. . . . The use of the truck in going to and from his home was not for the accommodation of the store, but for William Hood's sole and single personal accommodation."

At the close of plaintiffs' evidence the defendant moved for judgments of nonsuit. Overruled; exception. The defendant offered no evidence, but relied upon the testimony of his bookkeeper as offered by the plaintiffs.

From verdicts and judgments for plaintiffs, the defendant appeals, assigning error.

Wellons & Wellons and Douglass & Douglass for plaintiffs, appellees.

A. J. Fletcher, Franklin T. Dupree, Jr., J. C. B. Ehringhaus, and Chas. Aycock Poe for defendant, appellant.

STACY, C. J. The single question presented by the appeal is the sufficiency of the evidence to carry the cases to the jury.

The plaintiffs contended with quite good fortune in the court below that Hood's use of the truck under the circumstances was such as to warrant the inference that it was being driven to his home for storage or safe keeping during the night; that he was, therefore, about his master's business at the time of the injury, and that plaintiffs are entitled to recover on the theory of *respondeat superior*.

It is true the defendant's bookkeeper is led to speak of Hood's yard as a storage place for the truck at nighttime, albeit there was plenty of room at the store where the other trucks were kept. In view of the same witness' positive testimony that Hood's use of the truck after closing hours in driving to his home was not for the benefit of the defendant but for "Hood's sole and single personal accommodation," we think it would be somewhat chimerical to say the truck was being operated for and on behalf of the defendant at the time of the collision. The compelling facts speak louder than the suggested inference. *Harrison v. R. R.*, 194 N. C., 656, 140 S. E., 598. There was no more protection for the truck in Hood's yard than at the defendant's store. The same stars shine at both places.

It is conceded that unless Hood was engaged in the work of the defendant "at the time of and in respect to the very transaction out of which the injury arose," the plaintiffs are not entitled to recover. *Liverman v. Cline*, 212 N. C., 43, 192 S. E., 849; *Van Landingham v. Sewing Machine Co.*, 207 N. C., 355, 177 S. E., 126; *Jeffrey v. Mfg. Co.*, 197 N. C., 724, 150 S. E., 503; *Tyson v. Frutchey*, 194 N. C., 750, 140 S. E., 718; *Grier v. Grier*, 192 N. C., 760, 135 S. E., 852; *Reich v. Cone*, 180 N. C., 267, 104 S. E., 530.

It is elementary that the master is responsible for the tort of his servant which results in injury to another when the servant is acting in the course of his employment, and is at the time about the master's business. *D'Armour v. Hardware Co.*, 217 N. C., 568; *Barrow v. Keel*, 213 N. C., 373; *Roberts v. R. R.*, 143 N. C., 176, 55 S. E., 509. It is equally well established that the master is not liable if the tort of the servant which causes the injury occurs while the servant is acting outside the legitimate scope of his authority, and is then engaged in some private matter of his own. *Tribble v. Swinson*, 213 N. C., 550, 196 S. E., 820; *Parrish v. Mfg. Co.*, 211 N. C., 7, 188 S. E., 897; *Bucken v. R. R.*, 157 N. C., 443, 73 S. E., 137.

As a general rule the servant is not in the course of his employment while going to and returning from his work. This is essentially his own task. See *Bray v. Weatherly Co.*, 203 N. C., 160, 165 S. E., 332, and cases there cited.

At present we are not concerned with a case where the servant uses the master's car in traveling to and from his work as a part of his compensation or in furtherance of the master's business. Nor are we confronted with a case where such use of the master's car is for the benefit of the master as well as the servant. *Williams v. R. R.,* 190 N. C., 366, 129 S. E., 816. A fair interpretation of the record reveals a case in which the servant is permitted to use the master's truck in going to and from his home purely as a matter of accommodation to the servant. It is not the policy of the law to extend the legal relationship of master and servant, with its reciprocal duties and liabilities, to cover such a case. The gratuitous and permissive use by Hood of the defendant's truck in traveling back and forth between his home and place of work, under the circumstances disclosed by the record, is not sufficient to warrant the inference that such use of the truck became by implication a part of the contract of employment. *Distributing Corp. v. Drinkwater,* 81 F. (2d), 200.

It was said in *Hunt v. State,* 201 N. C., 707, 161 S. E., 203, that "the employee is in the course of employment if he has a right to the transportation, but not if it is gratuitous, or a mere accommodation."

A careful perusal of the whole record impels the conclusion that Hood's use of the defendant's truck on the night in question was for his own purposes, first, in going to Smithfield, and, second, in returning home. *Wilkie v. Stancil,* 196 N. C., 794, 146 S. E., 296. The defendant had no control over him at the time. Hood was his own master while driving home. This defeats recovery on the theory of *respondeat superior. Martin v. Bus Line,* 197 N. C., 720, 150 S. E., 501. The doctrine is inapplicable where there is no superior to respond. *Standard Oil Co. v. Parkinson,* 152 Fed., 681.

The plaintiffs stress the statement of the defendant's bookkeeper that the truck was in Hood's care at night, "and if anything should have to be hauled or delivered after the store was closed, we could get in touch with him and he would do it." He added, however, that if Hood had ever been called after closing hours, he knew nothing of it. "Not in all the time I worked there did I ever know Hood to be called on during the night. He was simply working there, and we all felt, if an emergency arose, we were liable to be called on." This evidence, in its entirety, expresses no more than a sense of loyalty on the part of all the employees of the defendant. It is to be commended rather than held for liability. It does not even carry the suggestion that Hood had the truck in order that he might be accessible after closing hours or at nighttime. Thus, on this record, to say that Hood was acting in the course of his employment at the time of the injury would be to tax the generosity of

the defendant, and place the law at variance with kindly impulses and generous treatment.

Speaking to a similar situation in *Gewanski v. Ellsworth,* 166 Wis., 250, 164 N. W., 996, *Rosenberry, J.,* delivering the opinion of the Court, said: "While it is true that fair and generous treatment on the part of the master is likely to produce a corresponding sense of loyalty on the part of the servant, it cannot be said that such treatment of a servant by a master in any way promotes or facilitates the master's business in a legal sense. It is to the benefit of both master and servant that their relationship should be pleasant and harmonious, but the effort of the master to accommodate and assist the servant does not bring within the scope of the master's employment acts of the servant otherwise without such scope."

It is not suggested that plaintiffs are entitled to recover on any other theory. There is no evidence that Hood was a reckless driver or that his drinking was known to the defendant. *Taylor v. Caudle,* 210 N. C., 60, 185 S. E., 446.

There was error in overruling the defendant's motion for judgments as in cases of nonsuit.

Reversed.

CLARKSON, J., dissenting: The facts: It is charged by plaintiff that William Hood, at about 8:00 p.m. on 18 February, 1939, carelessly, recklessly, willfully and wantonly, while under the influence of intoxicating liquor, in operating a certain truck owned by defendant and acting in the scope of his employment, in violation of law, ran into the wagon driven by J. B. Parrish, in which plaintiff McLamb was a guest, knocking said wagon to the left across said road into the ditch and throwing said wagon on top of the mule, and knocking the plaintiff from said wagon violently to the ground, knocking out two of his front teeth, cutting an ugly wound in his lower lip, severely bruising and dislocating his right shoulder, wrenching his back, and lacerating and bruising the plaintiff in numerous places, severely and permanently. Like allegations were made by J. B. Parrish, except that he was driving the wagon. He was permanently injured. The cases were consolidated.

The first issue submitted to the jury: "Was the plaintiff injured by the negligence of William Hood, an employee of the defendant, as alleged?"

It was conceded by defendant that the evidence in the cases was sufficient for the jury to find an affirmative answer to the first issue, and defendant conceded that the jury could answer the issue in each case "Yes."

The second issue: "If so, was said William Hood at the time of the alleged injury to plaintiff acting within the scope of his employment, as alleged in the complaint?"

On both issues the jury answered "Yes" and to the third issue assessed damages. The only question on this appeal: Was William Hood "acting within the scope of his employment?"

The record discloses: "1. The plaintiffs were injured by the defendant's truck. 'He was operating Mr. Beasley's pick-up. . . . I am familiar with the truck Hood was operating. . . . Mr. Beasley's sign was painted on the truck.' 2. The collision occurred on Saturday night around eight o'clock. 'I would say it was about 8 o'clock. I didn't have any watch.' 3. 'It was usually closed by 8 o'clock. That is what I say.' 4. Hood was the regular driver of the truck that injured the plaintiffs. 5. Hood lived on the Angier Road, about three miles from defendant's store. 6. The wreck occurred about halfway between defendant's store and Hood's home, and the truck was headed toward Hood's home. 7. Hood's home was the regular storage place for the truck; and it was used by Hood daily in going to and from the store. 'This truck was kept at William Hood's house at night. That is around three miles from where he works. He got to and from his work on this truck. I know that of my own knowledge. In going to and from work William Hood passed the road I live on every day. I didn't notice what was in the truck that night.'" Another witness said: "I have seen it there early in the morning and late in the evening." Another said: "I know he regularly went by my home night and morning on the truck. Early in the morning in time to go to work and late in the evening." Another said: "Hood has been working for Mr. Beasley a good many years. . . . I have seen this truck at his home on numerous occasions at night." The witness Whitley said: "He passed my residence with it regularly night and morning. In the morning he would be coming from toward home and going toward Beasley's store. In the evening he would be coming from toward Beasley's store and going in the direction of his home."

W. Leon Johnson testified for plaintiff, in part: "On February 18, 1939, I was employed with C. W. Beasley & Son as bookkeeper and manager. William Hood was employed by Mr. Beasley. He was a truck driver. He drove the delivery truck and helped around the store, and did odd jobs around the store. He was the regular driver of that truck. Q. State whether or not he regularly kept that truck at his home at night. Ans.: Yes, sir, he has been keeping the truck. I have been working there for five years, and the truck was in his possession there every night. It was kept with Mr. Beasley's knowledge and consent. There were no deductions made in the salary of William Hood for the

gasoline and oil used in going from the store to his home and from his home to the store. The store furnished the gas and oil for the truck, and there was usually enough in there for him to go home in the evening and come back in the morning. I would not say that William Hood was any more subject to be called at night than me or any of the rest of them, *but the truck was in his care, and if anything should have to be hauled or delivered after the store was closed we could get in touch with him and he would do it.* Q. State whether or not William Hood at times continued to deliver after the closing of the store. Ans.: Well, most of the time I would leave the store—I would leave there thirty minutes or an hour before they would close the store, but just now and then I would be there when the store would close. And on several occasions he would be through delivering everything that was going *except a few things maybe, that were going right out from the store up the road a little ways, and he would put them in the truck and take them as he would go on home.* (Re-direct examination) Q. Where was the regular storage place of this truck, of this particular truck that was driven by William Hood during the night of February 18, 1939, prior thereto and subsequent thereto? Q. The regular storage place at night for that truck? Ans.: Well, William Hood had been keeping the truck at his home. I had been working there for five years. He had been keeping the truck in his possession all the time I was over there. That storage place was known to Mr. Beasley. *I never did get any instructions to change the storage place. I have known Hood to make deliveries on his way home.*"

The main opinion bases the nonsuit on the cross-examination of Johnson. The main opinion does not give precisely what he said, and, interpreting rather than quoting from the record, says: "That Hood's use of the truck in going to and from his home was purely a matter of accommodation and *gratuity to him,* and that the *defendant in no way benefited therefrom.*" The actual language is: "Hood's employment was driving that truck. After he finished he was permitted to go home in the truck and come back to his work in the morning. The use of the truck after the store closed in going to his house was just purely a matter of permission and accommodation to him. There was plenty of parking space at the store to keep the truck. Q. The use of the truck in going to and from his home was not for the accommodation of the store, but for William Hood's sole and single personal accommodation? Isn't that right? Ans.: Yes, sir, I *expect* so."

The main opinion is a conclusion not supported by the record. The witness Johnson said the use of the truck was "purely a matter of permission and accommodation to him," and as to "sole and single personal accommodation" he wavered and was uncertain and said "I expect so." This was a conclusion or supposition. He did not say it was a "gratuity

to him," nor did he say "that the defendant in no way benefited therefrom." Conclusions on facts are not for the witness or this Court—they are matters for the jury to determine on all the facts and circumstances, based on both direct and circumstantial evidence. The employee used the gas of defendant in going home and returning, its cost was paid by defendant for five years, as is admitted by the record. Assuming six days, coming and going, 24 days a month, amounting in a year to 288 days, 5 years is 1,440 days, 6 miles a day would be 8,640, or more than one-third the distance around the world. Further estimating 15 miles to the gallon, and gas 20c a gallon, this would total $115.20. It is almost inconceivable that, under the facts of this case, the master "gave" to the servant as an outright *gratuity* the sum of $115.20.

This payment of gas and the other evidence set forth makes it a matter for the jury to determine and not for us. The court below gave defendant, on the testimony of Johnson, all and perhaps more from the Johnson testimony than defendant was entitled to. "As I told you, gentlemen of the jury, in order for the plaintiffs to sustain the burden which the law places upon them with respect to this second issue, and in order to entitle the plaintiff in either case to an affirmative finding on your part, the burden is upon the plaintiff in each case to satisfy you by the evidence and by its greater weight of the truth of his contentions with respect to the second issue. Now, gentlemen of the jury, it is conceded that the motor truck in question was owned by Mr. Beasley, and that with his permission it was used by William Hood in going to and from his home, but Mr. Beasley would not be liable for any negligent operation of that motor truck on the part of William Hood if the motor truck was being used by William Hood *solely for his own convenience* and not as incidental to, or in aid of, the business of C. L. Beasley. The employer's liability, that is, Beasley's liability, in cases of this kind depends upon whether the conveyance, that is, the motor truck in question, had been provided by him after the beginning of employment in compliance with *one of the implied or express terms* of the contract of employment for the mere use of the employee William Hood, and one which the employee William Hood was required or as a matter of right was permitted to use by virtue of that contract pursuant to that rule. William Hood would be in the course of his employment if he had a right to the transportation but not, gentlemen of the jury, if the transportation was gratuitous, a mere accommodation to him. The defendant contends and says further that according to the testimony of plaintiff's own witness, Mr. Johnson, who was employed at the store in February, 1939, was bookkeeper, that this truck was used by Hood only by his, Beasley's permission; that Johnson testified from the witness stand, when he was plaintiff's witness, that the truck was used as a matter of

pure accommodation, not to Beasley but to Hood, in order to allow him to go back and forth from his home to his work quicker and easier than he otherwise would have been able to have done; that it was for Hood's pure accommodation and nothing else that he was permitted to use it. He says and contends, gentlemen of the jury, that you should accept Mr. Johnson's version about that."

This Court must stand by the ancient landmark—the jury—to determine the issue of facts, and should be slow to take from the jury facts as disclosed from this record.

The defendant did not testify, but at the close of plaintiff's evidence made a motion for judgment as in case of nonsuit. C. S., 567. The motion was overruled and the cases were submitted to the jury. It is well settled in this jurisdiction that the evidence is to be taken in its "most favorable light for plaintiff" and he is entitled to the benefit of every "reasonable intendment" and every "reasonable inference" to be drawn therefrom.

In *Williams v. R. R.*, 190 N. C., 366, *Stacy, C. J.*, writing the opinion, at p. 366, it is said: "Defendants earnestly contend that the nonsuit in favor of the Garysburg Manufacturing Company should be sustained and that the verdict in favor of the Atlantic Coast Line should be upheld, but we think there was more than a scintilla of evidence offered on the hearing tending to establish the plaintiff's position as against both defendants, which was sufficient to carry the matters to the jury for its consideration and determination. . . . (pp. 367-8) The nonsuit in favor of the manufacturing company was allowed upon the theory that the truck in question has been borrowed by plaintiff's intestate and was being operated under his direction and control at the time of the collision by one Connie Williams. Defendant contends that plaintiff's intestate was engaged in transporting laborers from the Long Creek section to Burgaw on his own responsibility and that it was distinctly understood between them that no liability should attach to the defendant, manufacturing company, by reason of the use of its truck. There was evidence tending to support this view of the case. Plaintiff, on the other hand, takes the position that the laborers were being transported by the defendant manufacturing company, and for its benefit. As bearing on this phase of the case, Connie Williams testified as follows: 'I live at Long Creek, and Ed Williams lived at Long Creek. About 17 or 18 of us lived in the Long Creek section, about 9 or 10 miles from Burgaw. *The Garysburg Company furnished the truck for us to go back and forth home and back here to our work. Once a week I drove the truck for that purpose, every Saturday night and Monday morning.* We had to come to Burgaw before we went to work, and were required to be there at 5:30; then we got on the train and went in the woods, about

10 miles, where we were working. Saturday evening when we got back and got our pay we went home on the truck. We all worked for the Garysburg Company. *On this evening I got the truck out of the house near the office—the Garysburg Company exercised dominion over that property—and I drove it down here and got some gas, over at Mr. Davis',* did some shopping and started home. *I did not pay for the gas, nor did anyone riding in the truck pay for it; it was charged to the company.'* We think this evidence was sufficient to carry the case to the jury under the principle announced in *Tanner v. Lumber Co.,* 140 N. C., 475, and contended for by plaintiff in the present action, that where the master undertakes to furnish his laborers transportation to and from their work, it is his duty, in the exercise of ordinary care, to see to it that such transportation is rendered as reasonably safe as the character of it will permit. See note to *Thomas v. Wisconsin C. R. Co.,* as reported in 23 L. R. A. (N. S.), 954, where the authorities on the subject are collected and reviewed by the annotator." (Italics mine.)

In *Fleming v. Holleman,* 190 N. C., 449 (456), is the following: "W. L. Holleman testified: 'I used this car in going backward and forward. On this night in question I was driving a Ford that belonged to Armour & Company, which car I kept at my home. On 19 February, 1924, I drove this car toward my home. . . . Have been using it constantly since then. I only use this car on the company's business. At the time of the accident I was on my way home.' I think all the evidence on this phase sufficient to justify the court below in the charge as given. *Williams v. R. R., ante,* 366." *Mehaffey v. Construction Co.,* 197 N. C., 22.

Mere ownership of automobile does not render one liable for injuries from operation by another. *Martin v. Bus Line,* 197 N. C., 720. Owner loaning truck to another held not liable for injuries in collision without evidence that borrower's driver was incompetent. *Tyson v. Frutchey,* 194 N. C., 750. In an action for injuries, caused by the alleged agent of defendant driving defendant's automobile into plaintiff, the ownership of the automobile was evidence from which the jury might infer that it was being used in defendant's business at the time of the injury. *Freeman v. Dalton,* 183 N. C., 538.

In *West v. Baking Co.,* 208 N. C., 526, it appeared that the truck was being driven by defendant's employee. This Court held there was sufficient evidence from which the jury could *infer* that the servant was acting within the scope of his employment. *Adams v. Foy & Shemwell,* 176 N. C., 695; *Misenheimer v. Hayman,* 195 N. C., 613; *Phifer v. Dairy Co.,* 200 N. C., 65; *Parrish v. Armour & Co.,* 200 N. C., 654; *Lazarus v. Grocery Co.,* 201 N. C., 817; *Edwards v. Loving,* 203 N. C., 189; *Dickerson v. Reynolds,* 205 N. C., 770; *Barrow v. Keel,* 213 N. C., 373;

Smith v. Gastonia, 216 N. C., 517, holding that scope of employment was for the jury.

Evidence showing plaintiff was injured by negligent operation of truck, operated by regular driver pursuant to orders, made *prima facie* case against owner of truck. *Lazarus v. Grocery Co., supra.*

In the recent case of *Smith v. Gastonia, supra* (216 N. C., 517), at p. 519, *Seawell, J.,* used this language: "The sole question in controversy here is as to whether the decedent was at the time of his injury and death in the exercise of any of the duties of his employment or in the enjoyment of its protection. Nothing else appearing, an employer is not liable for accidents occurring to an employee while going to or returning from the employer's premises in order to begin his work or after its conclusion, and an accident so occurring is not held to arise out of and in the course of the employment. *Bray v. Weatherly & Co.,* 203 N. C., 160, 161, 165 S. E., 332, 94 A. L. R., 589. *But the authorities seem to be uniform to the effect that where the employer furnishes the means of transportation to and from the place where the service is performed as an incident to the contract of employment an injury suffered by the employee while going to and from work is compensable*" (italics mine), citing *Phifer v. Dairy Co., supra; Jackson v. Creamery Co.,* 202 N. C., 196; *Bellamy v. Mfg. Co.,* 200 N. C., 676; *Parrish v. Armour & Co.,* 200 N. C., 654; *Massey v. Board of Education,* 204 N. C., 193, and cases cited.

We think the learned judge in the court below, under the authorities of this and other jurisdictions, took the correct view in refusing to grant the nonsuit requested by defendant, and that he also charged the jury correctly. The law, we think, is settled in favor of the position taken by the court below.

From other cases and text writers, the rule laid down is as follows: "The tendency of the courts is to enlarge the field of operation of the doctrine of *respondeat superior.* The doctrine is bottomed on the principle that he who expects to derive advantage from an act done for him by another should answer for any injury which a third person may sustain from the act. The rapid industrial and commercial progress of the times had brought about conditions which render it expedient in the interests of the community to extend the application of the rule that every man, in the management of his affairs, whether by himself or by his agents or servants, shall take care not to injure another, for only by imposing vicarious liability upon employers can vigilance be secured in the selection and supervision of employees to the end that those who are incompetent or reckless may be weeded out." *Elliason v. Western Coal & Coke Co.,* 202 N. W., 485, 162 Minn., 213.

"However, where a master places at the disposal of his servant an automobile to be used by the servant in going to and from his work, and where the transportation is beneficial to both, the relation of master and servant continues while the automobile is used for such purpose; also if the employer, as an incident of contract, furnishes transportation, injury to employee going to and from place of employment 'arises out of and in the course of employment.'" 5 Cyc. of Automobile Law and Practice (Blashfield), sec. 3041, pp. 197-8. Under the above section is cited *Phifer's Dependents v. Foremost Dairy, Inc.,* 200 N. C., 65, 156 S. E., 147. In that case, *Adams, J.* (citing a wealth of authorities), says, at pp. 66-7: "While there is diversity of opinion on the question, the weight of authority sustains the conclusion that if an employer furnishes transportation for his employee as an incident of the employment, or as a part of the contract of employment, an injury suffered by the employee while going to or returning from the place of employment in the vehicle furnished by the employer and under his control arises out of and in the course of the employment. . . . (p. 68) While the employee's actual work began at a designated place, yet to go there was an act within and necessary to his service."

In 7-8 Cyc. of Automobile Law (Huddy), 9th Ed., sec. 94, at p. 251, we find: "Use to enable driver to reach work earlier. Where the employer permits the driver to use the machine to and from his home in order that the driver may reach his work earlier, it has been held that the relation of master and servant continues during such trips."

In *In re Hinton,* 180 N. C., 206 (213), *Walker, J.,* said: "Evidence of this kind was competent for the jury to consider, for when one can easily disprove a charge by testimony within his control, and which he can then produce, and fails to do it, it is some proof that he cannot refute the charge." In *York v. York,* 212 N. C., 695 (702), the above is quoted and it is there said: "The rule of the *Hinton case, supra,* has been repeatedly approved and followed in recent cases decided by this Court. See *Walker v. Walker,* 201 N. C., 183 (184); *Puckett v. Dyer,* 203 N. C., 684 (690); *Maxwell v. Distributing Co.,* 204 N. C., 309 (316)."

The charge of plaintiffs against defendant was to the effect that defendant's driver permanently injured them in the course of his employment by defendant. The record indicates that defendant, charged with this wrong, sat by while having an opportunity to refute the charge as to whether it was true or not; the truth or falsity was peculiarly within defendant's knowledge. The fact that he did not deny the wrong done by his driver was a "pregnant circumstance" for the jury to consider, as stated in opinion of this Court.

There is no denial that defendant's driver had the red pick-up truck, was employed to drive same, and habitually drove same with defendant's name on it. He had driven the truck for five years with the knowledge and consent of defendant, from where he worked to his home each night and return with same each morning. The evidence indicates that he was subject to call after the store was closed. The truck was parked each night at defendant's driver's home and there was no garage at the place of business for the truck except in the open. The main opinion says, "The same stars shine at both places," but they now shine on plaintiffs' broken bodies which have suffered injuries admittedly caused by defendant's driver while operating defendant's truck in a drunken condition.

The defendant furnished the gas to the driver to go to and from his work. The gas alone amounted to some $115.20. Some $23.00 a year—perhaps the larger part of a month's salary. The home of defendant's driver was six miles from the place of work. The accident to plaintiffs took place about halfway between the place of work and the driver's home, on the public highway. When the witness Johnson, introduced by plaintiff, was questioned on cross-examination, he would not deny *in toto* that the services of defendant's driver were not in the course of his employment. His final answer was, "I expect so," which implied an uncertainty as to whether the truck was being used as an accommodation to the defendant's driver. There was plenary evidence, direct and circumstantial, for the jury to consider.

In the Law of Automobiles (Michie), North Carolina, sec. 131, at p. 381, it is written: "The question as to whether the servant's or the employee's act may reasonably be held within the scope of his employment is ordinarily *one of fact for the determination of the jury,* except where the departure from the master's business is of marked and decided character." (Italics mine.)

I see no error in the ruling of the court below.

QUEEN CITY COACH COMPANY v. CLYDE LEE AND BERRY B. FREEMAN, ADMINISTRATOR OF THE ESTATE OF ANDREW FREEMAN, DECEASED.

(Filed 30 October, 1940.)

1. Trial § 22b—

Upon motion to nonsuit, the evidence tending to establish the cause of action is to be considered in the light most favorable to the party asserting the cause of action, and he is entitled to every reasonable intendment thereon and every reasonable inference therefrom. C. S., 567.

2. Trial § 19—

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

3. Trial § 22b—

Only the evidence in support of the cause of the action will be considered upon motion to nonsuit.

4. Automobiles §§ 10, 18a—Conflicting evidence as to whether vehicle was being operated on right side of highway held to take case to jury.

This action grew out of a collision between a bus and an automobile traveling in opposite directions on the highway. The collision was caused by the fact that one or the other of the vehicles was over the center line to its left of the highway. There was testimony to the effect that immediately after the accident there was a line of oil which began on the highway at the place of the collision and ran directly to the bus, and that said line of oil was over the center line about 18 inches on the bus' left side of the highway and ran on the bus' left-hand side of the highway a distance of about 35 steps, and testimony of another witness that at the time of the collision the bus was over the center line to its left side of the highway. The evidence of defendant bus company tended to show that the bus remained on its right side of the highway. *Held:* Upon the bus company's motion to nonsuit its evidence must be disregarded, and the evidence that the left wheels of the bus were over the center line of the highway is sufficient to take the case to the jury, the weight and credibility of the evidence being for its determination.

5. Automobiles § 18h: Trial § 32—It is not error to refuse to give requested instructions which are not predicated on the jury's finding of the essential facts by the greater weight of evidence.

The accident in suit was caused by the fact that one or the other of the vehicles involved was over the center line of the highway. Plaintiff requested an instruction that if the jury should find that the collision occurred on plaintiff's right of the center of the highway, or that if the automobile ran to its left into the path of plaintiff's bus at a time when the bus was on its right side of the center of the highway, to answer the issues in favor of plaintiff on defendant's counterclaim. *Held:* The refusal to give the instructions requested was not error, since they were not predicated upon the jury's finding of the facts from the greater weight of the evidence, and made no reference to the burden of proof, which constitutes a substantial right.

6. Same—

Plaintiff requested instruction as to the right of a motorist to assume that a vehicle approaching from the opposite direction will stay on its right side of the highway *held* substantially given in the charge.

7. Death § 8—Charge on issue of damages for wrongful death held without error.

The evidence disclosed that intestate was a young man 18 years of age, of sober and industrious habits, that at the time of his death he was a newspaper photographer of skill and ability. The court correctly instructed the jury as to the method of ascertaining the present net worth of deceased to his family. *Held:* The refusal of a requested instruction that since the administrator had not shown the amount of any earnings

on the part of the intestate, the jury should not speculate as to what his earnings had been, is not error.

8. Evidence § 30—

In this action for wrongful death the admission in evidence of the photograph of intestate for the purpose of corroborating the witnesses, *is held* not error.

9. Automobiles § 18f—

Testimony of a witness as to speed of plaintiff's bus when it passed the witness' car on the highway immediately before the collision in suit *is held* competent as some evidence of the speed of the bus at the time of the collision, the probative force being for the jury.

10. Evidence § 42b—

The test of whether testimony of a declaration is competent as being a part of the *res gestæ* depends upon the spontaneity of the declaration, it being required that the declaration be the facts talking through declarant rather than the declarant talking about the facts, and the element of contemporaneousness being important merely as bearing on the question of spontaneity.

11. Evidence § 18—Declaration held competent for purpose of corroborating or impeaching testimony of declarant.

Plaintiff's bus driver testified that he went to the car involved in the collision with plaintiff's bus and saw "this boy in the car and he was not making any noise." Defendants' witness testified that about 15 minutes after the accident the bus driver made a declaration to the effect that he thought he had killed a man down the road. The court admitted the testimony of the declaration, not as substantive evidence, but solely for the purpose of contradicting or corroborating the testimony of plaintiff's driver. *Held:* Plaintiff's objection thereto cannot be sustained.

BARNHILL, J., concurring in result.

STACY, C. J., and WINBORNE, J., join in concurring opinion.

APPEAL by plaintiff from *Ervin, Special Judge,* and a jury, at April Term, 1940, of RUTHERFORD. No error.

This is an action for actionable negligence, brought by plaintiff against Clyde Lee and Berry B. Freeman, administrator of the estate of Andrew Freeman, deceased, to recover the sum of $250.00 for alleged damage to plaintiff's bus. The defendant Clyde Lee, who owned the automobile involved in the wreck, denied negligence and set up a counterclaim for $250.00 damage to his car. Plaintiff in reply denied the allegations of Clyde Lee. Berry B. Freeman, the administrator of the estate of Andrew Freeman, denied negligence and set up a counterclaim against plaintiff for the sum of $100,000 for negligence in killing Andrew Freeman. The plaintiff denied negligence and set up the plea of contributory negligence.

The issues and verdict are as follows:

"1. Was the bus of the plaintiff, the Queen City Coach Company,

damaged by the negligence of the intestate, Andrew Freeman, as alleged in the complaint? Ans.: 'No.'

"2. What damages, if any, is the plaintiff, the Queen City Coach Company, entitled to recover of the defendants Clyde Lee and Berry B. Freeman, administrator of Andrew Freeman, upon the cause of action stated in the complaint? Ans.: 'None.'

"3. Was the automobile of the defendant Clyde Lee damaged by the negligence of the driver of the bus of the plaintiff Queen City Coach Company, as alleged in the said counterclaim? Ans.: 'Yes.'

"4. Was the intestate Andrew Freeman killed by the negligence of the driver of the plaintiff Queen City Coach Company, as alleged in the counterclaim of the defendant Berry B. Freeman, administrator of said intestate? Ans.: 'Yes.'

"5. Did the intestate Andrew Freeman, by his own negligence, contribute to the injuries whereof the defendants complain in their counterclaim? Ans.: 'No.'

"6. What damage, if any, is the defendant Clyde Lee entitled to recover of the plaintiff Queen City Coach Company upon said defendant's counterclaim? Ans.: '$70.00.'

"7. What damages, if any, is the defendant Berry B. Freeman, administrator of Andrew Freeman, entitled to recover of the plaintiff Queen City Coach Company upon said defendant's counterclaim? Ans.: '$15,000.00.'"

The court below rendered judgment on the verdict. 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.

Edwards & Edwards and Robinson & Jones for plaintiff, appellant.

Woodrow W. Jones, Stover P. Dunagan, and R. Marion Ross for defendants, appellees.

CLARKSON, J. At the close of defendants' evidence and at the close of all the evidence, the plaintiff made motions for judgment as in case of nonsuit. C. S., 567. The court below refused these motions and in this we can see no error.

On a motion to nonsuit, the evidence is to be taken in the light most favorable to the plaintiff, and he is entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference drawn therefrom. The competency, admissibility, and sufficiency of the evidence is a matter for the court to determine. The credibility, probative force, and weight is a matter for the jury. This principle is so well settled we do not think it necessary to cite authorities.

The record is voluminous, but the facts are simple. The plaintiff's evidence is discarded, as the jury believed the evidence of the defendants. This evidence is to the effect that B. T. Mullis, the driver of plaintiff's bus, left Asheville, N. C., at 6:55 o'clock p.m., on his run to Charlotte, N. C. He was 25 minutes late, having had to wait on the Knoxville, Tenn., bus. The defendants' intestate, Andrew Freeman, was driving a 1931 model Ford automobile. The bus was traveling in an eastward direction, the Ford was going in a westward direction. The collision occurred about 4 miles north of Shelby, on Thursday, 27 July, 1939, at about 9:15 p.m. The place where the collision occurred was on a curve, the bus going uphill and the Ford coming downhill. The bus, according to witnesses, was running 55, 60 and 65 miles an hour. It was in evidence that the Ford was equipped with proper brakes, steering apparatus and all its important parts were in good condition. The car had oil and gasoline in it. Witnesses who were at the wreck 10 or 15 minutes after the collision said the Ford was torn all to pieces and that Andrew Freeman was under the floor boards dead. The left wheel was off. The body of the car where the driver would sit under the wheel, or under the steering post, was mashed in. The whole left side was all smashed in on the car. One witness testified: "In the cement near this car I saw some scratched places dug out. The car was eight or ten feet from the scratched places. At the time I saw it the Ford car was kind of crossways of the road, a little more so back towards Shelby than toward Rutherfordton. I examined the bus some. It was off the hard surface. The front of the car was headed sort of across the road, a sort of an angle more toward Shelby than Forest City. There was an embankment near where the Ford car was. I would say the embankment was four feet high. The Ford car was up on the bank. The right rear wheel was kind of dug out, sitting in the bank. *About 12 to 18 inches from the scratches were little oil marks, and there was a stream right up the highway I guess 60 or 70 feet. Commencing at where the scratches appear, I observed an oil mark, leading toward Shelby.* The bus was over on the right-hand side, over beyond these marks. I did not measure it but *it looked to me like this oil mark was 18 or 20 inches from the north side of the black line, or on the Freeman side of the road.*" Another witness testified: "Where the cement was torn up, leading in the direction of the bus, a black mark started about 10 inches to the south of the hole in the pavement and about 6 inches south of the hole in the pavement there was another black mark. The small black mark was oil and the center one had been scraped with metal. That black line was *14, 16 or 18 inches north of the center line of the highway.* I followed that black line to the bus. Going in the direction of where the bus was located, *that black line continued on the north side of the center mark*

23 steps. I stepped it. Then it crossed the black line and this fresh scratched mark, then crossed the center line; it didn't make much of a curve and did not have to as the road was turned. They went practically straight. I followed that to the bus. The mark I have described followed continuously from the place where the hole was dug out to the bus. The steel mark was plain. When it got to the dirt, the steel mark plowed in the dirt 3 or 4 inches and the oil line was right along with it. The left front spindle on the bus was broken off and the left-hand front wheel back a little, and the left front axle was down in the dirt. It was plowing all the way along and when it run into this gulley it went deep into the bank." Numerous witnesses testified to like effect as the above. The center of the highway had a black line to guide traffic. The defendants' contention was that the bus going up hill on a curve at a rapid rate swerved to the left, crossed the black line and struck the left wheel of the Ford coming down. The bus weighed 12,000 pounds and the Ford 3,350 pounds.

Clarence Greer testified, in part: "On or about July 27, 1939, about 9:00 or 9:15, three or four miles west of Shelby, I observed a collision between a Queen City Coach Company bus and a Ford automobile. The bus was traveling toward Charlotte and Shelby and the Ford was coming this way. They collided on a kind of curve, on the bend of the curve. I was behind the bus about as far as from here to those gentlemen sitting there. The bus had passed me some time prior to that. Brice Mullis was driving the bus. I have known him for about a year. I was driving a 1932 model Pontiac coupe. A lady friend, Oma Ledbetter, was with me. She is in Sweetwater, Tennessee, now. At the time I saw the bus and the Ford collide, the bus was over the black line around a foot or two feet. On that curve the bus was making fifty miles an hour, and starting down hill he came by me I would say anywhere from the neighborhood of fifty-five, sixty or sixty-five miles an hour. From my position on the curve I could see the oncoming car. At the time of the collision the Ford was on the northerly side of the road. After the bus passed me, it had to gain on me."

Plaintiff's evidence was in conflict with the defendants', and the evidence in the record showed Greer to be a disreputable man. The plaintiff's evidence on appeal is eliminated as the defendants' evidence only is considered. The questions as to the weight, probative force and credibility was for the jury to determine, not for us.

The plaintiff contends: "From the above, it will be seen that there was only one vital question of fact in the case: Upon which side of the center line did the collision occur?" The jury has decided against plaintiff's contentions. The plaintiff requested the following instructions: "At the conclusion of the evidence the plaintiff, in apt time, by

duly signed and written requests therefor, duly requested the court to charge the jury in part as follows: '1. If you find that the collision in question occurred on the right of the center of the highway in the direction in which the plaintiff's bus was going, you should answer the first issue Yes, the third issue No, and the fourth issue No. 2. If you find as facts from the evidence that as the bus and the automobile were approaching each other, the automobile ran to its left into the path of the bus at a time when the bus was on its right of the center of the highway, you should answer the first issue Yes, and the third issue No, and the fourth issue No.' "

These two instructions are so drawn as to peremptorily instruct the jury to find against the defendants and in favor of plaintiff. They do not even suggest that "If the jury should find by the greater weight of the evidence."

The burden of proof is a substantial right omitted from the requests.

In *Fisher v. Jackson,* 216 N. C., 302 (304), *Schenck, J.,* for the Court says: " 'The rule as to the burden of proof is important and indispensable in the administration of justice. It constitutes a substantial right of the party upon whose adversary the burden rests; and, therefore, it should be carefully guarded and rigidly enforced by the courts. *S. v. Falkner,* 182 N. C., 798, and cases there cited.' *Hosiery Co. v. Express Co.,* 184 N. C., 478."

The plaintiff also requested the court to charge: "3. The plaintiff, in the operation of its bus, had a right to assume that the approaching automobile in which Andrew Freeman was riding would stay on its side of the center of the road, and you should bear this instruction in mind in passing upon the first issue and the third issue and the fourth issue." This was given substantially in the charge as laid down in *Shirley v. Ayers,* 201 N. C., 51 (53-54). "4. Upon the seventh issue, as to what damages, if any, Berry B. Freeman, administrator, is entitled to recover, the said administrator has not shown the amount of any earnings on the part of Andrew Freeman, and in the absence of such evidence, you should not speculate as to what his earnings had been." The plaintiff's prayers 1, 2 and 3 were refused, except as given in the general charge. The fourth was refused.

The court below charged the rule of the road correctly, under the facts in this case: "The court instructs you that there is a statute in this State which is now in force, and which was in force at the time mentioned in the pleadings, which reads as follows: (C. S., 2621 [293]) —'Upon all highways of sufficient width, except upon one-way streets, the driver of a vehicle shall drive the same upon the right half of the highway, and shall drive a slow moving vehicle as closely as possible to the right-hand edge or curb of such highway, unless it is impracticable

to travel on such side of the highway and except when overtaking and passing another vehicle subject to the limitations applicable in overtaking and passing, set forth in section 2621, subsections 296 and 297.'" Under this statute the court below charged, we think, fully as to the rights and duties both of the driver of the bus and of the Ford automobile, and defined proximate cause. In the charge is the following: "As our Supreme Court has declared in the case of *Stephenson v. Leonard,* 208 N. C., 451, the first requisite of proximate cause is the doing or omitting to do an act which a person of ordinary prudence could foresee might naturally or probably produce the injury complained of, and the second requisite is that such an act or omission did cause the injury. In order that a party may be liable for negligence, however, it is not necessary that he should have contemplated or even been able to anticipate the particular consequence or precise form of the injury, or the particular manner in which it occurred, or that it would occur to the particular person. It is sufficient if the injury complained of was the natural and probable consequence of the negligent act or omission, and if it could have been reasonably anticipated by the party sought to be charged with responsibility therefor that injury or harm to another might follow the wrongful act or omission. In other words, the proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any new and independent cause, produced the injury and without which the injury would not have occurred, and one from which any person of ordinary prudence could have foreseen that some injury to another was probable under all the facts as they existed." We think from the entire charge, taken as a whole, the instructions were substantially given.

It is well settled that the prayer of instructions "should be given by the court with substantial conformity to the prayer." *Groome v. Statesville,* 207 N. C., 538 (540).

The fourth prayer for instructions cannot be sustained. It was in evidence that Andrew Freeman was 19 years of age. He was employed prior to his death for 6 months at $40.00 a month. He was employed by Clyde Lee at the time of his death. It was shown by the evidence that the young man had ability and special aptitude for newspaper work. He was a newspaper photographer. He had a high school diploma. He was practical in business, sober and temperate, and his character and habits were good. His physical condition was perfect, except that he was 3 pounds underweight. Other evidence was received in this case without objection on the part of the appellant as to the skill and ability of defendants' intestate in his photographic work. Under the Mortality Tables offered in evidence, N. C. Code 1939

(Michie), sec. 1790, his expectancy, he being 19 years of age, would be 42.9 years.

The court below charged the jury, to which no exceptions were taken: "The amount of damages which may be recovered in cases arising under section 160 of Consolidated Statutes for the death of a person caused by the wrongful act, neglect or default of another is fixed by section 161 of Consolidated Statutes at 'such damages as are a fair and just compensation for the pecuniary injury resulting from such death.' The measure of damages for wrongful death is the present worth of the net pecuniary value of the life to the deceased to be ascertained by deducting the probable cost of his own living and usual and ordinary expenses from the probable gross income derived from his own exertions based upon his life expectancy. As a basis on which to enable the jury to make their estimates, it is competent to show, and for the jury to consider, the age, health and expectancy of the life of the deceased; his earning capacity, his habits, his ability and skill, the business in which he was employed and the means he had for making money—the end of all of it being to enable the jury fairly to determine the net income which the deceased might reasonably have been expected to earn had his death not ensued, and thus arrive at the pecuniary worth of the deceased to his estate. The mortality tables embodied in section 1790 of the Consolidated Statutes have been called to your attention. The court instructs you that in arriving at the life expectancy of the defendant's intestate, you have a right to consider such mortality tables in connection with the other evidence in the case bearing upon the health, constitution and habits of the defendant's intestate, but you are not bound by such mortality tables. It is only the present worth of the pecuniary injury resulting from the wrongful death of the deceased that may be awarded to his administrator. It is not the equivalent of human life that is to be given, nor is punishment to be inflicted or anger to be appeased, or sorrow to be assuaged, but only a fair and just compensation for the pecuniary injury resulting from the death of the deceased is to be awarded." We think the above charge in accordance with the authorities in this jurisdiction. *Mendenhall v. R. R.,* 123 N. C., 275; *Russell v. Steamboat Co.,* 126 N. C., 961.

In *Mendenhall v. R. R., supra,* at p. 278, the court charged: "The measure of damages 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. As a basis on which to enable the jury to make their estimate, it is competent to show, and for them to consider, the age of the deceased, his prospects in life, his habits, his character, his industry and skill, the means he had for making money, the business in which he was

employed—the end of it all being to enable the jury to fix upon the net income which might be reasonably expected if death had not ensued, and thus arrive at the pecuniary worth of the deceased to his family." *Barnes v. Wilson,* 217 N. C., 190 (195).

In *Hicks v. Love,* 201 N. C., 773 (776-7), the rule is thus stated: "The appellant excepted to evidence offered by the plaintiff that the deceased provided for his family, that he had a comfortable home, a 200-acre farm, and a plenty for his family to eat and wear. In determining the pecuniary advantage to be derived from the continuance of a human life, it is competent for the jury in an action for wrongful death, under C. S., 160, to consider evidence as to the age, habits, industry, skill, means, and business of the deceased. *Burton v. R. R.,* 82 N. C., 505; *Carter v. R. R.,* 139 N. C., 499; *Carpenter v. Power Co.,* 191 N. C., 130. A part of this evidence has reference to the industry of the deceased and to the business in which he was engaged and is clearly within the scope of the cases just cited; and we see no convincing reason for holding that the result of his toil as manifested in providing for the support of his family should not be considered as evidence of his constant attention to business. Certainly the admission of the evidence is not adequate cause for a new trial. 17 C. J., 1356, see 244 (3)."

The exception and assignment of error which relates to the introduction of the photograph of Andrew Freeman cannot be sustained. The court made the statement when it was introduced: "The court admits the photograph in evidence and instructs the jury that the same is admitted for the purpose of enabling witness to explain his testimony, and for the purpose of enabling the jury to understand the testimony, and for no other purposes." The picture was not introduced as substantive evidence.

In *Elliott v. Power Co.,* 190 N. C., 62 (65), it is said: "Plaintiffs excepted because certain pictures were submitted to the jury. All of these pictures were used to explain the witnesses' testimony to the jury. It was not error for the court to allow the jury to consider the pictures for this purpose and to give them such weight, if any, as the jury may find they are entitled to in explaining the testimony." *Honeycutt v. Brick Co.,* 196 N. C., 556; *Kelly v. Granite Co.,* 200 N. C., 326; *Pearson v. Luther,* 212 N. C., 412 (425).

As to the speed of the bus, as testified to by Humphries, it was immediately before the collision and competent. The probative force was for the jury. *S. v. Leonard,* 195 N. C., 242 (251); *Barnes v. Teer, ante,* 122.

The plaintiff contends that the court erred in permitting Clyde Lee to testify to a statement made by the bus driver about fifteen minutes after the collision, that he "thought he killed a man down the road."

The general principle of law is thus stated in *Young v. Stewart,* 191 N. C., 297 (302-3): "A statement made as a part of the *res gestæ* may be given as evidence, although the person by whom the statement is made does not testify as a witness at the trial. *'Res gestæ* is generally defined,' says *Furches, C. J.,* in *Summerrow v. Baruch,* 128 N. C., 202, 'to be what is said or done contemporaneous with the fact sought to be established, or, at least, so nearly contemporaneous in point of time as to constitute a part of the fact to be proved, and to form a part of it, or to explain it.' The statement must be instinctive rather than narrative or the result of a deliberation. 'In order for a declaration to be admissible as a part of the *res gestæ,* it must be the spontaneous utterance of the mind, while under the influence of the transaction, the best being, it has been said, whether the declaration was the facts talking through the party or the party talking about the facts.' 22 C. J., 461, sec. 549, and cases cited; *S. v. Spivey,* 151 N. C., 676; *S. v. Bethea,* 186 N. C., 23. It is said that 'the modern tendency seems to be to treat spontaneity as a substitute for contemporaneousness, so that the act or declaration is not required to be exactly coincident in point of time with the main fact, but may even be separate from it by a considerable length of time, provided it is so immediately and closely connected with the main fact as to be practically inseparable therefrom, and serviceable to a clear understanding thereof, the element of time being of importance merely as bearing on the question of spontaneity.' 22 C. J., 452. If a declaration is admissible as part of the *res gestæ,* it is competent, no matter by whom said. *Queen v. Ins. Co.,* 177 N. C., 34." *Batchelor v. R. R.,* 196 N. C., 84; *Brown v. Montgomery Ward & Co.,* 217 N. C., 368 (371).

The evidence on which this exception and assignment of error is predicated—the testimony of B. T. Mullis, plaintiff's bus driver, and Clyde Lee, witness for defendant—is as follows: (Mullis testified:) "Immediately after the collision, I turned on the light and looked at my passengers. None of them seemed seriously hurt—two were skinned—*and went back to the car. I looked in and saw this boy in the car and he was not making any noise and I could not do anything with getting him out.* About that time there was a car coming from Shelby on the highway and I stopped and asked him would he run back to a phone or to Shelby and send an ambulance. I was at the Freeman car." (Clyde Lee testified, in part:) "When I approached the scene of the wreck I saw the bus headed off into the field, headed toward Shelby. At that time I had not observed the other car. The bus was over on the right-hand side of the road in a ditch. I stopped and asked the bus driver if anybody was hurt. He was in the bus at the time with little pieces of paper getting the names of the people on the bus. He said (By the Court) Gentlemen of the Jury, this evidence is admitted to be consid-

ered by you simply as evidence tending *to corroborate or contradict plaintiff's witness* Mullis as a witness and for no other purpose. It is not to be considered by you as substantive evidence. Ans. (continuing) He was getting the names in the bus and I asked was anybody hurt and he said he did not think so, in the bus, and he said he thought he killed a man down the road. (By the Court) This evidence is admitted to be considered by the jury simply as evidence tending to corroborate or contradict plaintiff's witness Mullis as a witness, and for no other purpose. It is not to be considered by you as substantive evidence."

It will be noted that the bus driver, Mullis, had already testified as a witness in the case, and in admitting the testimony the court charged the jury: "This evidence is admitted to be considered by you simply as evidence tending to corroborate or contradict plaintiff's witness, Mullis, as a witness, and for no other purpose. It is not to be considered by you as substantive evidence." And again, the court, after the evidence was given by the witness Lee, instructed the jury to the same effect, in its consideration of this evidence. The evidence was not offered as part of the *res gestæ*. "I saw this boy in the car and he was not making any noise." Mullis told Clyde Lee "that he thought he had killed a man down the road." The whole evidence shows that he did kill him. The evidence is corroborative and so admitted. It was not prejudicial. The contention cannot be sustained.

The plaintiff contends that the charge of the court below failed to comply with C. S., 564, in that it failed to properly explain and apply the law to the facts. We cannot so hold. The court below defined correctly negligence, contributory negligence, burden of proof and proximate cause. The charge set forth the applicable statutes of the law of the road germane to the facts. The contentions on both sides were fairly and correctly given. The charge consisted of 46 pages, covering every conceivable attitude of the law applicable to the facts. It was a careful, well considered charge and in it we can find no prejudicial or reversible error. None of the exceptions and assignments of error made by plaintiff can be sustained.

No error.

BARNHILL, J., *concurring in result*: I cannot agree that plaintiff's prayers for instruction Nos. 1 and 2 constitute a peremptory instruction against the defendants and in favor of the plaintiff. When the facts are admitted or established the court must say whether negligence does or does not exist. "This rule extends and applies not only to the question of negligent breach of duty, but also to the feature of proximate cause." *Hicks v. Mfg. Co.*, 138 N. C., 319; *Russell v. R. R.*, 118 N. C., 1098; *Lineberry v. R. R.*, 187 N. C., 786, 123 S. E., 1; *Clinard v. Elec-*

tric Co., 192 N. C., 736, 136 S. E., 1; *Murray v. R. R., post*, 392. Speaking to the subject in *Lineberry v. R. R., supra, Clarkson, J.*, said: "It is well settled that where the facts are all admitted (or established) and only one inference may be drawn from them, the court will declare whether an act was the proximate cause of the injury or not."

On this record the collision was caused by reason of the fact that either one or the other vehicle was being operated on its left-hand side of the road. This seems to be admitted. The plaintiff simply prayed the court to instruct the jury that if it found that plaintiff's contention that the defendant's automobile was being operated on its left-hand side of the road was established by the evidence then that constituted negligence, as a matter of law, and was the proximate cause of the collision. No other conclusion was reasonable. *Burke v. Coach Co.*, 198 N. C., 8, 150 S. E., 636; *Butner v. Spease*, 217 N. C., 82. The prayers for instruction left to the jury the finding of fact upon which they were to apply the law. They not only do not constitute a peremptory instruction but are correct statements of law as applied to the evidence in this case.

I am not inadvertent to what was said in the opinion in *Groome v. Davis*, 215 N. C., 510, 2 S. E. (2d), 771. In that case the Court was dealing with the statutory rights of motorists who approach an intersection at right angles to each other. I do not now challenge the correctness of that opinion as applied to the facts of that record. But, it must not be understood that what was there said constitutes a general statement of the law applicable in all cases. At intersections neither motorist has an unqualified right to any part of the intersection because both must use it. But when motorists are approaching and passing each other on an improved, unobstructed highway, each has a right to his half of the road and neither has a right to encroach upon the line of traffic of the other. Ch. 407, Public Laws 1937, secs. 108 and 112; *Shirley v. Ayers*, 201 N. C., 51, 158 S. E., 840.

Nor can I agree that plaintiff's prayer for instruction No. 3 was substantially given in the general charge. This prayer was materially and erroneously modified by the court. When the doctrine of last clear chance is not pleaded and the evidence is not such as to invoke its application the right of a motorist who is driving on his right-hand side of the road to assume that the operator of a motor vehicle approaching from the opposite direction will seasonably turn to its right-hand side of the highway so as to pass in safety is not limited to those who are strictly and scrupulously driving within the statutory speed limit. Circumstances which would limit or restrict this right may arise. But, ordinarily, the right to so assume is the right of every motorist. *Shirley v. Ayers, supra; Guthrie v. Gocking*, 214 N. C., 513, 199 S. E., 707;

Burke v. Coach Co., supra. See also *Bowen v. Schnibben,* 184 N. C., 248, 114 S. E., 170. The action of the court in conditioning plaintiff's right to so assume upon the finding that the driver of the bus "was driving in a lawful manner" was error.

To make a practical application of the instruction as modified by the court: if the bus driver was on his right-hand side of the highway and was proceeding at a rate of speed of less than 45 miles per hour, he had a right to assume that Freeman would stay on his own side of the highway; but, if the bus driver was going at a rate of 46 miles per hour or more, he did not have the right to act on such assumption. This is not the law as written in the statute. Ch. 407, Public Laws 1937, secs. 108, 110 and 112.

Assignments of error Nos. 12, 13, 14 are not mentioned or discussed in the majority opinion. These assignments are directed to the action of the court in instructing the jury in respect to the alleged negligence of the plaintiff and applying the law in respect thereto to the first issue. The first issue was directed only to the question of the negligence of the defendant. These instructions placed upon the plaintiff the burden of showing that its driver was not negligent. This placed an undue burden on the plaintiff, tended to confuse and was error. *Lea v. Utilities Co.,* 178 N. C., 509, 101 S. E., 19; *Ogle v. Gibson,* 214 N. C., 127, 198 S. E., 598. This is particularly true in view of the fact that contributory negligence of plaintiff was not pleaded.

Notwithstanding the errors above indicated, I am compelled to the view that the judgment below should be affirmed. In the final analysis the issue of fact on the question of negligence was simple. Which vehicle was being operated on its left-hand side of the highway? When the court came to apply the law to the facts in the case, as required by C. S., 564, it disregarded its former abstract definitions of the law and its references to immaterial provisions in the Automobile Law and simply, clearly and directly explained and applied the law on the one real fact at issue. Under those instructions the jury has found that plaintiff's bus, and not Freeman's automobile, was being operated on its left-hand side of the highway. This being true, it was the proximate cause of the collision. Certainly the jury was justified in so finding. Therefore, the indicated error was not sufficiently prejudicial to require a new trial.

STACY, C. J., and WINBORNE, J., join in this opinion.

STATE v. ZEDIKIEL SMITH.

(Filed 30 October, 1940.)

Criminal Law §§ 41e, 48a—Testimony held competent for the purpose of corroborating witness.

In this prosecution for murder committed in the perpetration of a robbery, the sheriff was permitted to testify that defendant stated that he had spent the night before the homicide at his aunt's house, that defendant was taken to his aunt's house, and that his aunt stated in defendant's presence that defendant came to her house the morning after the homicide and asked her to tell the officers of the law, if they came there, that he had spent the night at her house. Defendant objected to this testimony on the ground that the accusation of his aunt was not made under circumstances calling for a denial by him, and was therefore incompetent as an implied admission. Defendant's aunt subsequently testified that defendant came to her house the morning following the homicide, stated in effect that he was afraid he would be connected with the murder and asked her to tell officers of the law that he had spent the night before the homicide at her house and had borrowed money from her. *Held:* The testimony of defendant's aunt was substantive and relevant as indicating an attempt on the part of the defendant to frame a defense in advance of accusation and to account for money in his possession, and the testimony of the sheriff was competent for the purpose of corroborating the testimony of defendant's aunt, the order of proof being immaterial, and whether the evidence was competent as an implied admission need not be determined.

APPEAL by defendant from *Parker, J.*, at February Term, 1940, of SAMPSON. No error.

The defendant was tried at the February Term, 1940, of Sampson Superior Court upon a charge of murder, was convicted of murder in the first degree, and sentenced to death.

The evidence tended to show that William Daniel, a man of about sixty years of age, living alone on a small farm in Sampson County, was found dead near a path leading from his home through the field and into the woods. His skull had been fractured and there were several lacerations about the face and head. Death was attributed to a fracture of the skull. A brick and bloody cherry limb were found near the body.

On the next day the defendant, who lived near Daniel's home, was arrested for the murder. The evidence tends to show that prior to the time he was arrested the defendant went to his aunt's house and requested her "if the law came" to tell that he stayed at her house on Saturday night, and to tell them that she lent him five dollars. He explained that there was a "mess-up" and he was afraid they might try to get him in it.

The defendant first denied the killing, but there is evidence tending to

show that upon being confronted with the brick which was found near the body of the deceased and with other evidence tending to connect him with the killing, he made a voluntary confession, admitting and giving particulars of the killing. This confession, as taken, is as follows:

"I spent Saturday night, October 28, 1939, at my home alone, getting up Sunday morning, October 29, about 7:00 o'clock. I then went to my possum traps about a half mile from home. After passing the first possum trap I picked up a brickbat lying on the side of the road and put it in my pocket. This was the same brickbat Sheriff Tart showed me on Thursday morning. After picking up the brickbat, I turned down a little road leading to an old house sitting in the field where I was born at. I turned there at the yard and looked at a possum trap a short distance from this old house by a persimmon tree. From this trap I cut across the tobacco field, jumped a ditch to another path leading to Mr. William Daniel's home. I went on to Mr. Daniel's home, getting to Mr. Daniel's about 8:00 o'clock, as near as I could guess. Mr. Daniels was in the back of the house fixing breakfast. Mr. Daniels asked me to come in. I went in the back door. Mr. Daniels and I eat breakfast. Mr. Daniels had a piece of a jar of white whiskey sitting on the dining room table. Mr. Daniels offered me a drink, which I took, then Mr. Daniels took a drink. We talked at his home for about an hour. We both took another drink. Mr. Daniels asked me where I was going. I told him I was going over to Charlie Smith's. Mr. Daniels said he believed he would walk over and go to see Mr. Charlie Rouse. We both left there after I had been there about an hour by way of the back door and back porch. Mr. Daniels did not lock up the house or leave from the front way. We walked together down the little path leading from Mr. Daniel's house, turned right about five hundred feet, then turned to our left down a little path leading in the general direction of Mr. Charlie Rouse's home. As we got down the path some one-quarter of a mile, this brickbat I had in my pocket, I took it out, hit Mr. Daniels over the head, knocking him down. The brickbat breaking in half, flying out of my hand, I reached down in the bushes nearby, picked up a limb of cherry wood and then hit Mr. Daniels with the piece of cherry wood three or four times. I did not hit him but one time with the brick. After searching one or two pockets of Mr. Daniels, I found $16.00 folded in a small square bundle in his right watch pocket. This money I removed from his pocket, the denomination of which was two $5.00 bills and six one dollar bills. Mr. Daniels did not say anything to me when I hit him with the brickbat, but as he fell he did make a gurgling sound. After I had hit him three or four times with the cherry limb noticing Mr. Daniels was not struggling, I picked up his hat which had fallen off to one side and placed it on Mr. Daniel's head, the side of his head,

as he lay on the ground in the position he fell. After searching Mr. Daniels I hurried away from the place where I had hit him. The first place I stopped after hitting Mr. Daniels was at Jack Faison's home, staying there about thirty minutes. From there I went to Charlie Smith's about 10:30 o'clock. Of this 16 dollars that I had taken from Mr. Daniels' pocket after I had killed him, I spent as near as I can figure about $3.00 of this money at Charlie Smith's for whiskey. I paid Jack Faison $3.00 of this money that I owed Jack and his sister, Hannah. I loaned Roosevelt Faison $1.25, his brother Rufus $.75 cents, his brother Frank, 75 cents, and lost some three or four dollars skinning Sunday and Sunday night. Monday morning, after spending the night with Colonel James Aycock, I spent fifty cents at Mr. McCleny's filling station about 7:30 o'clock for a gallon of gas, tobacco and cigarettes. When we left the filling station Monday morning, after making these purchases, I with Colonel James Aycock and Ernest Aycock went to my Aunt Delia Smith's, which is a few hundred yards over the Duplin County line. My purpose for going to see Aunt Delia was to ask her if the law came there inquiring for me for her to tell them that I spent Saturday night at her house. Tell them that she loaned me some money too. I told her that there was a mess out and I was afraid they might get it on me. Me, Ernest Aycock, and Colonel James Aycock left Aunt Delia's and came back to Ernest Aycock's. From there I went on over to Charlie Smith's, which is a few hundred yards across the field, where I again got in a skin game and there during Monday lost three or four dollars. I also bought about $1.50 worth of liquor from Charlie Smith. From Charlie Smith's I went to Eve Cox, where the Sampson County officers arrested me some time Monday afternoon. The brickbat that I picked up on the way to my traps and hit Mr. Daniels with and broke in two pieces when shown this same brick in two parts by Sheriff Tart and two other officers on November 3, I took Sheriff Tart and these officers to the place where I killed Mr. Daniels and showed them the place where I had thrown the brickbat immediately after hitting Mr. Daniels. I then took the Sheriff and the same two officers to the place and pointed out to them where I had picked this brickbat up from a bunch of weeds on Sunday morning, showing them the imprint in the weeds where the brick had lain. The officers placed this brickbat back in the imprint and showed me that the brickbat fitted in the place where I showed them I picked the brickbat up from. I noticed that Sunday morning near a bridge not far from Mr. Daniels' house a place that a fire had been built. The coals were still hot as I passed going towards Mr. Daniels' home. I do not know who built this fire but the officer showed it to me and I remembered seeing it as I went to Mr. Daniel's house and killed and robbed Mr. Daniels as near as I can figure from

9:00 to 9:30 o'clock. I spent most of Sunday evening at Charlie Smith's drinking and skinning. I went to Eve Cox' home Sunday night where Eve gave me change for one of the $5.00 bills which I had taken from Mr. Daniels. Eve Cox gave me this change, giving me five one dollar bills. Monday morning after my visit and conversation with Aunt Delia, I spent most of Monday evening at Charlie Smith's skinning. From there I went to Eve Cox, where I was later arrested. After I was arrested, I was brought to the jail in Clinton, North Carolina. I told Sheriff Tart in the first conversation with him that I spent Saturday night with Aunt Delia but after I told him I knew he knowed I was telling a story and I told him the truth which was that I stayed at my home Saturday night and did not borrow any money from Aunt Delia."

The voluntariness of this confession was denied by defendant, and, on motion of defendant, evidence was taken in the absence of the jury as to the circumstances under which it was made, upon which its competency was sustained and it was admitted in evidence.

Alve Rouse testified that he knew William Daniel and saw him Sunday, 29 October, 1939, between eleven and twelve o'clock. "He was lying with his hands out and with his head turned down. When I found him I ran every step of the way from there home; I ran in the house and told my mama and daddy about it and they cranked up. I did not see Mr. Daniel any more that day until the sheriff and coroner went back over there with me, then I saw him again. His head was beat up. When I found him there I picked his head up between my fingers and looked at his face—how he was beat up, and I left there running. He was dead at that time. He was in Sampson County, just across the line about 100 yards near the Duplin line, near Warsaw; he was about 300 yards from his house and about one mile from my house. It was not in the woods that I found him; it was in a big field. I didn't see anything on the ground around him at all.

"I didn't see any stick or brickbat. I first went to the place and found him and later went back that afternoon with the sheriff. I went twice before he was moved. His body was warm when the coroner and sheriff got there in the afternoon between 1:00 and 2:00 o'clock. He lived alone. He was a married man with two children but was not living with his wife and children."

This witness further testified that the defendant, Zedikiel Smith, lived about three or four hundred yards from Mr. Daniel's home.

Dr. Royal, the coroner, testified, as an expert, that he had been called on to view William Daniel and did examine him about twelve o'clock noon. He found several lacerations about his face. He had been hit with some instrument that caused lacerations at each lip; had a fracture

of the jaw and a cut on the right upper lip, a cut on the right ear, and a laceration back of the ear, five of them on his head. He was dead. He had been hit about the chest with some instrument like a stick, which caused no lacerations but did cause fracture of his ribs on both sides and his breastbone in front. His skull was fractured. In the opinion of the witness, the fracture was the cause of death.

When he examined the deceased he was lying on his back and a hat had been placed on his face. Witness was of the opinion that he could not have fallen that way. The wounds were in front. There was nothing to indicate a scuffle or that he had moved.

Sheriff Tart testified that he was called to the residence of William Daniel and found Mr. Daniel about 300 yards from his house in a little road leading through the field, dead, with a number of wounds on his head and chest. This witness testified as to the geography of the section around Mr. Daniel's place.

He found a very long track, apparently made with a run-over shoe—an extra long track with a little dent in one of the tracks. The track was not complete; it had a little spot where the dirt was not pressed down; just a little hole on one side of this track on the inside. Witness found a brick near Mr. Daniel's head in the ditch; also a cherry limb with bloodstains on it. (The brick and cherry limb were introduced in evidence.)

This witness testified that he made an investigation and found that Zedikiel Smith had some money and had been spending it freely. Later, witness had a conversation with the defendant in jail. Neither threats nor offer of reward were made, and the defendant was told that any statement he might make would be used as evidence against him. Thereupon, the defendant confessed the killing of Daniel, giving particulars, and signed the above confession.

Witness further testified that he called on the North Carolina State Bureau of Investigation to send some help, and they sent Mr. Scott and Mr. Pierce. "We then taken the prisoner to his Aunt Delia Smith's, that he told me he spent Saturday night there. We took the defendant to his Aunt Delia's. She said in his presence that Zedikiel was there and told her to tell the officers if they came there that he spent Saturday night with her." To this defendant excepted. "She said that Zedikiel came there on Sunday morning and asked her to tell the officers that he spent the night there if they came." Defendant moved to strike out the testimony of this witness. The motion was denied and defendant excepted.

"We then taken him over near the scene of the crime. There I taken the shoes, the suit of clothes, the brick and the stick out of the boot of the car. Zedikiel and Mr. Pierce and Mr. Scott at that time had got

out of the car and come to the back of the car. I asked Zedikiel if the suit was his and he said it was. I asked him if the shoes were his. After hesitating for just a few seconds, he said they were his shoes. Then I asked Zedikiel, after noticing that he was very nervous, I asked him if he was the man that killed Mr. Daniel. He hesitated possibly thirty seconds, perhaps, or longer, and then said that he was. I asked him to show me just where the crime was committed. He took us down a little road leading from Mr. Daniel's house in the direction of Mr. Rouse's house. And he showed us the exact spot that we found Mr. Daniel on Sunday afternoon. I asked him what he hit him with and then he said, 'I hit him with the brick one time and the brick bursted' and that he threw it in the ditch and then that he got him a limb and hit him several times. Then I asked him where he got the brick from and he pointed over in the direction of his house; said he picked it up." The defendant showed this witness where he had gotten the brick from and the brick itself fitted the imprint in the dirt. The witness identified the track of defendant by certain marks of the shoes which defendant admitted were his, and the fact that the shoes fitted the tracks. He further testified that he asked the defendant why he killed Mr. Daniel and his reply was that he robbed him, taking two five-dollar bills and six one-dollar bills out of his watch pocket.

It is in evidence that Zedikiel's first statement involved Ernest Aycock and delay was made in writing down the confession until that angle could be cleared up, but that subsequently Zedikiel stated that he wanted to tell the truth and made the statement which had been signed.

H. L. Pierce, connected with the North Carolina State Bureau of Investigation, testified that he was with Sheriff Tart and Mr. Scott on the occasion that the defendant was taken down to the place where Mr. Daniel was alleged to have been killed; that he rode in the rear seat with the defendant and they talked in general about the case in going on out. Nothing was said about any threats or about anything relating to whether "we would get out or not"; nothing whatsoever of the kind. The car stopped in front of Mr. Daniel's home and all got out and went around to the back of the car. The sheriff opened the back of the car and took out a suit of clothes which Zedikiel identified as being his clothes. The sheriff then took the shoes out and dropped them on the ground without saying anything. "We were all standing in a circle. Zedikiel looked at the shoes; the sheriff next took the brickbat out and dropped that on the ground. Zedikiel identified the suit as being his and the sheriff asked him about the shoes, which were then on the ground, and Zedikiel's eyes were fastened on the shoes. After a short hesitancy, he said they belonged to him." After that the sheriff said, "Zedikiel, did you ever see this brickbat before?" and he hesitated a little

and then said "yes, sir," and then he asked him where he had seen it last and he said where Mr. Daniel was killed. That was before we ever left the automobile. No threats of any kind were ever made by anyone. I never heard anything that could be considered like there being doubt as to whether "we would get out of there or not." We were in a grove of two or three oak trees. Mr. Daniel's body was found in a field, not in the woods. The nearest woods were two or three hundred yards from there.

Delia Smith testified that she saw Zedikiel Monday after Mr. Daniel was killed, at her house. That he told her if the law came there for her to tell them that he stayed there Saturday night, "because there was a mess-up and he was afraid they might try to get him in it." She also testified the defendant said: "If they ask you if you lent me any money, you tell them yes, $5.00." That afterwards the sheriff and others brought Zedikiel to her house and she said the same thing in his presence.

The defendant went on the stand and testified substantially that he went to the scene of the killing with the sheriff and others and told them that he "murdered the man." However, he stated on the stand that he did not kill Mr. Daniel and declared that a little before they got to the place the sheriff stopped the car and said: "I am carrying you in here; I don't know where I will get you out or not; I hope them men ain't in here." They then proceeded to the place where the crime was alleged to have been committed.

Defendant admitted that a suit of clothes, some sticks and brickbats, and a pair of slippers were shown him, and that he admitted they were his, but denied that he had ever seen the brickbats and sticks before; that a little ways further on the sheriff asked the other two men: "You reckon we better put this piece of rope on him?" and they said, "I reckon so," and he tied the rope in the handcuffs about that time. A little further on, as defendant testified, he was asked: "Don't you know about this brick?" and defendant said "No," and he said: "Yes, you know that this is the brickbat you hit Mr. Daniel with," which defendant denied, and the sheriff replied: "You know you are the one that done it," and "I said I didn't." The defendant testified, after repetition of these questions, he was frightened and admitted the murder. He repudiated the purported confession and explained that he had gotten the money, which he had been using, by sale of his crop.

On cross-examination, the defendant again denied the killing or that he had confessed it, or that he had said anything about Ernest Aycock in connection with it.

H. L. Pierce was returned to the stand for a re-direct examination and was questioned as to the statement of the defendant that they suggested some doubt as to whether defendant "would come out of there or

not." Defendant objected to this. The objection was overruled and defendant excepted. Exceptions Nos. 7, 8, and 9.

The witness testified that the defendant had on a pair of Peerless handcuffs and that there was no rope there. Defendant objected and excepted to this evidence. Exception No. 10.

Other exceptions, 12 to 17, inclusive, relate to instructions given the jury.

The jury returned a verdict of guilty of murder in the first degree, and, thereupon, the court pronounced the sentence of death.

The defendant in apt time, upon the coming in of the verdict, moved to set aside the verdict for a new trial. The motion was denied and defendant excepted. Exception No. 18.

The defendant objected to the judgment and, in apt time, excepted to the same and appealed to this Court.

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

A. F. Carroll and J. D. Johnson, Jr., for defendant, appellant.

SEAWELL, J. The defendant took 19 exceptions during the course of the trial, but in his brief abandons all of them except four. Two of these relate to the same subject matter and may be considered together. The other two are to the refusal of the judge to set aside the verdict of the jury and to the rendering and signing of the judgment, and may be considered formal or, rather, fully discussed under the other exceptions.

Defendant claims that the court committed error in admitting in evidence the testimony of Sheriff Tart to the effect that, the defendant having asserted that he spent the time before the homicide at the home of Delia Smith, the witness took him to Delia Smith's house, and that she stated, in the presence of said defendant (we use the language of defendant's brief), "that he (the defendant), came there to her home on Sunday morning and asked her to tell the officers that he spent the night there, if they came."

But, as may be seen in the above statement of the case, there is more to the evidence of this incident than just this. The sheriff testified: "We then taken the prisoner to his Aunt Delia Smith's—that he told me he spent Saturday night there. We took the defendant to his Aunt Delia's. She said, in his presence, that Zedikiel was there and told her to tell the officers if they came there that he spent Saturday night with her."

Delia Smith testified: "I saw Zedikiel Monday after Mr. Daniel was killed. He went to my house. He told me if the law came and asked me did he stay there Saturday night to tell them yes, because there was

a mess up and he was afraid they might try to get him in it, and he said: 'if they ask you if you lent me any money, you tell them yes, $5.00.' After that the sheriff and others went back to my house and brought Zedikiel out there in the road and I told them the same thing I have just told you. I told it to them in the presence of Zedikiel. Zedikiel did not say anything. Only the law asked him where he stayed Saturday night and he said he stayed at his home, and that is all I heard him say." To this evidence of Delia Smith, there was no exception. See also defendant's admissions.

Whether the statement as presented in the sheriff's testimony was of an accusatory nature, justifying an unfavorable inference from the silence of defendant, we need not inquire, since the testimony of Delia Smith was substantive and relevant as indicating an attempt on the part of the defendant to frame a defense in advance of accusation, and to account for the money taken from the body of Daniel; and the sheriff's testimony was, in part at least, corroborative of her testimony. The order in which the testimony was admitted becomes unimportant on appeal. *Earnhardt v. Clement,* 137 N. C., 91, 92, 49 S. E., 49; *Hamilton v. R. R.,* 200 N. C., 543, 158 S. E., 75; *Ripley v. Arledge,* 94 N. C., 467. The exceptions to the admission of this evidence are without merit.

For these reasons, also, the objections and exceptions to the refusal to set aside the verdict and to the judgment cannot be sustained.

Although other exceptions in the record are abandoned, we have carefully examined them and find that they disclose nothing that would justify interference with the result of the trial.

We find

No error.

T. L. COX v. JOHN A. WRIGHT AND MRS. JOHN A. WRIGHT.

(Filed 30 October, 1940.)

1. Descent and Distribution § 16: Partition § 5—Plaintiff in partition is entitled to prove title by records showing his purchase at sale to make assets to pay debts of deceased tenant in common.

In this proceeding for partition, defendants claimed sole seizin. The evidence tended to show that defendants' grantor owned an undivided interest in the *locus in quo* as tenant in common with her brother, that defendants' grantor was the sole heir at law of her brother and executed deed to defendants purporting to convey the entire tract of land less than two months after her brother's death. Plaintiff introduced in evidence testimony of the brother's administrator that he had sold the brother's interest in the land to make assets to pay debts of the estate, and offered in evidence court records of the summons, pleadings, judgment and confirmation, and deed executed by the commissioner to plaintiff in the pro-

ceeding to sell lands to make assets, and the judgment in plaintiff's favor against the estate of the brother. *Held:* Since a deed by an heir executed within two years of the intestate's death is ineffective as against creditors of intestate's estate, Michie's Code, 76, the record evidence, properly authenticated, was competent to prove plaintiff's title as tenant in common.

2. Executors and Administrators § 13e—

The commissioner's deed to the purchaser at the sale of lands of intestate to make assets is *prima facie* evidence of regularity in the sale.

3. Process § 10—

A summons containing an acceptance of service signed by the defendants is *prima facie* evidence of service and is competent evidence without proof of the signatures.

4. Evidence § 34—

The court records in a former proceeding may be proven by the original records themselves, and the fact that they are produced from the proper custody and show on their face that they are court records is *prima facie* evidence of their identity, authenticity and genuineness.

5. Adverse Possession § 4a—Tenant in common must hold exclusive possession for twenty years in order to ripen title by adverse possession against co-tenant.

A brother and sister owned the *locus in quo* as tenants in common. The sister was the sole heir at law of her brother, and within two months after his death executed deed purporting to convey the entire interest in the lands to defendants. Defendants went into possession and remained in exclusive possession for fourteen years. Plaintiff purchased the brother's interest in the land at the sale to make assets to pay debts against the brother's estate. *Held:* Although defendants went into possession of the entire *locus in quo* under their deed purporting to convey the entire estate, they nevertheless held possession as tenants in common with plaintiff who had succeeded to the brother's interest, since in contemplation of law their possession conformed to their true and not their pretended title, and their deed does not constitute color of title against their cotenant and their possession does not ripen title in them by adverse possession, twenty years exclusive possession being necessary to ripen title as against a cotenant under the presumption of an original ouster.

APPEAL by plaintiff from *Sink, J.*, at July Term, 1940, of RANDOLPH. Reversed.

This is a civil action, which was instituted by the plaintiff as a special proceeding in the Superior Court of Randolph County for the partition, or sale for partition, of fifty acres of land in that county. Upon the defendants' filing an answer denying that the plaintiff had any interest in the said lands and pleading sole seizin, the cause was transferred to the civil issue docket.

The fifty acres of land in controversy is really made up of two tracts of land, one containing thirty acres and the other twenty acres. It was agreed by both the plaintiff and the defendants, at the beginning of the

trial, that the thirty-acre tract described in the petition originally belonged to Stephen W. Cox and Joe T. Cox, neither of whom ever married or had any children. They were brothers, and had one sister, Mehetable A. Cox. They constituted the entire family, and none of them ever married. Stephen W. Cox died on 1 May, 1924, intestate, and leaving as his only heirs at law the said Joe T. Cox and Mehetable A. Cox. Joe T. Cox then owned one-half of the said thirty-acre tract by purchase and acquired a one-fourth interest therein by inheritance from Stephen W. Cox; and he, therefore, owned a three-fourths undivided interest in said land. Mehetable A. Cox acquired a one-fourth undivided interest in said land by inheritance from her brother, Stephen W. Cox. Therefore, Joe T. Cox and Mehetable A. Cox were tenants in common of the said thirty-acre tract of land, he owning a three-fourths undivided interest therein, and she a one-fourth undivided interest.

The twenty-acre tract of land described in the petition was owned by Stephen W. Cox, Joe T. Cox and Mehetable A. Cox, together, as tenants in common, each having a one-third undivided interest therein. Upon the death of Stephen W. Cox, Joe T. Cox and Mehetable A. Cox inherited his one-third undivided interest, and thereupon became the owners of the whole tract, each having a one-half undivided interest in the same.

Joe T. Cox died intestate on 3 November, 1925, leaving as his only heir at law the said Mehetable A. Cox, his sister.

On 28 December, 1925, the said Mehetable A. Cox conveyed the said thirty-acre tract and the said twenty-acre tract, describing the same as one tract of fifty acres, to the defendant, John A. Wright, by deed which was registered in the office of the register of deeds for Randolph County on 28 December, 1925, in Record of Deeds No. 220, at page 509.

N. T. Cox was appointed as administrator of the estate of Joe T. Cox, deceased, on 10 July, 1930.

The plaintiff, T. L. Cox, presented a claim against the estate of Joe T. Cox to the said administrator. As there was no personal property found by the administrator belonging to said estate, he brought a proceeding to obtain an order of the court to sell the real estate of the said Joe T. Cox, to make assets to pay the said claim. In pursuance thereof, the said N. T. Cox, as commissioner appointed by the court to make the said sale, conveyed to this plaintiff, T. L. Cox, a three-fourths undivided interest in three tracts of land, the first containing 87 acres, the second 65 acres, and the third 100 acres, and a one-half undivided interest in a fourth tract, by a deed bearing date of 9 March, 1937, and registered in the office of the register of deeds for Randolph County, in Book No. 288, at page 54, on 9 March, 1937.

The thirty-acre tract described in the petition, and above referred to, is included within the boundaries of the 64, or 65-acre tract described in the deed to T. L. Cox, the plaintiff; and the twenty-acre tract, described in the petition, and above referred to, is included within the boundaries of the 100-acre tract described in the deed to T. L. Cox.

The plaintiff appellant contends that when N. T. Cox, commissioner, conveyed to him the three-fourths interest in the 65-acre tract and the 100-acre tract described in the deed to him, the said commissioner was conveying to him the interest of Joe T. Cox, deceased, in the said lands; and that he, the plaintiff, stands in the shoes and place of the said Joe T. Cox with respect to the said lands.

The plaintiff further contends that since Mehetable A. Cox only owned a one-fourth undivided interest in the said thirty-acre tract and a one-half undivided interest in the said twenty-acre tract conveyed by her to the defendant John A. Wright, that is all the interest she could convey in the same, and that is all the interest that the said John A. Wright acquired in the same. The plaintiff, therefore, contends that he and the defendant John A. Wright are tenants in common of the said lands, he owning a three-fourths undivided interest in the thirty-acre tract and a one-half undivided interest in the twenty-acre tract. In pursuance of this contention the plaintiff brought this proceeding in order that he might hold his said interests in the said lands, or in the proceeds from the sale thereof, in severalty.

At the conclusion of the plaintiff's evidence, the trial judge granted the motion of the defendants for judgment as of nonsuit. From this judgment the plaintiff excepted, assigned error and appealed to the Supreme Court. The other exceptions and assignments of error made by plaintiff and the other material facts will be set forth in the opinion.

J. G. Prevette and Daniel L. Bell for plaintiff.
E. A. Wright and Z. I. Walser for defendants.

CLARKSON, J. The defendants in their brief do not deny that the above statement of facts set forth by plaintiff is correct, if the documents offered by plaintiff had been admitted in evidence.

The defendants' first question: "Did the court below err in excluding the summons in the partition case of 'N. T. Cox, Admr. of the Estate of J. T. Cox, deceased, *v.* T. L. Cox, R. A. Cox, Bettie L. Cox, Mrs. C. L. Dixon, Nannie Hinshaw, Walter Stout, Ada L. Stout, W. C. Cox, heirs at law of J. T. Cox, deceased'?" We think so.

Mehetable A. Cox, at the death of Joe T. Cox, her brother who died intestate, became the owner of the fifty-acre tract of land in controversy (two tracts of land, one containing 30 acres and the other 20 acres),

subject to the debts of her brother. Before the death of her brother she was a tenant in common with him, owning a one-fourth undivided interest in the 30-acre tract and one-half undivided interest in the 20-acre tract. Joe T. Cox, at the time of his death, 3 November, 1925, owed T. L. Cox, the plaintiff, $1,500.00, which was reduced to judgment at Special October Term, 1931, in an action entitled "T. L. Cox *v.* N. T. Cox, Admr. of the Estate of Joe T. Cox, deceased."

N. C. Code, 1939 (Michie), sec. 76, is as follows: "Land conveyed by heir within two years sold.—All conveyances of real property of any decedent made by any devisee or heir at law within two years of the death of the decedent, shall be void as to the creditors, executors, administrators and collectors of such decedent but such conveyances to *bona fide* purchasers for value and without notice, if made after two years from the death of the decedent, shall be valid even as against creditors. Provided, that if the decedent was a nonresident, such conveyances shall not be valid unless made after two years from the grant of letters. But such conveyances shall be valid, if made five years from the death of a nonresident decedent, notwithstanding no letters testamentary or letters of administration shall have been granted."

The amendment of 1935 made the limitation begin to run from the death of the decedent rather than from the grant of letters. The proviso as to nonresidents is new. The 1939 amendment, which added the last sentence, provided that it should not affect pending litigation nor prior conveyances. The conveyances, under this section, are only conditionally void, *i.e.,* contingent upon the personal estate proving insufficient to pay the debts. *Davis v. Perry,* 96 N. C., 260; see, also, *Bank v. Zollicoffer,* 199 N. C., 620 (623).

The language of the above section is clear. Joe T. Cox died on 3 November, 1925, and Mehetable A. Cox on 28 December, 1925, made a deed to the defendant John A. Wright for the land in controversy, within two years. This deed was void as to creditors. In a special proceeding to sell the land for assets, plaintiff offered evidence:

(1) Record of Administrators Book "H," page 1, showing the appointment of N. T. Cox as administrator of Jos. T. Cox, on 10 July, 1930. No exception was taken to this.

(2) Plaintiff offered in evidence summons of "N. T. Cox, Admr. of the Estate of J. T. Cox, deceased, *v.* T. C. Cox and others, for Mr. and Mrs. L. B. Lambert," duly served by the sheriff. No objection to this.

(3) Summons of "N. T. Cox, Admr. of the Estate of J. T. Cox, deceased, *v.* T. L. Cox, Bettie L. Cox, Mrs. C. L. Dixon, Nannie Hinshaw, Walter Stout, Ada L. Stout, W. C. Cox, heirs at law of J. T. Cox, deceased." On this summons is the following: "We the undersigned hereby accept service on the within summons and waive all time in

which to answer. This May, 1935. Bettie L. Cox, Mrs. C. L. Dixon, Mrs. Nannie Hinshaw, Ada L. Stout, Walter Stout, T. L. Cox."

(4) Plaintiff offered petition and amended petition and reply, filed by N. T. Cox, petitioner, in the case of "N. T. Cox, Admr. of the Estate of J. T. Cox, deceased, *v.* T. L. Cox." Plaintiff offered answer filed by L. B. Lambert and Mrs. L. B. Lambert in the case, or proceeding, entitled "N. T. Cox, Admr. of the Estate of J. T. Cox, deceased, *v.* T. L. Cox, *et al.*" Plaintiff offered judgment rendered by Cowper, J., in the Superior Court of Randolph County, at the July Term, 1936, in the said case, or proceeding, of "N. T. Cox, administrator of J. T. Cox, deceased, *v.* T. L. Cox, *et al.*"

(5) Plaintiff offered judgment of confirmation by Hill, J., rendered in the Superior Court of Randolph County in said case, or proceeding, entitled "N. T. Cox, Administrator of the Estate of J. T. Cox, deceased, *v.* T. L. Cox, *et al.*"

(6) Plaintiff offered deed by N. T. Cox, administrator of J. T. Cox, deceased, to T. L. Cox, plaintiff.

(7) Plaintiff introduces Judgment Roll A-7820, entitled "T. L. Cox *v.* N. T. Cox, Administrator of the Estate of Joe T. Cox, deceased," and offered the judgment signed by his Honor, N. A. Sinclair, Judge presiding, in said case at the Special October Term, 1931, of the Superior Court of Randolph County, being a judgment in favor of the said T. L. Cox and against N. T. Cox, administrator, for $1,500.00.

Objection by defendants to all the above sustained. Plaintiff excepted. We think that none of the objections made by defendants can be sustained.

N. T. Cox testified for plaintiff: "I live at Greensboro. I was appointed as administrator of the estate of Joe T. Cox. The plaintiff T. L. Cox presented a claim against the estate of Joe T. Cox to me. There was no personal property that I found in the estate of Joe T. Cox. I made an effort to find some personal property. The assets I did find were real estate. That claim, to the best of my recollection, was about $1,500.00. I sold the real estate to make assets to pay the judgment. I was present at the sale of the real estate. The land described in the deed from N. T. Cox, administrator, to T. L. Cox, is the land that I sold. I am a brother to the plaintiff T. L. Cox." This was unobjected to.

In the judgment of Cowper, J., before setting forth the facts on which the judgment is predicated, is the following: "This cause coming on to be heard before his Honor, G. Vernon Cowper, Judge presiding at the July Term, 1936, Superior Court of Randolph County, upon the petition of the plaintiff, N. T. Cox, Admr. of the estate of J. T. Cox, deceased, and the answer filed by the defendants L. B. Lambert and

Mrs. L. B. Lambert, and it appearing to the court that none of the other defendants have filed any answer or other plea. And the court finds from the pleadings and from the admissions of counsel for the petitioner and the answering defendants made in open court, that the facts in this cause are as follows," etc.

It will be noted that the parties who accepted service are making no contention that the record does not import verity.

The evidence, unobjected to, of N. T. Cox, the administrator, was, "I sold the real estate to make assets," etc. "The land described in the deed from N. T. Cox, Admr. of T. C. Cox, is the land that I sold." It is the land in controversy in this action.

In *Black v. Chase,* 145 Iowa, 715 (720), it is said: "The signature to the waiver, dated, etc., is *prima facie* evidence of the service. It is to be regarded by the court in the same light as the signature to a pleading," citing authorities.

With the summons in evidence showing acceptance, the testimony of the administrator that he sold the real estate to make assets and made the deed, which we think presumes regularity and the objection not being made by parties affected, is at least *prima facie* evidence.

The first contention of defendants: (1) "Did the court err in excluding the summons set out in the record?" (2) "Did the court err in excluding the judgment roll as a whole or in excluding each of the documents separate?" We have set forth our reasons as to the first. As to the second, as far as we can glean from the records introduced in evidence, they were material to the controversy and were original records.

In *Blalock v. Whisnant,* 216 N. C., 417 (420), it is stated: "The contents of a public record may be proven in any court by the original record itself. *S. v. Voight,* 90 N. C., 741; *Iron Co. v. Abernathy,* 94 N. C., 545. See, also, *Riley v. Carter,* 165 N. C., 334, 81 S. E., 414, where the Court said: 'While certified copies of records are admitted in evidence, the originals are not thereby made incompetent.'"

From the evidence we think the records were produced from the proper custody, at least they showed on their face that they were court records, etc., and at least *prima facie* evidence of their identity, authenticity and genuineness.

The last question presented by defendants: (4) "Did the court err in granting a nonsuit (a) because the evidence of the plaintiff showed that the defendants had been in possession of the lands under a recorded deed for fourteen years, (b) or that the plaintiff by any admitted evidence had not shown any chain of title?" We think the nonsuit improperly granted.

The chain of title of both litigants came from a common source and the parties were tenants in common. The answer of defendants says:

"That defendant John A. Wright purchased the said lands on December 29, 1925, and has a fee simple deed therefor recorded in the office of the register of deeds of Randolph County, in Book 220, page 509, and that since said date he has been in the sole, exclusive and adverse possession thereof, and is now in the sole, adverse and exclusive possession thereof."

In *Alexander v. Gibbon,* 118 N. C., 796 (798), it is said: "It is admitted, as claimed by defendant, that when sole seizin is pleaded, in a proceeding among tenants in common for partition, it becomes substantially an action of ejectment. *Huneycutt v. Brooks,* 116 N. C., 788. And it then becomes subject to the rules of law applicable to trials in actions of ejectment—that plaintiffs must recover by the strength of their own title, and not on the weakness of defendant's title. This is the doctrine enumerated in *Huneycutt v. Brooks, supra.*"

In *Woodlief v. Woodlief,* 136 N. C., 133 (137), *Connor, J.,* says: "In *Day v. Howard,* 73 N. C., 1, *Pearson, C. J.,* says: 'There is a fellowship between tenants in common, the law assumes that they will be true to each other; the possession of one is the possession of all and one is supposed to protect the right of his cotenants and is not tolerated in taking an adversary position unless he acts in such a manner as to expose himself to an action by his fellows on the ground of a breach of fealty; that is an actual ouster. . . . If a tenant in common conveys to a third person, the purchaser occupies the relation of a tenant in common, although the deed purports to pass the whole tract and he takes possession of the whole, for in contemplation of law his possession conforms to his true and not to his pretended title.' In *Covington v. Stewart,* 77 N. C., 148, it is held that the possession of one tenant in common is the possession of all, but if one have the sole possession for twenty years without acknowledgment on his part of title in his cotenants, and without any demand or claim on the part of such cotenants to rents, profits or possession, he being under no disability during the time, the law in such cases raises a presumption that such sole possession is rightful and will protect it.' It is also held in that case that under our statute of limitations such sole possession vests title. *Neely v. Neely,* 79 N. C., 478; *Caldwell v. Neely,* 81 N. C., 114; *Ward v. Farmer,* 92 N. C., 93; *Hicks v. Bullock,* 96 N. C., 164." To the same effect is *Page v. Branch,* 97 N. C., 97.

In *Crews v. Crews,* 192 N. C., 679 (685), we find: "This Court has held that *a deed by one tenant in common, conveying to his grantee the entire estate in the land, is not color of title as against his cotenants,* so that possession under such a deed by the grantee, and *those who claim under him, for seven years,* does not bar an action by cotenants to be let into possession of the land, according to their respective interests. *Lumber Co. v. Cedar Works,* 165 N. C., 83, and cases cited. *'In such*

cases, twenty years of adverse possession, under a claim of sole ownership, is required to bar the entry of the other tenants, under the presumption of an ouster from the beginning raised thereby.' *Lumber Co. v. Cedar Works,* 168 N. C., 344. The principle supported by authoritative decisions of this Court is as follows: Where the grantee of a tenant in common, who enters into possession under a deed conveying to him the entire tract of land and those who claim under such grantee, *have been in the exclusive, quiet, and peaceable possession of the whole of said land, for twenty years or more, the law presumes that there was an actual ouster,* not at the end of the period, but at the beginning, and that the subsequent possession was adverse to the cotenant, who was out of possession." (Italics ours.) *Stallings v. Teeter,* 211 N. C., 298.

From the authorities cited, we think the positions taken by defendants cannot be sustained and the evidence objected to was competent, and as between tenants in common an adverse possession for 20 years by one tenant in common is necessary to bar his cotenants. The possession of defendant John A. Wright had existed some 14 years at the time this proceeding was instituted.

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

Reversed.

ED COX v. WALLER D. BROWN, TREASURER OF THE CITY OF CONCORD.

(Filed 30 October, 1940.)

1. Municipal Corporations § 5—

A municipality is an agency created by the State and has no power or authority except that granted by the General Assembly, and is subject to almost unlimited legislative control.

2. Statutes § 5a—

Where the language of a statute is clear and unambiguous, resort may not be had to anything extrinsic for the purpose of interpretation.

3. Municipal Corporations § 42—Municipality may not levy license tax on use of passenger vehicle for hire.

Public Laws of 1937, chapter 407, section 61, expressly prohibits a municipality from levying a license or privilege tax in excess of $1.00 upon the use of any motor vehicle license by the State, and repeals all laws in conflict therewith, sec. 145, and this statute must be construed with and operates as an exception to, and limitation upon the general power of municipalities to levy license and privilege taxes upon businesses, trades and professions granted by charter and C. S., 2677 (Private Laws of 1907, chapter 344; Private Laws of 1925, chapter 104), and provisions of a municipal ordinance imposing a license tax upon the operation of passenger vehicles for hire in addition to the $1.00 theretofore imposed

by it upon motor vehicles generally, is void, nor may the additional municipal tax be sustained upon the theory that it is a tax upon the business of operating a motor vehicle for hire rather than upon the ownership of the vehicle, since the word "business" and the word "use" as used in the statutes mean the same thing. *S. v. Fink,* 179 N. C., 712, cited and applied.

APPEAL by defendant from *Ervin, Special Judge,* at August Civil Term, 1940, of CABARRUS. Affirmed.

Facts. The plaintiff, a resident of the city of Concord, during the fiscal year beginning 1 June, 1939, and expiring 31 May, 1940, owned and operated a passenger motor vehicle for hire, being commonly known as a "taxi." That the business of the plaintiff consisted in transporting passengers for compensation from place to place over the streets and highways within the city of Concord as well as from place to place outside the city of Concord. For the year 1939, and for the year 1940, the plaintiff's for-hire passenger vehicle was licensed by the State of North Carolina as such and the State of North Carolina collected from the plaintiff for the said years of 1939 and 1940, a for-hire passenger vehicle licensed at the rate provided by law for such for-hire passenger vehicle. The tax levied and collected was at the rate of $1.90 per hundred pounds of weight as provided in Public Laws of 1937, chapter 407, section 51 (c). On 8 June, 1939, the board of aldermen of the city of Concord passed an ordinance entitled "An Ordinance to Amend the Privilege Tax Ordinance of the City of Concord Relating to the Taxing of Motor Vehicles for Hire." On 29 June, 1939, the plaintiff paid to the city of Concord, under written protest, the sum of $25.00 in payment of taxi license levied under the ordinance adopted 11 May, 1939, and amended 8 June, 1939, for the year beginning 1 June, 1939, and expiring 31 May, 1940, and the city of Concord then issued and delivered to the plaintiff a tin plate bearing the words and figures as follows: "Concord—Car for Hire—Expires May 31, 1940—20." The said tin plate was similar to the ordinary motor vehicle license plate issued by the State of North Carolina, and that the plaintiff was required to attach the said tin plate to his for-hire motor vehicle and to keep the same on his said vehicle during the life of the license. On 26 July, 1939, the plaintiff made written demand upon the defendant, Waller D. Brown, Treasurer of the city of Concord, for refund of $25.00 taxi license paid on 29 June, 1939. The city of Concord failed and refused to refund the said sum to the plaintiff and notified the plaintiff that the same will not be refunded by order of the board of aldermen of the city of Concord. On 29 May, 1940, this action was instituted before C. A. Robinson, justice of the peace, to recover said tax, and was submitted and heard on agreed statement of facts as appears in the record. From the judgment in favor of the plaintiff, rendered by the justice of

the peace, the defendant appealed to the Superior Court, and from a judgment in favor of plaintiff, rendered in the Superior Court, the defendant excepted, assigned error and appealed to the Supreme Court. In addition to the payment of the $25.00 license, the plaintiff also paid $1.00 license on his for-hire passenger motor vehicle; that the said tax of $1.00 was not paid under protest, its refund has not been demanded and it is not involved in this action.

E. T. Bost, Jr., for plaintiff.
Hartsell & Hartsell and Waller D. Brown for defendant.

CLARKSON, J. The only question for us to determine on this appeal is: Has the city of Concord the authority to levy a license or privilege tax of $25.00 on each taxicab or motor vehicle for hire owned or operated by a resident within the city of Concord? We think not.

The defendant contends that the city of Concord has the power under the provisions of Private Laws of 1907, ch. 344, sec. 50 (d), and also under the general law, C. S., 2677, to levy the tax.

The plaintiff's for-hire passenger vehicle was, during the year of 1939, and during the year 1940, licensed by the State of North Carolina as such. During the said years, the plaintiff paid to the State of North Carolina a license fee on his for-hire passenger vehicle at the rate of $1.90 per hundred pounds of weight.

The plaintiff contends that the city of Concord does not have the power to levy the tax in question. That power has been withdrawn from the city of Concord as well as from all other cities and towns within the State.

Public Laws of 1937, chapter 407, provides: "Sec. 61, Taxes Compensatory. (a) That all taxes levied under the provisions of this act are intended as compensatory taxes for the use and privileges of the public highways of this State, and shall be paid by the commissioner to the State Treasurer, to be credited by him to the State Highway Fund; and no county or municipality shall levy any license *or privilege tax upon the use of any motor vehicle licensed by the State of North Carolina, except that cities and towns may levy not more than one dollar* ($1.00) per year upon any such vehicle resident therein." "Section 145. Repealing Clause. *That all laws and clauses of laws in conflict with the provisions of this act or laws or clauses of laws providing otherwise for the subject matter of this act are hereby repealed.*" (Italics ours.)

The city of Concord, by and through the board of aldermen, on 8 June, 1939, passed the following ordinance: "An Ordinance: To Amend the Privilege Tax Ordinance of The City of Concord Relating To The Taxing of Motor Vehicles For Hire. The Board of Aldermen

of the City of Concord do ordain: Section 1. That section 9 of the Ordinance Levying, Assessing, Imposing and Defining the License and Privilege Taxes of the City of Concord, for the year beginning June 1, 1939, and ending May 31, 1940, heretofore ordained on the 11th day of May, 1939, be and the same is hereby amended by striking out the words and figures 'motor vehicles for hire: Automobiles bonded $25.00; Trucks owned or operated in the City, $25.00' and by inserting in lieu thereof the following: 'Motor Vehicles for hire': 'Every person, firm or corporation engaged in *the business of operating an automobile or automobiles for hire, commonly designated as taxi-cabs,* shall apply for and obtain from the Tax Collector of the City of Concord a city privilege license *for the purpose of engaging in such business* in the City of Concord, and shall pay for such privilege, for each automobile so owned or operated, a tax of $25.00. And every person, firm or corporation engaged in the business of operating motor trucks for hire in the City of Concord shall apply for and obtain a city privilege license for the purpose of engaging in such business, and shall pay for such privilege, for each truck owned or operated, a tax of $25.00.' Section 2. That this ordinance shall take effect and be in force from and after its publication."

As authority to enact the above ordinance, the defendant introduced in evidence the following act relating to the city of Concord: "Private Laws of 1907, Chap. 344, Section 50. That among the powers conferred on the board of aldermen are these: '(d) To regulate, control, tax and license all franchises, privileges, *businesses,* trades, professions, callings or occupations which are now or may hereafter be taxed by the laws of the State of North Carolina, by imposing a franchise, license or privilege tax upon each and every of the aforementioned subjects in such a manner as the aldermen may deem proper, not to exceed $1,000.00.' Private Laws of 1925, Chapter 104, Section 2. 'That chapter three hundred and forty-four of the Private Laws of One Thousand Nine Hundred and Seven be further amended by adding after Section eighty-nine a new section to be known as 'Section eighty-nine-a' to read as follows: 'Section 89a. In addition to the powers and privileges hereinbefore conferred, the City of Concord shall have all the powers incident and usual to corporations of like character under the general laws of the State; and the amounts of tax named above which the City is authorized to levy and collect shall only be a guide and shall not be binding as to the amount of tax the city may levy on each trade, profession, business or franchise but the amount of tax which the city may levy and collect on each trade, profession, *business,* or franchise shall be in the discretion of the board of aldermen.' "

The plaintiff contends that the act above quoted does not give the city of Concord the authority it claimed. That it is prohibited under the

general State statute, as follows: "And no county or municipality shall levy any license or *privilege tax upon the use of any motor vehicle licensed by the State of North Carolina.*" And in the repealing clause, "All laws and clauses of laws in conflict . . . or providing otherwise are repealed."

In *Comrs. v. Comrs.*, 186 N. C., 202 (204), it is written: "And in determining whether there is a repugnancy, it is the approved rule here and elsewhere that the intent of the Legislature must be sought primarily in the language used, and 'where this is free from ambiguity and expresses plainly, clearly and distinctly the sense of the framers, a resort to other means of interpretation is not permitted.' *Kearney v. Vann,* 154 N. C., 311; *In re Applicants for License,* 143 N. C., 1. . . . (p. 205) And from Lewis' Sutherland on Statutory Construction (2d Ed.) sec. 267, 'Where the intention of the Legislature is so apparent on the face of the statute that there can be no question of its meaning, there is no room for construction.' "

In the case of *S. v. Prevo,* 178 N. C., 740 (743), it is said: "It is well understood that municipalities, in the exercise of their governmental functions, are subject to almost unlimited legislative control, except when restricted by constitutional provision. And it is uniformly held that a town ordinance in violation of a valid State statute appertaining to the question is void," citing *Trustees v. Webb,* 155 N. C., 379; *S. v. Beacham,* 125 N. C., 652; *Shaw v. Kennedy,* 4 N. C., 591; 19 R. C. L., 803, and cases cited.

The city of Concord is an agency, created by the State, and has no power or authority except that granted by the General Assembly. The repealing clause is clear and not ambiguous and takes away from the city of Concord the right to pass the ordinance which it attempted to pass and which is in controversy in the present case.

The question raised in this case, we think, is settled in *S. v. Fink,* 179 N. C., 712 (715-16). *Hoke, J.,* so clearly states the law that we quote fully: "It is insisted for the State that the license fee, provided for in the public law, is one of ownership merely, and in no way affects the provision in the charter of the city of Concord, Private Laws 1907, ch. 314, empowering its authorities to 'regulate, control, tax, and license all franchises, privileges, business, trades, professions, callings, occupations, etc., by imposing a franchise license or privilege tax upon each and every of the afore-mentioned subjects,' etc. But, in our view, the tax imposed in the general law is a license tax for the privilege of operating motor vehicles: 1. For private use. 2. For carrying passengers for hire, and is one and the same kind of tax formerly authorized under the city charter that is a franchise, license or privilege tax. It is stated in the ordinance that the tax of $20 is imposed for privilege of oper-

ating an automobile for hire, and this being true, the force and effect of the State law, regulating the use and operating of automobiles for hire, is to withdraw motor vehicles for hire from the power to tax this occupation, as conferred generally in the charter, and limits the power for this purpose to a tax of $1, as the later State statute clearly and in express terms provides. These statutes appertaining to the same subject are to be construed together, *Keith v. Lockhart,* 171 N. C., 451, and, by correct interpretation, the particular intent expressed in the later State statute will control the power conferred generally in the charter and constituting the business of operating motor vehicles for hire an exception, with the tax thereon restricted to one dollar. *Rankin v. Gaston County,* 173 N. C., 683; *Bramham v. Durham,* 171 N. C., 196; *School Comrs. v. Aldermen,* 158 N. C., 191-198. In the *School Comrs. case, supra,* the principle is stated as follows: 'When a general intent is expressed in a statute, and the act also expresses a particular intent incompatible with the former, the particular intent is to be considered in the nature of an exception,' citing 1 Lewis Sutherland on State Construction (2d Ed.), sec. 268; *Rodgers v. U. S.,* 185 U. S., 83; *Stockett v. Byrd,* 18 Md., 484; *Dahuke v. Roper,* 168 Ill., 102, and authoritative cases on the subject elsewhere are to the same general effect. *Barrett v. New York,* 189 Fed., 268; *Buffalo v. Lewis,* 192 N. Y., 193; *Newport v. Merkel Bros.* (Ky.), 161 S. W., 549; *Helena v. Dunlap,* 102 Arkansas, 131. The city authorities, therefore, being without power to impose a license tax on this business greater than $1, the ordinance by which they undertake to collect a tax of $20, contrary to the provisions of the general law, must be declared void, and the prosecution predicated upon it necessarily fails. *S. v. Prevo,* 178 N. C., 740, citing *S. v. Webber,* 107 N. C., 962."

It will be noted that the ordinance says "engaged in the business of operating an automobile or automobiles for hire commonly designated as taxi-cabs," etc.

The defendant contends that the city of Concord has the power and authority to tax the *business* or trade of operating a passenger motor vehicle for hire over its streets and highways. We cannot so hold.

The State act, upon which plaintiff relies, says: "And no county or municipality shall levy any license or privilege tax *upon the use of any motor vehicle* license by the State of North Carolina, except that cities and towns may levy not more than one dollar ($1.00) per year upon any such vehicle resident therein." "Section 145. Repealing Clause. That all laws and clauses of laws in conflict with the provisions of this Act or laws or clauses of laws providing otherwise for the subject matter of this Act are hereby repealed."

The State prohibits *"tax upon the use"* and the ordinance applies to those engaged in the *"business."* Both the State statute and the ordinance are aimed at the same object—the use of motor vehicles for hire—taxicabs. The *business* and *use* are the same. The contention of defendant is a "distinction without a difference." On the argument defendant admitted that our former opinion (the *Fink case, supra*) is a "lion in the path." We think the *Fink case, supra,* is sound and logical and applicable to the present case, and we see no reason to change or modify it.

The judgment of the court below is

Affirmed.

S. P. DRY, ADMINISTRATOR OF JOHN T. DRY, DECEASED, v. THE BOARD OF DRAINAGE COMMISSIONERS OF CABARRUS COUNTY, DRAINAGE DISTRICT No. 6, AND H. M. JOHNSTON, H. G. BRADFORD AND R. C. BRADFORD, DRAINAGE COMMISSIONERS.

(Filed 30 October, 1940.)

1. Pleadings § 5: Drainage Districts § 16—

In an action to recover upon bonds of a drainage district, allegations of ownership and amount of the bonds, their maturity, demand for payment and prayer for *mandamus* to require the imposition and collection of assessments for their payment, will support judgment for the recovery of the money due upon the bonds, notwithstanding the absence of a specific prayer for judgment for the money, since the relief to which the plaintiff is entitled is determined by the facts alleged and not by the prayer for relief.

2. Drainage Districts § 16: Mandamus § 2c—Municipality may waive condition precedent to mandamus that claim be reduced to final judgment and that resources for its satisfaction be shown.

The provisions of C. S., 867, requiring that in an application for a writ of *mandamus* to enforce a money demand *ex contractu* against a municipal corporation the complaint should show that the claim or debt has been reduced to final judgment and should show what resources are available for the satisfaction of the judgment, and the actual value of all property sought to be subjected to additional taxation, and the necessity for the issuance of the writ, are provisions for the protection of the municipality which may be waived by it, and where the municipality does not make objection and agrees that the issues of fact and of law be submitted to the court, it waives the provisions of the statute. Whether action for the recovery of the money demand and a petition for *mandamus* to effectuate the judgment may be united in the same action, see C. S., 5356.

3. Drainage Districts § 16—Questions relating to duty of commissioners in management of fiscal affairs and collection of drainage liens held immaterial in bondholder's action to recover on bonds of district.

This action was instituted to recover on drainage bonds issued by defendant district. Defendants' answer alleged that certain landowners

in the district paid their assessments in cash prior to the issuance of bonds but that there was no record identifying them with reference to the record upon which assessments were apportioned, that the value of lands within the district had declined so that in many instances the assessments exceeded the value of the land, that the district had improved the roads of two counties and prayed that the counties be made parties to determine their respective liability to the district, that plaintiff was not entitled to priority over other holders of the bonds of the district, and that the amount of special assessments could not be determined until exhaustion of all remedies of the district, and requested instructions from the court as to the duties of defendant commissioners in levying the special assessment demanded and in respect to the enforcement and collection of liens against the various classifications of lands within the district. *Held:* It was not error for the court to confine its investigation to the issues existing solely between plaintiff and defendants even in the absence of a motion to strike the extraneous matter from the answer, and its judgment upon the bonds and order for the assessment and collection of a sufficient amount of money to pay plaintiff's judgment is upheld. Many of the administrative questions presented by the answer might be solved by court action in a proceeding properly constituted, but not in this action.

APPEAL by defendants from *Ervin, Special Judge,* at August Term, 1940, of CABARRUS. Affirmed.

The plaintiff administrator brought this action to recover judgment on certain bonds of the defendant Drainage District which had been sold to plaintiff's intestate and are now a part of his estate. Plaintiff also prayed that a writ of *mandamus* issue to compel the defendant commissioners to levy a tax for the payment of the judgment. The defendants answered, admitting the formal allegations of the complaint, and the issue of the bonds described in the complaint made payable to bearer; and denied knowledge of the present ownership of the bonds or their presentation for payment.

As a further defense, the defendants set up that certain owners of lands in the Drainage District had availed themselves of the option to pay cash upon the assessments made against them for the said bonds; that the total cost of improvements and maintenance for three years had been $30,026.20; that there was no record in the clerk's office identifying persons who paid cash assessments totaling $12,740.19, with reference to the record upon which assessments have been apportioned; that the depression beginning in 1929 forced down values of real estate and left the land in idleness, so that now the assessments in many instances are more than the land is worth; that the District had taken loss by sale of property, and that sale of lands had failed to bring the amount of the assessment, and that no one would bid when lands were subject to further assessment; that the Government had spent much money on the Drainage District but that drainage was still insufficient; that the lands were materially reduced in value by dyestuffs and sewage emptied in the

upper portion of the river by mills and towns on the watershed. Specific instances are given of low bids on lands within the district; and it is alleged that the drainage commissioners had ordered steps taken for foreclosure; that certain benefits were to be received by the roads of Mecklenburg County, and that repeated demands have been made that "benefits to the roads of the respective counties should be paid." It is alleged that there is no way at this time to tell what amount of special assessments should be made until foreclosures and other remedies are exhausted against all the lands. Following this, certain questions are asked: "In what amount a special assessment shall be made? Shall it include the lands in the district the owners of which have paid their assessments in cash prior to the issuing of the bonds? Shall it include the lands foreclosed and bought in by the Drainage Board, title to which is now in the Drainage Board? Shall it include the lands which have been foreclosed and bid in by and title made to persons other than the Board of Drainage Commissioners? Shall it include lands still owing assessments and not yet foreclosed? Shall it include lands that went into the bonds, the owners of which have paid out in full since the bonds were issued?

The answer further sets up that there are a large number of bonds, other than those involved in this action, outstanding against the Drainage District.

Upon these questions the further defense demands "that the Board of Drainage Commissioners be definitely instructed by declaratory judgment as to its further duties."

When the case was reached for a hearing, the parties waived trial by jury and submitted the issues of fact and of law to the court.

Finding the facts upon the admissions in the pleadings and the evidence before him, the trial court granted judgment upon the bonds held by plaintiff, allowed the petition for *mandamus,* and ordered the assessment and collection of "a sufficient amount of money to pay the judgment of the plaintiff, interest to date of payment, and of costs." Thereupon, defendants appealed.

Hartsell & Hartsell for plaintiff, appellee.
J. Lee Crowell, Jr., for defendants, appellants.

SEAWELL, J. In the chapter on Civil Procedure and sub-chapter relating to *mandamus,* the following occurs: "867. For money demand. In application for a writ of *mandamus* when the plaintiff seeks to enforce a money demand, the summons, pleadings and practice are the same as prescribed for civil actions: 'Provided that in all applications seeking a writ of *mandamus* to enforce a money demand on actions *ex contractu*

against any county, city, town or taxing district within the State, the applicant shall allege and show in the complaint that the claim or debt has been reduced to a final judgment establishing what part of said judgment, if any, remains unpaid, what resources, if any, are available for the satisfaction of the judgment, including the actual value of all property sought to be subjected to additional taxation and the necessity for the issuing of such writ."

Apparently the complaint in this case was drawn without reference to this statute, since it merely sets up the amount and ownership of the bonds, their maturity and demand, with other more formal allegations, and asks that *mandamus* may issue requiring the imposition and collection of assessments for their payment. Prayer for judgment for the money is not specifically made.

No doubt, judgment for recovery of the money due upon the bonds was correctly entered, since the plaintiff is entitled to any relief which the facts set up in the complaint warrant. *Knight v. Houghtalling,* 85 N. C., 17; *Gattis v. Kilgo,* 125 N. C., 133, 135, 34 S. E., 246; *Bolich v. Ins. Co.,* 206 N. C., 144, 172 S. E., 320; *McNeill v. Hodges,* 105 N. C., 52, 11 S. E., 265. However, a serious question arises as to whether or not the plaintiff is entitled to sue for judgment on the bonds and for a writ of *mandamus* in the same action.

Prior to the 1933 amendment, the writ of *mandamus* was available to compel the levy of taxes and assessments to pay the principal and interest on bonds and liabilities *ex contractu* which had not been reduced to judgment. *Casualty Co. v. Comrs. of Saluda,* 214 N. C., 235, 238, 199 S. E., 7. But, under chapter 349, Public Laws of 1933, amending C. S., 867, the petitioner for *mandamus* must allege and show that the claim has been reduced to judgment. Whether the purpose of the statute might not be satisfied by uniting a cause of action for the recovery of the money and a petition for *mandamus* to effectuate the judgment in the same action, see C. S., 5356.

It is true that the use of the writ of *mandamus* in matters of this kind has been much simplified: "Such proceedings are not proceedings in equity. *Walkley v. Muscatine,* 6 Wall. (U. S.), 481; *Thompson v. Allen County,* 115 U. S., 550. Under our own practice, *mandamus* is put to statutory uses, and both by custom and authority has been deprived of much of its common law character. The writ is no longer, as at common law, a high prerogative writ; *Belmont v. Reilly,* 71 N. C., 260; *Burton v. Furman,* 115 N. C., 166, 168, 20 S. E., 443; and the court has no discretion to refuse it when it is sought to enforce a clear legal right to which it is appropriate. *Hammond v. Charlotte,* 206 N. C., 604, 175 S. E., 148; *Hickory v. Catawba County,* 206 N. C., 165, 173 S. E., 56; *Braddy v. Winston-Salem,* 201 N. C., 301, 159 S. E., 310;

Cody v. Barrett, 200 N. C., 43, 156 S. E., 146; *Hayes v. Benton,* 193 N. C., 379, 137 S. E., 169; *Person v. Watts,* 184 N. C., 499, 115 S. E., 336. *Mandamus* is as much an instrument of enforcement at law as it is an aid in equity, and, as sought here, may be considered the equivalent of execution. *Bear v. Comrs.,* 124 N. C., 204, 210, 32 S. E., 558; *United States v. Oswego,* 28 Fed., 55; *Chicago v. Hasley,* 25 Ill., 595." *Casualty Co. v. Comrs. of Saluda, supra.*

Still our statute seems to be reminiscent of the equitable origin of the proceeding, having regard for matters that have been heretofore cognizable in equity when the writ was discretionary. It does more than require that judgment be taken before the remedy is available: It must be alleged and shown "what resources, if any, are available for the satisfaction of the judgment, including the actual value of all property sought to be subjected to additional taxation and the necessity of such writ." There is no averment of this sort in the complaint and no corresponding proof. But to what extent these considerations condition proper exercise of the writ, we do not find it necessary to determine at this time. The statute was enacted for the protection of municipalities and taxing bodies, and we do not question that this protection may be waived. Failure to assert it in apt time will have that effect. *Cameron v. McDonald,* 216 N. C., 712, 715, 6 S. E. (2d), 497.

We then have to consider the case upon the specific exceptions taken upon the trial.

The appeal is based upon supposed error in the trial court in failing to take certain action demanded by the defendants: (1) To instruct the Board of Drainage Commissioners as to its duties with respect to levying the special assessment; (2) to determine how many of the landowners had paid in cash the total amount of their assessments before the bonds were issued; (3) to make Cabarrus and Mecklenburg counties parties to the action, to determine the respective liabilities of each; (4) to make all bondholders parties to the action; (5) to declare the liabilities of various classification of lands in their present status with respect to the additional assessment to pay off the unpaid bonds and accrued interest; (6) to insert in the judgment a clause that the judgment should not be a prior lien to any other unpaid bonds issued by the Drainage District, but that it should share pro rata in the assessments of the district.

While the plaintiff did not make any motion to strike out the extraneous matter contained in defendants' further answer, this did not prevent the court from confining the investigation to the field of inquiry limited by the complaint and the relevant portions of the answers and the issues thus raised. The issues between the plaintiff and the defendants were clear-cut and none of the matters excluded by the court had a relevant bearing thereupon or could in any way delay or defeat the plaintiff in its action.

None of the parties suggested by the defendants were necessary to a determination of the immediate rights between the parties to this action with respect to the relief demanded, however necessary the final adjustment of the financial affairs of the district may be. *Casualty Co. v. Comrs. of Saluda, supra.*

It must be admitted that very serious questions are presented to commissioners who have the financial affairs of a district in charge, and perhaps questions still more serious confront its creditors. In the present proceeding, however, the court is unable to recognize the propriety of any proceeding or device which might result in something in the nature of a declaratory judgment, in which advice might be given upon the complicated questions presented to the court. Many of them, no doubt, in a proceeding properly constituted, might be solved by court action. In the present case, however, there seems to be no legal reason why the plaintiff is not entitled to his relief without reference to them. *Casualty Co. v. Comrs. of Saluda, supra.*

We find no error in the trial, and the judgment is

Affirmed.

TAR HEEL BOND COMPANY, A CORPORATION, v. J. H. KRIDER, SHERIFF OF ROWAN COUNTY, NORTH CAROLINA.

(Filed 30 October, 1940.)

1. Bail § 4—Judgment may be had upon sci. fa. against surety on appearance bond prior to service of sci. fa. upon principal.

An appearance bond is a debt of record conditioned to be void upon the appearance of defendant, and while judgment absolute may not be entered upon a forfeited recognizance except upon a *sci. fa.*, C. S., 4585, the object of the *sci. fa.* is merely to give notice and an opportunity to show cause why the cognizee should not have execution acknowledged, and the surety being a party to the recognizance and his liability being primary, direct and equal with that of the principal, judgment absolute may be had against the surety on the *sci. fa.* before service of the *sci. fa.* upon the principal. C. S., 4585.

2. Same—Subsequent arrest of defendant under a capias does not discharge original forfeiture of appearance bond.

The arrest of defendant in a criminal proceeding upon a *capias* and his trial and conviction does not discharge the original forfeiture of his appearance bond, and judgment absolute against the surety may be entered upon the *sci. fa.* after defendant has been arrested under the *capias*. C. S., 4594, has no application, since in such case the defendant is not arrested and surrendered by the surety, and further, even if the statute were applicable, it provides that surrender by the bail after

recognizance is forfeited does not discharge the bail, but is merely a circumstance which the court may consider in the exercise of its discretionary power to reduce or remit the forfeiture. C. S., 4588.

3. Same—

A motion by the surety asking that the forfeiture theretofore entered upon the appearance bond be stricken out for that defendant had been subsequently arrested under a *capias* is addressed to the sound discretion of the court in the exercise of its power to remit the forfeiture, C. S., 4588, and does not serve to stay execution on the judgment entered against the surety upon the *sci. fa.*, and therefore the court, while the motion is pending, may hear and determine the surety's application for injunction to restrain enforcement of the execution issued on the judgment. *Semble:* The remedy for a reduction or remission of the forfeiture is by application under C. S., 4588.

APPEAL by plaintiff from *Phillips, J.*, at May Term, 1940, of ROWAN. Affirmed.

Civil action to restrain the enforcement of an execution issued on a judgment rendered against plaintiff as surety on the appearance bond of one James Nance.

On 21 October, 1938, James Nance, having been arrested on a warrant charging him with violation of the prohibition law, executed his appearance bond with the plaintiff as surety thereon. When the cause was reached for trial at the May Term, 1939, the said James Nance was duly called and failed to appear. Thereupon, judgment *nisi* on the bond was entered and *sci. fa.* and *capias* ordered. The *sci. fa.* having been served upon the plaintiff herein it filed answer thereto. Upon the call of the *sci. fa.* docket at the September Term, 1939, after considering the answer of the bondsman, judgment absolute on the bond was pronounced for one-half of the amount thereof and the *sci. fa.* cost.

James Nance was arrested in June, 1939, under the *capias* issued at the May Term and arranged other bond. At the November Term, 1939, he was tried and convicted and paid the fine and cost imposed.

At the November Term, 1939, plaintiff filed motion asking that the forfeiture theretofore entered be stricken out. The hearing of this motion was continued from time to time, largely through the fault of the plaintiff.

On 21 January, 1940, execution was issued against the plaintiff for the collection of the amount due on the judgment absolute. Plaintiff, on 10 April, 1940, instituted this action to restrain the enforcement of the execution.

When the cause came on to be heard on the notice to show cause the court below entered judgment dissolving the temporary restraining order theretofore issued and dismissing the action. Plaintiff excepted and appealed.

C. P. Barringer for plaintiff, appellant.

T. G. Furr and Attorney-General McMullan and Assistant Attorney-General Patton for defendant, appellee.

BARNHILL, J. The plaintiff herein seeks to present three questions: (1) Was it error for the court to enter judgment absolute upon the bond before the service of *sci. fa.* upon the principal, James Nance? (2) Did the subsequent arrest of James Nance under the *capias* issued by the court discharge his bond upon which plaintiff was surety? (3) Was it error for the court below to hear and determine the application for an injunction on its merits while plaintiff's motion, entered subsequent to the judgment absolute, was pending and before ruling on the merits of the motion?

First. A recognizance duly entered into is a debt of record, and the object of a *scire facias* is to notify the cognizor to show cause, if any he have, wherefore the cognizee should not have execution of the same thereby acknowledged. Under the common law when a recognizance was acknowledged with a condition to be void upon the appearance of the cognizor or any other person in court and the party did not answer, the default was recorded and thereby the recognizance became absolute or forfeited. Thereupon, the cognizee might have immediate recourse to the property of the cognizor for the satisfaction thereof. However, the ordinary procedure was to sue out a *scire facias* thereon, and our act of 1777, ch. 115, sec. 48, now C. S., 4585, makes it imperative that before suing out execution on a forfeited recognizance a *scire facias* shall issue and judgment be had thereon. The recognizance is of the nature of a conditional judgment and the recorded default makes it absolute subject only to such matters of legal avoidance as may be shown by plea, or to such matters of relief as may induce the court to remit or mitigate the forfeiture. *S. v. Mills,* 19 N. C., 552.

The remedy upon a forfeited bond is summary in nature by forfeiture and the forfeiture creates an absolute debt of record in the nature of a judgment. 17 C. J., 376. The surety's obligation is primary, original and direct. 50 C. J., 70. He is the original promisor and debtor from the beginning. Brandt on Suretyship & Guaranty (3d), sec. 2; *Rouse v. Wooten,* 140 N. C., 557; *Shaw v. McFarlane,* 23 N. C., 216; *Gatewood v. Burns,* 99 N. C., 357; *Pritchard v. Mitchell,* 139 N. C., 55. He is in the first instance answerable for the debt for which he makes himself responsible and is directly and equally bound with his principal. *Rouse v. Wooten, supra.* He is primarily liable as a maker. *Edwards v. Ins. Co.,* 173 N. C., 614; *Horton v. Wilson,* 175 N. C., 533, 95 S. E., 904; *Bank v. Whitehurst,* 203 N. C., 302, 165 S. E., 793; *Dry v. Reynolds,* 205 N. C., 571, 172 S. E., 405; *Bank v. Richards,* 37 Vt., 284; *Ballard*

v. Burton, 16 L. R. A., 667. The text writers are explicit in assigning the undertaking of a surety to the class of primary liabilities. A surety is liable as much as his principal is liable, and absolutely liable as soon as default is made, without any demand upon the principal whatsoever. 2 Daniel Neg. Inst. (5d), sec. 1753; Tiedeman on Commercial Paper, sec. 415.

Plaintiff appeared in response to the *sci. fa.* issued, filed answer and was duly heard. He cannot now complain that the principal in the bond was not likewise served with *sci. fa.* Even so, such contention is without merit. To hold otherwise would tend to destroy the effectiveness of an appearance bond. It would be discharged if the defendant appeared and unenforceable if he disappeared.

Plaintiff was a party to the recognizance. Therefore, the position here assumed is not in conflict with the provisions of C. S., 4585; and C. S., 4587, merely provides a method of substituted service when the party cannot be found.

Second. Upon entry of judgment *nisi* the debt of the surety on the bond matured subject to his right to be heard after the issuance and service of *sci. fa.* He was duly heard and judgment absolute was entered. At that time Nance had already been arrested. This fact was used as a defense in plaintiff's answer to the *sci. fa.* It was a matter which addressed itself to the sound discretion of the court in the exercise of its power to reduce or remit a forfeiture and the court, no doubt influenced largely by this fact, did reduce the forfeiture by one-half. C. S., 4588.

The subsequent arrest, trial and conviction of the defendant Nance did not serve to discharge his original forfeiture. C. S., 4594, has no application. Nance was arrested under *capias* issued by the court. He was not arrested and surrendered by his surety. Furthermore, this section provides that in criminal proceedings the surrender by the bail after the recognizance is forfeited shall not have the effect to discharge the bail, but the forfeiture may be remitted in the manner provided for. There is an absolute discharge only when the principal is surrendered by the surety before forfeiture.

Third. The plaintiff's motion filed after judgment absolute presented no new matter for consideration of the court other than that the defendant Nance, who was arrested prior to the hearing on the *sci. fa.,* was subsequently tried and convicted and paid his fine and cost. It undertakes to show further that *Gwyn, J.,* out of term and while the cause was not properly pending before him, expressed a written opinion that the surety was entitled to a remittance of the forfeiture. This motion was addressed to the sound discretion of the court in the exercise of its power

to remit forfeitures. C. S., 4588. It did not serve to stay execution on the judgment.

While we have considered the questions the plaintiff seeks to present, we are inclined to agree with the defendant in his contention that the complaint or petition is wholly insufficient to sustain injunctive relief. Plaintiff was duly heard on the *sci. fa.* He did not except or appeal from the judgment rendered. His remedy for a reduction or remission of the forfeiture is provided by C. S., 4588, under which relief may be granted even after payment of the forfeiture.

The judgment below is

Affirmed.

STATE v. JAMES ELLER AND SURETY, TAR HEEL BOND COMPANY.

(Filed 30 October, 1940.)

1. Bail § 4—

Judgment *nisi* may be made absolute against the surety upon the hearing of the *sci. fa.* notwithstanding that the *sci. fa.* has not been served upon the principal.

2. Same—Where, at time case is called, defendant is in custody of State upon another charge, judgment absolute should not be entered against surety until he has opportunity to produce defendant after his release.

Upon the failure of defendant to appear when his case was called, judgment *nisi* was entered and *sci. fa.* and *capias* issued. Upon the hearing of the *sci. fa.*, the surety showed that at the time of the call of the case defendant was incarcerated in another county of this State on other charges, that upon the subsequent trial in such other county defendant was sentenced to imprisonment, and that the surety had secured *capias* and filed same with the officials of the State's Prison so that defendant would be surrendered to the court to stand trial upon the expiration of his sentence. *Held:* Notwithstanding that C. S., 791, relates only to bonds executed in arrest and bail proceedings, the bail will be exonerated during defendant's detention, since only the State and not the surety can produce the body of defendant, and judgment absolute against the surety should be stricken out and hearing on the *sci. fa.* continued until the surety has had opportunity to produce defendant after his release from prison. C. S., 4594. *S. v. Holt*, 145 N. C., 450, cited and distinguished.

APPEAL by respondent Tar Heel Bond Company, Inc., from *Phillips, J.*, at May Term, 1940, of ROWAN. Error and remanded.

Proceedings on appearance bond.

One James Eller having been arrested on a warrant charging violation of the Prohibition Law, on 17 October, 1938, executed his appearance bond returnable to the November Term, 1938, Rowan Superior Court,

with respondent as surety thereon. The case was called for trial at the February Term, 1939, at which time the defendant was duly called and failed to appear. Thereupon, judgment *nisi* was entered and *sci. fa.* and *capias* were ordered. The *sci. fa.* was served upon the surety but not upon the principal. The surety in response to the *sci. fa.* served appeared and answered setting up in defense that on or about 10 November, 1938, said Eller was arrested by officers of Cabarrus Superior Court on warrants charging the larceny of automobiles in said county; that he was incarcerated under said warrants until the January, 1939, Term of Cabarrus Superior Court, at which time he was tried and sentenced in two cases for a term of three years in each case, the sentence in one to begin at the expiration of the sentence in the other; that said Eller was thereupon committed to the prison and has since been and is now in custody of the prison authorities of the State of North Carolina; that the respondent has secured a *capias* from the clerk of the Superior Court of Rowan County and has filed it with the officials of the State Prison as a detainer. It further asserts that by virtue of the detainer said Eller will be surrendered to the court to stand trial upon the expiration of said sentence.

When the matter was heard upon the return of the *sci. fa.* after considering respondent's answer, judgment absolute was entered. Respondent excepted and appealed.

T. G. Furr, Attorney-General McMullan, and Assistant Attorneys-General Bruton and Patton for the State.

C. P. Barringer for respondent, appellant.

BARNHILL, J. Respondent's contention that the judgment absolute is voidable and unenforceable for that the *sci. fa.* was not served on the principal cannot be sustained. *Bond Co. v. Krider, ante,* 361. Its further contention that the fact that the principal on the bond had been arrested by officials of another county of this State and was tried and sentenced and was actually in custody of State officials at the time the case was called for trial constitutes a valid defense and that the judgment absolute was prematurely pronounced presents a more serious question.

The authorities seem to be in substantial accord in holding that if the principal in a bail bond is a fugitive from justice or is imprisoned in another jurisdiction for a second and different offense this is no defense in behalf of the surety and will not defeat a judgment absolute on the bond. *Granberry v. Pool,* 14 N. C., 155; 3 E. C. L., 53. See also Anno. 26 A. L. R., 412. However, the courts are not agreed as to whether a subsequent arrest and imprisonment, in another county of the

same State, of the principal in a criminal bail bond for an offense other than that for which the bond was given and is being actually detained at the time he is obligated to appear will exonerate the surety on the bond. Anno. 26 A. L. R., 417.

Upon a careful consideration of this question we are convinced that the weight of authority both on principle and reasoning supports appellant's contention that when one is bound as bail for another for his appearance in a particular court at a particular time and the State, before the time stipulated for the appearance, arrests the principal and detains him in another place, thus preventing him from appearing at the time and place stipulated, the bail will be exonerated during such detention. "The State does an act perfectly lawful when she so arrests him for a second offense. If she should keep him in her own custody, of course the bail in the first case would be discharged; because she could produce him, but they could not. . . . And whichever case is tried first, if it results in imprisonment, the sureties for the other are discharged." 3 R. C. L., 62.

By recognizance of bail in a criminal action the principal is, in the theory of the law, committed to the custody of the surety. So long as the principal remains at large the surety may relieve him of the undertaking at any time before forfeiture of the recognizance by surrendering the accused into the custody of the sheriff of the county in which he is prosecuted. C. S., 4594. But when the State steps in and rearrests the principal and thus assumes custody of his person it deprives the surety of this right and takes from him any control over the principal. At the time the case is called for trial the State, having the principal in its custody, can either continue the case until the former sentence expires or it can apply to the court for a writ of *habeas corpus ad deliberandum et recipiendum.* It and not the surety then has the power to produce the body of the principal.

We do not consider *S. v. Holt,* 145 N. C., 450, in substantial conflict with the position here assumed. There the principal was only temporarily confined by town authorities for drunkenness at the time his case was called. He was released and could have been produced by the bondsman before the expiration of that term. That was not done. Instead, the principal became a fugitive from justice and the bondsman was negligent in failing to produce him after his release and in permitting his escape. Here the surety has been diligent and has arranged for the production of the principal so soon as his sentence expires. However, in so far as that case does conflict herewith it is overruled.

It may be well to note that C. S., 791, which contains the provision that the bail will be exonerated by the imprisonment of the defendant in the State's Prison, relates only to bonds executed in arrest and bail

proceedings. *Adrian v. Scanlin,* 77 N. C., 317; *Sedberry v. Carver,* 77 N. C., 319. Even so, we adhere to the view that when the State imprisons a principal in a criminal appearance bond after the execution of the bond and has him in custody at the time he is obligated to appear for trial the bond is exonerated during the term of detention. *S. v. Welborn,* 205 N. C., 601. The State may not detain the principal in the State's Prison and at the same time demand his presence in court on penalty of forfeiture of his bond.

The judgment absolute should be stricken from the record and the hearing on the *sci. fa.* should be continued until the surety has had opportunity to produce the defendant after his release from prison.

Error and remanded.

STATE v. WADIS BROWN AND SURETY, TAR HEEL BOND COMPANY, INC.

(Filed 30 October, 1940.)

1. Bail § 4—

Judgment *nisi* may be made absolute against the surety upon the hearing of the *sci. fa.* notwithstanding that the *sci. fa.* has not been served upon the principal.

2. Same—

Upon defendant's plea to an offense less than that charged in the warrant, judgment was suspended upon condition that defendant pay the cost. Defendant was given until Monday of the second week of the term in which to pay the cost. Defendant failed to appear when called Monday of the second week of the term. *Held:* Since defendant was permitted to remain at large under the bond until the second Monday of the term, his failure to appear at that time constitutes a forfeiture of his appearance bond, and the judgment *nisi* was properly made absolute against the surety upon the hearing of the *sci. fa.*

APPEAL by respondent Tar Heel Bond Co., Inc., from *Phillips, J.,* at May Term, 1940, of ROWAN. Affirmed.

Proceeding on appearance bond.

One Wadis Brown having been arrested on a charge of reckless driving, on 17 August, 1937, executed his appearance bond returnable to the September Term, 1939, Rowan Superior Court, with the respondent as surety thereon. The case was called for trial at the February Term, 1940, at which time the defendant entered a plea to an offense less than that charged in the warrant and judgment was suspended upon condition that the defendant pay the cost. The defendant was given by the

court until Monday of the second week in which to pay the cost. On Monday of the second week the defendant was duly called and failed to answer. Thereupon, judgment *nisi* was entered and *sci. fa.* and *capias* was ordered. The *sci. fa.* was served upon the surety but not upon the principal. The surety, in response to the *sci. fa.* served, appeared and answered. When the matter was heard upon the return of the *sci. fa.*, after consideration of respondent's answer, judgment absolute was entered. Respondent excepted and appealed.

T. G. Furr, Attorney-General McMullan, and Assistant Attorney-General Patton for the State.

C. P. Barringer for respondent, appellant.

BARNHILL, J. The appellant contends that it was error for the court to enter judgment absolute on the *sci. fa.* until such *sci. fa.* had been served on the principal and that, therefore, the judgment pronounced is voidable and unenforceable. The question thus sought to be presented is decided by this Court in *Bond Co. v. Krider, ante,* 361. The decision in that case is controlling. As the defendant Brown was permitted to remain at large under the bond until the second Monday of the court, his failure to appear constitutes a forfeiture thereof. *S. v. Staley,* 200 N. C., 385, 157 S. E., 25.

Affirmed.

STATE v. EMMETT BRACKETT.

(Filed 30 October, 1940.)

1. Seduction § 1—

The essential elements of the offense of seduction are the innocence and virtue of the prosecutrix, the promise of marriage, and intercourse induced by such promise.

2. Seduction § 8—

Unqualified testimony that the character of prosecutrix was good at the time of the alleged seduction is sufficient supporting evidence upon the question of the innocence and virtue of prosecutrix.

3. Same—

Testimony of the mother of prosecutrix that defendant had asked her approval of their marriage, and subsequent to the birth of the child, had acknowledged paternity of the child and reiterated his intention to marry prosecutrix, is sufficient supporting evidence upon the question of the promise of marriage.

4. Same—

Evidence that defendant had asked the approval of prosecutrix' mother to their marriage, that he paid prosecutrix assiduous attention, and gave her a ring, a watch and a dress, is sufficient supporting evidence on the question of intercourse induced by promise of marriage.

5. Criminal Law § 51—

Impropriety in the argument of counsel is cured by correction by the court, and ordinarily the court may make such correction in the charge or at any time during the trial, immediate interference by the court being necessary only in case of gross impropriety.

6. Seduction § 7—

In a prosecution for seduction the paternity of the child is in issue, and when the child has been introduced in evidence but not "exhibited" to the jury, and the defendant is in court and observable by the jury, although not a witness in his own behalf, the resemblance of the child to defendant is some evidence of paternity, which may be considered by the jury.

7. Constitutional Law § 29—

The constitutional provision that a defendant shall not be compelled to testify against himself, Fifth Amendment to the Federal Constitution, does not preclude the prosecution from calling to the jury's attention the physical aspect of defendant when relevant to the inquiry.

8. Seduction § 10—

In this prosecution for seduction, the court's charge to the jury as to the character and requirements of evidence in support of the testimony of prosecutrix, *is held* without error.

9. Criminal Law § 53h—

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

10. Criminal Law § 53c—

A charge that the burden of proving defendant guilty beyond a reasonable doubt does not require the State to prove defendant guilty beyond all doubt, or a vain or fanciful doubt, but only beyond a reasonable doubt, which is one based upon common sense and reason, and generated by insufficiency of proof, *is held* without error.

11. Constitutional Law § 32—

Defendant's contention that he was subjected to cruel and unusual punishment in that the trial court sentenced him to the maximum prison term permitted by statute for the offense of seduction of which he was convicted, and in addition dictated a letter to the Parole Commissioner in which he requested that no clemency be extended defendant, and also directed the solicitor to institute prosecution against defendant for failure to support his illegitimate child, *is held* untenable, since the letter to the Parole Commissioner and the instructions to the solicitor are not parts of the sentence imposed.

APPEAL by defendant from *Gwyn, J.*, at March Term, 1940, of CLEVELAND.

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

B. T. Falls for defendant, appellant.

SCHENCK, J. The defendant was tried and convicted upon a bill of indictment charging the seduction of an innocent and virtuous woman under the promise of marriage, C. S., 4339, and from sentence of imprisonment in the State's Prison for a term of five years appealed to the Supreme Court, assigning errors.

The defendant's first three exceptive assignments of error relate to the court's refusal to allow motion for a nonsuit, C. S., 4643, upon the theory that the testimony of the prosecutrix as to some of the essential elements of the offense was unsupported.

The essential elements of the offense are (1) the innocence and virtue of the prosecutrix, (2) the promise of marriage, and (3) intercourse induced by such promise. *S. v. McDade,* 208 N. C., 197.

As to the first element, the innocence and virtue of the prosecutrix, at least two witnesses testified unqualifiedly that the prosecutrix was of good character at the time of the alleged seduction. This is sufficient supporting evidence upon this element of the offense. *S. v. Doss,* 188 N. C., 214; *S. v. Moody,* 172 N. C., 967. As to the second essential element, the promise of marriage, the supporting evidence was plenary. The mother of the prosecutrix testified that the defendant asked her approval of the marriage of himself and her daughter, and that subsequent to the birth of the child he acknowledged his paternity thereof and reiterated his intention to marry the prosecutrix. As to the third essential element of the offense (intercourse induced by such promise, the testimony of the prosecutrix is supported by the testimony of her mother as to statements made by the defendant and the actions of the defendant, such as the assiduous attention paid the prosecutrix by the defendant, accompanied by the giving to her of a ring, a watch and a dress. These assignments cannot be sustained.

The fourth exceptive assignment of error relates to a statement made in the course of his argument by counsel for the private prosecution, to which exception was preserved by counsel for defendant as follows: "Look at the defendant. This baby has black hair just like his." If it be conceded that the statement was improper, such impropriety or error was cured and corrected in the general charge when the court said: "The court instructs you not to consider any reference to the defendant's appearance made in the argument of the case. . . ."

"Where counsel oversteps the bounds of legitimate argument, or abuses the privilege of fair debate, and objection is interposed at the time, it must be left, as a general rule, to the sound discretion of the

presiding judge as to when he will interfere and correct the abuse, but he must correct it at some time during the trial, and if the impropriety be gross it is the duty of the judge to interfere at once." *Stacy, C. J.*, in *S. v. Tucker,* 190 N. C., 708. We do not apprehend that the impropriety of the statement of counsel, if indeed impropriety it was, was so gross as to demand immediate interference by the court. In seduction, as well as in bastardy cases, the paternity of the child is an issue, and the resemblance of the child to the defendant is some evidence of the paternity. The child had been introduced in evidence, and, although the defendant had not gone upon the stand as a witness, he was nevertheless in court and observable by the jury. *S. v. Tucker, supra,* and cases there cited. In speaking of the prohibition in the Fifth Amendment to the Constitution of United States against compelling a person to be a witness against himself, *Mr. Justice Holmes* in *Holt v. United States,* 218 U. S., 245, says: "But the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material."

The fifth, sixth, eighth and ninth exceptive assignments of error all assail his Honor's charge relating to evidence supporting the testimony of the prosecutrix required by the statute creating the crime of seduction. We have examined each of these assignments and are of the opinion, and so hold, that they are untenable. His Honor charged that "The statute requires further that the unsupported testimony of the prosecutrix shall not be sufficient to convict. It means that the prosecutrix must be supported by evidence of independent facts and circumstances, added to her testimony and added to her statements as to each of the elements." This is in accord with the decisions of this Court. *S. v. Malonee,* 154 N. C., 200; *S. v. Raynor,* 145 N. C., 472. A charge is to be taken as a whole, and not broken up into disconnected and desultory fragments, and thus considered. *S. v. Butler,* 185 N. C., 625; *S. v. Hege,* 194 N. C., 526.

The seventh exceptive assignment of error assails the instruction to the jury as to what constitutes a reasonable doubt. The excerpt objected to reads: "The defendant is presumed to be innocent, and this presumption goes with him throughout the entire trial and until the jury is satisfied beyond reasonable doubt of his guilt; not satisfied beyond any doubt, or all doubt, or a vain or fanciful doubt, but rather what that term implies, a reasonable doubt, one based upon common sense and reason, generated by insufficiency of proof." This is in substantial compliance with the decisions of this Court, *S. v. Schoolfield,* 184 N. C., 721; *S. v. Hege, supra,* and in the absence of a request for more specific and more elaborate instructions cannot be held for error.

The tenth exceptive assignment of error is to the refusal of the court to allow motion for a new trial, and, being formal, is disposed of in the discussion of the other assignments.

The eleventh and last assignment of error is to the sentence imposed. This assignment was argued before us with considerable vigor and earnestness. The record discloses that the sentence imposed was the maximum allowed by the statute, five years imprisonment in the State's Prison, and that his Honor immediately after sentence was imposed dictated a letter to the Parole Commissioner wherein he requested that no clemency be extended the prisoner, and directed the solicitor to institute prosecution against the defendant for failure to support his bastard child. It is the contention of the defendant that the maximum punishment allowed by the statute has been exceeded and that Art. I, sec. 14, of the Constitution of North Carolina has been impinged in that cruel and unusual punishment has been inflicted.

It is well settled in this jurisdiction that a sentence is not excessive, or "cruel or unusual" when within the limits prescribed by the Legislature, *S. v. Daniels,* 197 N. C., 285, and cases there cited, and the sentence of five years imprisonment in the State's Prison being within these limits it cannot be held for error.

The letter of his Honor to the Parole Commissioner and his instructions to the solicitor are not parts of the sentence imposed, but were simply the exercise of his personal, if not his official, prerogative.

In the record we find

No error.

STATE v. FRANK JACKSON AND HARVEY WOOTEN.

(Filed 30 October, 1940.)

1. Larceny § 1—

The common law offense of larceny does not include larceny of chattels real.

2. Same—

C. S., 4259, creates the statutory offense of larceny of chattels real.

3. Same—

A tombstone erected at the grave of a deceased person becomes a chattel real and may not be the subject of the common law crime of larceny.

4. Indictment § 7—

An indictment for a statutory offense must show upon its face that it is based upon the statute, and must either charge the offense in the language thereof or specifically set forth the facts constituting same.

5. Indictment § 20—

Proof of the particular offense charged in the bill of indictment is necessary to support a conviction thereon.

6. Same: Larceny § 4—Proof of larceny of chattel real will not support conviction on indictment charging common law larceny.

Defendant was charged with feloniously stealing and carrying away one tombstone erected at the grave of a deceased person, being the goods and chattels of a named person. The court instructed the jury that the offense charged was larceny, which is the wrongful and felonious taking and carrying away of personal property of some value belonging to another, with felonious intent. *Held:* Neither the indictment nor the theory of trial refer to trespass constituting an element of the statutory crime of larceny of chattels real, C. S., 4259, nor to the distinction of taking with, and taking without felonious intent set forth in the statute, and there is a fatal variance between the indictment for common law larceny and the proof of the statutory larceny of a chattel real, and defendant's motion to nonsuit should have been granted. Nor may conviction be upheld under C. S., 4320, which creates a misdemeanor not defined as larceny. Whether C. S., 4320, and cognate statutes relating expressly to tombstones, graveyards, and graves, excludes such property from C. S., 4259, *quære.*

APPEAL by defendant Harvey Wooten from *Parker, J.,* at February Term, 1940, of SAMPSON. Reversed.

Criminal prosecution under indictment charging the crime of larceny.

The bill of indictment charged that the defendants, "with force and arms, at and in the county aforesaid, one tombstone at the head of the grave of A. J. Tuttle in the Clinton cemetery of the value of One Hundred and Fifty Dollars ($150.00), of the goods, chattels, and moneys of one Sarah E. Tuttle, then and there being found, feloniously did steal, take and carry away, contrary," etc. The bill also contains a second count for receiving.

There was evidence tending to show that the defendant Wooten, through his agent and employee, the defendant Jackson, without the knowledge and consent of the widow of A. J. Tuttle, went to the cemetery lot on which A. J. Tuttle was buried and removed therefrom a tombstone, erected at the grave of said Tuttle, of the value of $150.00, and carried the same away with intent to appropriate it to his own use.

In rebuttal the defendant Jackson offered evidence tending to show that he acted as an employee and under the direction of the defendant Wooten. The defendant Wooten offered evidence tending to show that he procured the removal of the stone under *bona fide* claim of right by virtue of a contract with Mrs. Tuttle.

The jury returned a verdict of not guilty as to the defendant Jackson and a verdict of guilty as to the defendant Wooten. From judgment pronounced on the verdict defendant Wooten appealed.

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

E. C. Robinson and J. D. Johnson, Jr., for defendant Harvey Wooten, appellant.

BARNHILL, J. Larceny at common law was confined to "goods and chattels"; it did not extend to land, because land could not be feloniously taken and carried away, except insignificant parcels thereof. *S. v. Burrows,* 33 N. C., 477; 36 C. J., 736, sec. 6. It, as a common law offense, is concerned with personal property only, and its nature has not been altered by the statutes making it larceny to steal things affixed to realty and severed therefrom by the thief. 36 C. J., 736, sec. 6. Therefore, it was not larceny, at common law, to steal anything adhering to the soil. *S. v. Burrows, supra;* 17 R. C. L., 33.

The only purpose of statutes making chattels real the subject of larceny, and thus extending the common law crime, is to abrogate, so far as it affects the prosecution for larceny, the rule that things in their nature personal are or become realty while or when affixed to the soil . . . and to abolish the subtle distinction between its severance and taking as a single and indivisible act and a severance and a taking as separate and distinct acts. 36 C. J., 736. Thus, C. S., 4259, was enacted to eliminate a defect in the common law rule and to extend it so as to make chattels real, such as growing trees, plants, minerals, metals and fences, connected in some way with the land, the subject of larceny. The obvious intent of the act was to prevent the willful and unlawful entry upon the land of another and the taking and carrying away of such articles as were not, at common law or by previous statute, the subject of larceny. *S. v. Vosburg,* 111 N. C., 718; *S. v. Beck,* 141 N. C., 829.

The thought underlying the erection of a tombstone or marker at the grave of a deceased person is that of permanency. Its purpose is to designate the spot where the deceased was buried, to perpetuate his name and to record biographical data as to birth, death, etc. When so erected it becomes a chattel real and is not the subject of the common law crime of larceny.

An indictment for an offense created by statute must be framed upon the statute, and this fact must distinctly appear upon the face of the indictment itself; and in order that it shall so appear, the bill must either charge the offense in the language of the act, or specifically set forth the facts constituting the same. 31 C. J., 703; *S. v. Merritt,* 89 N. C., 506; *S. v. Rose,* 90 N. C., 712; *S. v. Gibson,* 169 N. C., 318, 85 S. E., 7; *S. v. Mooney,* 173 N. C., 798, 92 S. E., 610; *S. v. Lockey,* 214 N. C., 525, 199 S. E., 715. "Where the words of a statute are descrip-

tive of the offense, an indictment should follow the language and expressly charge the described offense on the defendant so as to bring it within all the material words of the statute. Nothing can be taken by intendment. Whart. Criminal Law, sec. 364; Bishop on Stat. Crime, sec. 425;" *S. v. Liles,* 78 N. C., 496.

It is a rule of universal observance in the administration of criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment. The allegation and proof must correspond. *S. v. Wilkerson,* 164 N. C., 432, 79 S. E., 888; *S. v. Corpening,* 191 N. C., 751, 133 S. E., 4; *S. v. Martin,* 199 N. C., 636, 155 S. E., 447.

The bill of indictment charges the larceny of "goods and chattels"—a common law crime. The case was tried on this theory in the court below. The judge in the beginning of his charge said to the jury: "The offense charged is larceny. Larceny is the wrongful and felonious taking and carrying away of personal property of some value belonging to another with the felonious intent," etc. And the jury was not required to find as a condition precedent to a verdict of guilty that the defendant, "not being the present owner or *bona fide* claimant thereof . . . willfully and unlawfully entered upon the lands of another." Nor was any distinction made between the taking with and the taking without felonious intent as set forth in C. S., 4259.

It seems clear to us, therefore, that the contention of the State that the bill of indictment is sufficient to sustain a conviction under the terms of C. S., 4259, cannot be sustained. The fact alone that he was tried for the common law, and not the statutory, offense is sufficient answer to this contention. Furthermore, under C. S., 4259, a trespass upon land is an essential element of the offense thereby created. The bill of indictment fails to contain allegations of this and other essential elements of the statutory offense. Nor can the conviction be upheld under C. S., 4320. There is nothing in the bill of indictment or in the charge of the court to indicate that the defendant was tried and convicted under the provisions thereof. That section creates a misdemeanor and is not defined as larceny.

Defendant was indicted charged with the commission of a common law offense and the proof favorable to the State tends to show the commission of a statutory offense. Thus there is a fatal variance between the bill of indictment and the proof.

Where there is a fatal variance between the bill of indictment and the proof, this defect may be taken advantage of by motion for judgment as of nonsuit, there being a total failure of proof to support the indictment. *S. v. Wilkerson, supra; S. v. Harbert,* 185 N. C., 760, 118 S. E., 6; *S. v. Harris,* 195 N. C., 306, 141 S. E., 883; *S. v. Martin,*

supra; S. v. Corpening, supra; S. v. Gibson, 169 N. C., 318, 85 S. E., 7; *S. v. Hawley,* 186 N. C., 433, 119 S. E., 888.

The defendant must be prosecuted, if at all, under C. S., 4320, or C. S., 4259. *Quœre:* As C. S., 4320, and cognate statutes relate expressly to tombstones, graveyards and graves, does this not exclude such property from the provisions of C. S., 4259?

The motion for judgment as of nonsuit should have been allowed with leave to the solicitor to send another bill, if so advised

Reversed.

JOSEPH T. CARRUTHERS, JR., ADMINISTRATOR OF HERBERT L. BURROUGHS, v. ATLANTIC & YADKIN RAILWAY COMPANY,

and

JOSEPH T. CARRUTHERS, JR., ADMINISTRATOR OF LUTHER BURROUGHS, v. ATLANTIC & YADKIN RAILWAY COMPANY.

(Filed 30 October, 1940.)

1. Appeal and Error §§ 6f, 43—

On this petition to rehear, it appeared that the instruction containing error for which a new trial was ordered was given by the court in response to appellant's written prayer for instructions. *Held:* Appellant having requested the instruction in the lower court is bound thereby, at least to the extent that he may not assert it as error on appeal, and the petition to rehear is allowed.

2. Appeal and Error § 19—

The charge of the court is not a part of the record proper but is a part of the *postea* to be settled in the case on appeal.

APPEAL by plaintiff from *Clement, J.,* at 2 October Term, 1939, of GUILFORD. On rehearing. Petition allowed.

Frazier & Frazier and Walser & Wright for plaintiff, appellant.
Hobgood & Ward and Chas. M. Ivey, Jr., for defendant, appellee.

SEAWELL, J. This case was argued and decided at the Spring Term of this Court and is reported *ante,* 49. A petition to rehear was filed on 1 July, 1940, and briefs both for plaintiff and defendant were subsequently submitted. It stands now for determination upon the rehearing.

The decision of the case upon the former hearing rested principally upon the ground that erroneous instructions were given to the jury respecting plaintiff's evidence that no signals were given by defendant's

locomotive approaching the crossing where plaintiff's intestate received the injury resulting in his death. This was one of the allegations of negligence in the complaint.

There is no reference in the record, other than that contained in the charge of the judge, to the effect that the objectionable instructions to the jury were requested by plaintiff, and in the charge itself the record appears as follows: "Now the plaintiff has instructed me to give you some instructions. Some of them I give you." There follows a page of instructions, to which the plaintiff took exception. There is, however, no record of the actual instructions tendered by the plaintiff, unless it be assumed from this juxtaposition that these were the instructions requested in substantial identity. The defendant contends that this is a necessary interpretation.

Assuming that the instructions to which exception was made by the plaintiff had not been requested by him, they were passed upon independently and found to be erroneous. The court has not changed its mind as to the impropriety of these instructions.

In the argument now submitted to us, the construction which the defendant places upon the judge's charge does not seem to be successfully controverted by the plaintiff, and we must assume that the plaintiff asked for the instruction to which he subsequently made exception, and the court cannot do otherwise than correct the result, whether due to its own inadvertence or to the state of the record. In this connection it should be understood that the judge's charge is not a part of the record proper but is considered as a part of the *postea,* to be settled in the case on appeal. We do not, therefore, consider the extraneous matter brought into the controversy concerning the history of this settlement.

We must accord counsel the right to conduct the case of the client and to present to the court such views of the law bearing upon any subject under discussion as they deem proper. When the court is led into error by a specific prayer for instruction which counsel in good faith have requested, ordinarily the client is bound by the instruction given, to the extent at least that he may not assert it in this Court as error. *Blum v. R. R.,* 187 N. C., 640, 647, 122 S. E., 562; *Bell v. Harrison,* 179 N. C., 190, 198, 102 S. E., 200; *Kelly v. Traction Co.,* 132 N. C., 368, 374, 43 S. E., 923.

On a careful reëxamination of the record, we do not find other exceptions of sufficient merit to interfere with the verdict of the jury and judgment of the court.

The order for a new trial is annulled. For the reasons stated, we find in the judgment of the court below no reversible error.

Petition allowed.

IN RE HERBERT K. ADAMS.

(Filed 30 October, 1940.)

1. Appeal and Error § 3a: Habeas Corpus § 8—

The wife, a party to the action out of which *habeas corpus* proceedings were instituted by the husband to obtain his release from jail, where he had been committed for willful failure to comply with an order requiring him to pay alimony, is entitled to review by *certiorari* the order releasing the husband. C. S., 632, 638.

2. Habeas Corpus § 7—

In *habeas corpus* proceedings instituted by a husband to obtain his release from jail where he had been committed for willful violation of an order requiring him to pay alimony, the court is bound by the judgment for contempt and cannot review the facts upon which that judgment was predicated, *habeas corpus* not being available as a substitute for an appeal.

3. Contempt of Court § 2b: Divorce § 14—

The facts found by the court in contempt proceedings against a husband for willfully refusing to comply with an order for payment of alimony, are not reviewable on appeal except for the purpose of passing on their sufficiency to warrant the judgment committing him to jail.

4. Courts § 3—

Ordinarily, one Superior Court judge has no power to overrule the judgment or reverse the findings of fact previously made in the cause by another judge of the Superior Court.

5. Habeas Corpus § 7—In habeas corpus proceedings to obtain release from jail, prior order of commitment for contempt is conclusive.

Petitioner was committed to jail for willful violation of a prior court order requiring him to pay his wife alimony under the provisions of C. S., 1667, and to secure such payment by execution of a deed of trust on certain real estate owned by him in another state. The proceedings were in all respects regular upon their face, C. S., 978, 984. Petitioner obtained writ of *habeas corpus*, and upon the hearing he was remanded into custody upon the court's finding that he was legally restrained. Thereafter a second *habeas corpus* was issued, and at the hearing the court found that petitioner was without funds to pay anything for the support of his wife and children, and ordered him released from custody. *Held:* Where there was no application for modification of the original judgment, C. S., 1667, nor evidence to support a finding of changed conditions, nor explanation of petitioner's refusal to execute the deed of trust as required by the original judgment, and the finding that petitioner could not pay the alimony ordered is not sufficient to entitle petitioner to be discharged, and further, the findings in the contempt proceeding were conclusive and binding on the court upon the hearing upon the writ of *habeas corpus*, and the question of the legality of petitioner's restraint had been previously adjudged against him upon the prior writ of *habeas corpus*, and the order discharging petitioner from custody is reversed. C. S., 2206, 2209.

IN RE ADAMS.

CERTIORARI to review order o. *Stevens, J.,* in *habeas corpus* proceeding instituted by Herbert K. Adams. From DUPLIN. Reversed.

Butler & Butler for Hallie Mae Adams.
No counsel contra.

DEVIN, J. This case comes to us upon a writ of *certiorari* issued by this Court at the instance of Hallie Mae Adams to review the order of the judge below discharging the petitioner, Herbert K. Adams, from custody under writ of *habeas corpus.* The facts were these:

In 1934, Herbert K. Adams instituted action against his wife, Hallie Mae Adams, for divorce, and in the same action Hallie Mae Adams filed cross action for alimony without divorce, alleging that he had abandoned her without making adequate provision for her support and that of their three infant children. In that action, in 1938, Frizzelle, J., entered a judgment, based upon sufficient findings of fact, requiring Herbert K. Adams to make certain provision for the support of his wife and children, and, in order to secure the performance of the order, to execute a deed of trust on certain valuable real estate in South Carolina, which the court found belonged to him. No appeal was taken from this judgment, nor was any exception noted thereto.

More than a year later it was made to appear by affidavit to Judge Williams, then presiding in Duplin Superior Court, that Herbert K. Adams had not complied in any respect with the order of Judge Frizzelle, and contempt proceedings were instituted, after due notice. Upon the hearing Judge Williams found upon sufficient evidence that Adams had not complied with the order of the court, that he was able to comply therewith, and that his disobedience of the terms thereof was willful and contumacious, constituting an intentional resistance to a lawful order of the court, and thereupon committed him to jail until he should comply with the order of court or be otherwise legally discharged. That was 14 December, 1939. No appeal was taken from this order. On 29 January, 1940, at the instance of Herbert K. Adams, writ of *habeas corpus* was issued by Stevens, J., who, upon the hearing found that the petitioner was legally restrained, and remanded him to custody. On 27 April, 1940, again, upon petition of Herbert K. Adams, writ of *habeas corpus* was issued by Stevens, J., who, at this time, being of opinion that petitioner was illegally held in jail for the nonpayment of alimony, and that he was without funds to pay anything for the support of his wife and children, ordered him released from custody. This order was entered without notice to Hallie Mae Adams, as required by C. S., 2231. Hallie Mae Adams applied to this Court for writ of *certiorari,* which was allowed. Having been a party to the action out of

which these proceedings arose, and being interested in the result, she was permitted to bring the matter here for review. C. S., 632; C. S., 638; *Cromartie v. Comrs.*, 85 N. C., 211.

Apparently the proceedings under which the petitioner was in custody were in all respects in accordance with the statutes and the decisions of this Court. C. S., 978; C. S., 984; *Pain v. Pain*, 80 N. C., 322; *Childs v. Wiseman*, 119 N. C., 497, 26 S. E., 126; *Cromartie v. Comrs., supra; Green v. Green*, 130 N. C., 578, 41 S. E., 784; *In re Croom*, 175 N. C., 455, 95 S. E., 903; *Nobles v. Roberson*, 212 N. C., 334, 193 S. E., 420; *Dyer v. Dyer*, 213 N. C., 634, 197 S. E., 157. The facts found by Judge Williams, based upon evidence, are not reviewable by this Court except for the purpose of passing on their sufficiency to warrant the judgment. *In re Parker*, 177 N. C., 463, 99 S. E., 345; *Green v. Green, supra.* Nor upon the writ of *habeas corpus* could Judge Stevens go behind the judgment under which the petitioner was held, the only question being whether the judgment was warranted by law and within the jurisdiction of the court. *In re Holley*, 154 N. C., 163, 69 S. E., 872; *S. v. Edwards*, 192 N. C., 321, 135 S. E., 37.

It is an established rule in this jurisdiction that one Superior Court judge has no power to overrule the judgment or reverse the findings of fact of another judge of the Superior Court previously made in the cause, except in certain well defined cases which have no application here. *Roulhac v. Brown*, 87 N. C., 1; *Henry v. Hilliard*, 120 N. C., 479, 27 S. E., 130; *Davis v. Land Bank*, 217 N. C., 145. No appeal lies from one Superior Court judge to another. *Wellons v. Lassiter*, 200 N. C., 474, 157 S. E., 434; *S. v. Lea*, 203 N. C., 316, 166 S. E., 292; *Dail v. Hawkins*, 211 N. C., 283, 189 S. E., 774. Nor may the writ of *habeas corpus* be used as a substitute for an appeal. McIntosh, 1101; *Ex parte McCown*, 139 N. C., 95, 51 S. E., 957; *S. v. Edwards, supra; S. v. Dunn*, 159 N. C., 470, 74 S. E., 1064.

There was no application for modification of the original judgment (C. S., 1667), nor evidence to support a finding of changed conditions. *Anderson v. Anderson*, 183 N. C., 139, 110 S. E., 863. Though Judge Stevens found that petitioner had no funds with which to comply with the original judgment (contrary to the findings of both Judge Frizzelle and Judge Williams), this was not sufficient to entitle petitioner to be discharged, as there was yet the unexplained refusal of petitioner to execute the deed of trust on his land in South Carolina as required by the order of Judge Frizzelle. *Childs v. Wiseman, supra; S. v. Hooker*, 183 N. C., 763, 111 S. E., 351; *S. v. Godwin*, 210 N. C., 447, 187 S. E., 560.

It also appears that the question of the legality of petitioner's restraint had been previously adjudged against him upon a prior writ of *habeas*

corpus issued at the instance of petitioner upon the same ground. C. S., 2206; C. S., 2209; *In re Brittain*, 93 N. C., 587.

For the reasons stated, the order of the judge below discharging the petitioner from custody must be

Reversed.

H. S. GIBBS, ADMINISTRATOR D. B. N. OF THE ESTATE OF G. G. TAYLOR, v. PAULINE TAYLOR SMITH ET AL., HEIRS AT LAW OF G. G. TAYLOR.

(Filed 30 October, 1940.)

Limitation of Actions § 10—No statute of limitations bars right and duty of personal representative to sell lands to make assets to pay debts of estate.

This proceeding to sell lands to make assets was instituted by the administrator *d. b. n.* appointed after the death of the original administratrix, the estate having been settled except for a judgment rendered against intestate prior to his death. The original administratrix died some ten years after her appointment without having sold the lands as directed by the court, and the administrator *d. b. n.* instituted this proceedings some seven months after the death of the administratrix. The heirs at law contested the petition on the ground that the judgment for the payment of which the proceeding was instituted was barred by the statute of limitations. *Held:* As long as the estate remains unsettled no statute of limitations bars the right and duty of the personal representative to sell lands to make assets to pay the debts of the estate. C. S., 74.

APPEAL by defendants from *Bone, J.*, at June Term, 1940, of CARTERET.

Hamilton & McNeill and C. R. Wheatley for plaintiff, appellee.
J. F. Duncan and R. E. Whitehurst for defendants, appellants.

SCHENCK, J. This is a petition filed in the cause by an administrator *d. b. n.* to sell real estate to make assets to pay a judgment taken and docketed against the intestate during his lifetime, and from judgment granting the petition the defendants, heirs at law, appealed, assigning error. It is stipulated that the sole question presented by the exception to the judgment below is as to the effect of the statute of limitations pleaded by the defendants. It is also stipulated that the facts found by the court below are binding upon the parties. The court found, *inter alia*, the following facts:

(1) The action in the Superior Court was brought by the administrator *d. b. n.* by petition to sell land to make assets, the estate of the

former original administratrix never having been finally administered. The petition was contested by the heirs at law of the decedent, the original owner of the land, on the theory that the judgment in favor of Gladys Taylor against the decedent G. G. Taylor, rendered at the June Term, 1925, of Carteret Superior Court, was barred by pertinent statutes of limitations.

(2) That "at the time of her qualification (speaking of the qualification of the original administratrix, widow of deceased owner of land), and at the time of the filing of her final account, she had personal knowledge of the rendition and docketing of the said judgment and of the demand made upon her said husband for payment during his lifetime, and that the same had not been paid; that shortly after her qualifying as administratrix the said claim was filed with, and demand for payment made upon her as administratrix . . ."

(3) That upon citation by the clerk of the Superior Court to the original administratrix, she filed "Report and Account" setting up "there appears in record judgment in *re* Gladys Taylor *v.* G. G. Taylor, recorded in Book 3, pages 502 and 536."

(4) Under date of 2 November, 1929, the clerk of the Superior Court of Carteret County entered an order to the effect that since no personal assets were available to pay the judgment of $1,500.00 in favor of Gladys Taylor, and only real estate was available, the administratrix was ordered to proceed under authority and direction of the court to provide assets for final settlement of the estate.

(5) Under date of 15 September, 1930, the original administratrix, widow of deceased, filed in the office of the clerk of the Superior Court a petition to sell lands for assets, wherein it was recited that "the only debts unpaid, except attorneys' fees (not stated in the account yet), are set up in the report of August 29, 1929, to wit: Judgment—$1,500.00, duly recorded"; on the same date summons was duly issued against all the heirs at law and the guardian *ad litem* previously appointed, but no service appears to have been had upon any of the parties and no sheriff's return of any kind appears on the summons.

(7) On 8 December, 1935, the original administratrix died without having provided assets through sale of lands as directed by the court in the several orders referred to and without submitting any further report or taking further action in the premises.

(8) None of the heirs at law or next of kin of the decedent, G. G. Taylor, having applied for letters of administration *d. b. n.*, H. S. Gibbs was, by the court, on 20 July, 1936, appointed administrator *d. b. n.*

(9) In September, 1936, H. S. Gibbs, administrator *d. b. n.*, filed petition in the Superior Court to sell the real property belonging to the estate of G. G. Taylor, deceased, setting out that no personal assets were

available with which to conclude the administration or to pay the judgment rendered in favor of Gladys Taylor, and summons was duly issued against the heirs at law of G. G. Taylor on 16 October, 1936.

(10) That all the heirs at law were before the court, that the judgment creditor, Gladys Taylor, was represented by her administrator, Roland Taylor, she having died during her minority, and that there were no personal assets belonging to the estate, and that the sole remaining assets consist of real estate, and that the judgment of $1,500.00 in favor of Gladys Taylor against G. G. Taylor remains unsatisfied.

This case is governed by the law enunciated in *Trust Co. v. McDearman,* 213 N. C., 141, where it is said: "As long as the estate remained unsettled, and real property of the decedent remained subject to sale, the administrator could unquestionably proceed by proper petition in the original proceeding to have the real property sold for the payment of outstanding debts and for the final settlement of the estate. No statute of limitations barred that right or the performance of that duty. C. S., 74; *Adams v. Howard,* 110 N. C., 15, 14 S. E., 648; *Sledge v. Elliott,* 116 N. C., 712, 21 S. E., 797; *Lee v. McKoy,* 118 N. C., 518, 24 S. E., 210; *Warden v. McKinnon,* 94 N. C., 378; *Frier v. Lowe,* 232 Ill., 622; *Bursen v. Goodspeed,* 60 Ill., 277; *Killough v. Hinton,* 54 Ark., 65. As was said in *Creech v. Wilder,* 212 N. C., 162: 'Until the debts have been paid, or the assets of the estate exhausted, the estate is not settled, and the duties and obligations of the administrator continue.' . . . The change in administrators did not affect the rights of the parties. It was said in *Smith v. Brown,* 99 N. C., 377, 6 S. E., 667: 'The administrator *de bonis non* but takes up the broken thread and carries out an interrupted and incomplete administration. The two constitute a single administration of the estate.'"

Affirmed.

IN RE JAMES E. COOK.

(Filed 30 October, 1940.)

1. Insane Persons § 4—In proceeding under C. S., 6184, et seq., jury trial upon question of sanity is not required.

A proceeding to commit a person to a State Hospital for the Insane under the provisions of C. S., ch. 103, Art. 3 (C. S., 6184, *et seq.*), is strictly neither a civil action nor a special proceeding, notwithstanding C. S., 391, and in such proceeding a jury trial is not contemplated, and the clerk of the Superior Court upon supporting evidence upon the hearing may enter an order of commitment, C. S., 2285, not being applicable in the absence of application for the appointment of a guardian to manage the property of respondent.

2. Same—

There is no provision for appeal to the Superior Court from the order of the clerk committing respondent to a State Hospital in a proceeding under C. S., 6184, *et seq.*, nor may respondent invoke the provisions of C. S., 2302. Whether *certiorari* is available is not presented.

APPEAL by respondent from *Phillips, J.*, at May Term, 1940, of IREDELL.

Inquisition of lunacy.

On 30 April, 1940, Mrs. Grace I. Cook, wife of James E. Cook, filed affidavit with the clerk of the Superior Court of Iredell County that she believed her husband to be insane and a fit subject for admission into the State Hospital for the Insane. Her affidavit was accompanied by a questionnaire signed by two physicians of Mooresville, N. C., such, in form, as is prescribed in C. S., 6196.

Acting upon this information, the clerk duly issued his precept or writ *de lunatico inquirendo,* and a hearing was had on 6 May. The respondent, through counsel, entered a special appearance and moved to dismiss the inquiry for want of proper notice and for proper service of process. The motion was overruled. Counsel then moved for a continuance. This was denied.

Upon hearing the evidence, the clerk found the respondent to be a fit person for commitment to the State Hospital at Morganton for care and treatment, and accordingly entered an order to this effect. On appeal to the Superior Court, the order of the clerk was approved and confirmed.

Respondent appeals, assigning as error (1) the failure to dismiss for want of sufficient evidence to support the clerk's order, and (2) the refusal to grant a hearing *de novo* on appeal to the Superior Court.

Burke & Burke for petitioner, appellee.

Hugh Mitchell and C. P. Barringer for respondent, appellant.

STACY, C. J. The record discloses a proceeding in accordance with the provisions of Art. 3, ch. 103, of the Consolidated Statutes, which, in strictness, seems to be neither a civil action nor a special proceeding, notwithstanding C. S., 391. McIntosh on Procedure, 96.

It is not contemplated that there should be a jury trial of the issue in a matter of this kind. A justice of the peace may take the evidence and act in case of emergency, when for any reason the clerk is not immediately available. C. S., 6195. No guardian is sought to be appointed to manage the property of the respondent, and hence the provisions of C. S., 2285, are not presently applicable.

Moreover, there is no provision for an appeal from the order of the clerk to the Superior Court in a proceeding under this article. Whether *certiorari* would be available is not presented. *In re Sylivant,* 212 N. C., 343, 193 S. E., 422. The respondent may not call to his aid the provisions of C. S., 2302. There was evidence to support the order of the clerk.

Affirmed.

LULA QUERY v. GATE CITY LIFE INSURANCE COMPANY.

(Filed 30 October, 1940.)

1. Appeal and Error § 37b—

A motion at trial term to set aside a verdict as contrary to the weight of the evidence is addressed to the discretion of the trial court, and its decision thereon is not subject to review on appeal.

2. Appeal and Error § 40a—

An exception to the signing of the judgment presents only the question of whether error appears on the face of the record, and the exception must fail when the judgment is supported by the record.

APPEAL by defendant from *Ervin, Special Judge,* at February Term, 1940, of CABARRUS.

Civil action to recover on contract of insurance.

It is admitted that on 28 February, 1938, the defendant duly issued a $500 policy of insurance on the life of Mary Dorton, payable to the plaintiff as beneficiary, and that it was in force at the date of the death of the insured, 19 February, 1939.

The defendant denied liability under the following provision in the policy: "No benefits will be paid for death resulting within two years from . . . intemperance."

The medical certificate of death gives "Alcoholic intoxication" as the cause of death, while the coroner's certificate recites "Acute alcoholism" as one of the "Contributory causes of importance not related to principal cause." C. S., 7111; *Rees v. Ins. Co.,* 216 N. C., 428, 5 S. E. (2d), 154.

The jury answered the issue in favor of the plaintiff, and from judgment thereon, the defendant appeals, assigning errors.

R. Furman James for plaintiff, appellee.

Hartsell & Hartsell for defendant, appellant.

STACY, C. J. It is asserted that the court erred in two respects, (1) in refusing to set aside the verdict as against the weight of the evidence, and (2) in signing the judgment.

First. Speaking to the action of the trial court in refusing to enter judgment on a verdict which the court had theretofore set aside, in its discretion, as contrary to the weight of the evidence, it was said in *Goodman v. Goodman,* 201 N. C., 808, 161 S. E., 686: "Rulings of the Superior Court on matters addressed to the court's discretion, *e.g.,* . . . determination of motion at trial term to set aside verdict as contrary to the weight of the evidence, . . . which involve no question of law or legal inference, are not subject to review on appeal." In addition to the authorities there cited and as further illustrative of the rule, see *Evans v. Ins. Co.,* 213 N. C., 539, 196 S. E., 814; *Bank v. Shuford,* 204 N. C., 796, 169 S. E., 226; *Hardison v. Jones,* 196 N. C., 712, 146 S. E., 804. *Cf. Likas v. Lackey,* 186 N. C., 398, 119 S. E., 763.

Second. The imputed error "in signing the judgment" presents only the question whether error appears on the face of the record. *In re Escoffery,* 216 N. C., 19, 3 S. E. (2d), 425; *Moreland v. Wamboldt,* 208 N. C., 35, 179 S. E., 9; *Dixon v. Osborne,* 201 N. C., 489, 160 S. E., 579; *Smith v. Mineral Co.,* 217 N. C., 346. Obviously the judgment is supported by the record. Hence, the exception must fail. *Ingram v. Mortgage Co.,* 208 N. C., 329, 180 S. E., 594; *Warren v. Bottling Co.,* 207 N. C., 313, 176 S. E., 571; *Wilson v. Charlotte,* 206 N. C., 856, 175 S. E., 306.

No error.

STATE v. RALPH SHU.

(Filed 30 October, 1940.)

Criminal Law § 52b: Burglary § 9—Circumstantial evidence tending to identify defendant as perpetrator of crime which does not exclude reasonable hypothesis of innocence is insufficient.

In this prosecution for breaking and entering, the evidence tended to show that defendant operated a filling station and customarily drove his father's car, that on the night in question the car was seen at the filling station at about two o'clock, that the offense was committed about two-thirty o'clock, entry being effected by breaking the glass of the door, that blood was found on the floor and on the safe, apparently from some person cut by the broken glass, that two unidentified persons came out of the cafe, got into the car and drove rapidly away, that the car was found at the house of defendant's father, where defendant lived, the next morning, that there was blood in the automobile and on an automobile spring found therein which was usable as a tire tool and which corresponded to marks on the door of the cafe entered, indicating that it had

been used in effecting entrance. There was no evidence that defendant was seen at all on the night of the crime. *Held:* While the evidence tends to show that the automobile was used by those who committed the offense, it raises no more than a suspicion or conjecture that defendant was present or actually participated in its commission and does not exclude a reasonable hypothesis of defendant's innocence, and defendant's motion for judgment as of nonsuit should have been allowed.

APPEAL by defendant from *Phillips, J.*, at May Term, 1940, of IREDELL. Reversed.

The defendant was charged with felonious breaking and entering a building known as Stonestreet's Cafe. At the conclusion of State's evidence defendant moved for judgment as of nonsuit. Motion denied. Defendant offered no evidence. Verdict: Guilty. From judgment imposing prison sentence, defendant appealed.

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

A. A. Tarlton for defendant.

DEVIN, J. The only question presented by this appeal is whether the State's evidence was of sufficient probative force to warrant its submission to the jury. An examination of the record leads us to the conclusion that defendant's motion for judgment as of nonsuit should have been allowed.

The State's evidence tended to show that on the night of 24 April, 1940, about 2:30 a.m., Stonestreet's Cafe in Mooresville was broken and entered, and goods stolen therefrom, entrance being effected by breaking the glass of the front door. A small safe was removed and thrown out nearby, unopened. There was blood on the floor of the cafe, apparently from some person cut by the broken glass, and there was blood on the safe. A witness testified that at 2:30 a.m. he saw in front of Stonestreet's Cafe an automobile, which, it was shown, had been registered in the name of Wade Shu (defendant's father), and customarily driven by defendant, and that he saw two unidentified men come out of the cafe and get in the automobile and drive rapidly away. It was also in evidence that defendant lived with his father, two and a half miles from the cafe; that he had a service station about a mile and a half away; that this same automobile was seen at defendant's service station at 2:00 the same night. The automobile was found next morning in the yard at the home of defendant's father. There was blood in the automobile, and also a piece of automobile spring, usable as a tire tool, which corresponded to marks on the door of the cafe where it had apparently been used in effecting entrance. There was no evidence that the defendant

was seen at all on the night in question. When arrested next day he was examined from head to foot and no cut or scratch was found upon him.

This evidence tends to show that the automobile of Wade Shu, which the defendant habitually drove, was used by those who committed the offense charged in the bill of indictment, but it fails to connect the defendant personally with the crime. The fact of the unexplained use of the car by two unidentified persons affords no more than a suspicion or conjecture that defendant was present or actively participated in the offense.

From *S. v. Goodson,* 107 N. C., 798, 12 S. E., 329, where the evidence was held insufficient to sustain a conviction for murder, we quote the apt language of *Chief Justice Merrimon:* "This full summary of the incriminating facts, taken in the strongest view of them adverse to the prisoner, excite suspicion in the just mind that he is guilty, but such view is far from excluding the rational conclusion that some other unknown person may be the guilty party." *S. v. Montague,* 195 N. C., 21, 141 S. E., 285; *S. v. Woodell,* 211 N. C., 635, 191 S. E., 334; *S. v. Madden,* 212 N. C., 56, 192 S. E., 859; *S. v. English,* 214 N. C., 564, 199 S. E., 920. "It all comes to this, that there must be legal evidence of the fact in issue and not merely such as raises a suspicion or conjecture in regard to it." *S. v. Prince,* 182 N. C., 788, 108 S. E., 330; *S. v. Patterson,* 78 N. C., 470; *S. v. Martin,* 191 N. C., 404, 132 S. E., 16; *S. v. Epps,* 214 N. C., 577, 200 S. E., 20; *S. v. Norggins,* 215 N. C., 220, 1 S. E. (2d), 533.

The motion for nonsuit should have been allowed, and the judgment is Reversed.

STATE OF NORTH CAROLINA Ex REL. J. ABNER BARKER, SOLICITOR OF THE SIXTH JUDICIAL DISTRICT, v. BILL HUMPHREY AND PRESTON HARPER.

(Filed 30 October, 1940.)

Nuisances § 11—

In this proceeding to abate a public nuisance, a third party, claiming title to certain of the personal property seized by the sheriff, made a motion in the cause seeking to restrain the sale. *Held:* Even conceding that the court has authority to find the facts upon the motion, the court has the power to submit the determinative issue to a jury and to restrain the sheriff from proceeding further under the execution pending the trial of the issue.

APPEAL by plaintiff from *Parker, J.,* at June Term, 1940, of LENOIR. Affirmed.

Motion in the cause, which is a civil action to abate a public nuisance.

At the original trial the place of business of the defendant was adjudged to be a public nuisance and it was ordered abated and it was further ordered "that all fixtures, furniture, musical instruments or other movable property which have been used by the defendant Bill Humphrey in conducting the said nuisance shall be removed," etc. Thereafter, under execution duly issued, the sheriff of Lenoir County seized all the movable property, including a stock of merchandise found on the premises, and proceeded to sell the same. Thereupon, the defendant Humphrey, contending that the sheriff had seized property not subject to the order of condemnation, instituted an action to restrain the sale. From an order dissolving the restraining order the plaintiff therein appealed. Upon hearing in this Court the judgment was reversed. Thereafter, the defendant Humphrey filed a motion in this cause in the court below for modification and clarification of the judgment entered.

Upon hearing the motion the court ordered that an issue be submitted to a jury as follows, to wit: "What movable property, if any, seized by the sheriff of Lenoir County and now in his possession, under execution in this case, was used in conducting said nuisance?" and, pending the submission of said issue, restrained the sheriff from proceeding further under the execution. Plaintiff excepted and appealed.

Thos. J. White for plaintiff, appellant.
Louis I. Rubin, and Sutton & Greene for defendant, appellee.

PER CURIAM. The proceedings in the court below on the motion filed is in substantial accord with the opinion of this Court rendered in *Humphrey v. Churchill, Sheriff,* 217 N. C., 530. Even if it be conceded that the trial judge had the power to find the facts on the motion filed he had the authority to call a jury to his aid and to submit the issue of fact to the jury for determination.

The judgment below is

Affirmed.

GEORGIA WHITEHURST v. E. ELLIS WILLIAMS AND W. W. CHADWICK.

(Filed 30 October, 1940.)

Automobiles §§ 11, 18a—

The evidence tended to show that plaintiff was riding in an automobile traveling in one direction and that as the automobile approached a truck and another car traveling in the opposite direction, the other car, in at-

tempting to pass the truck, drove on its left side of the highway directly in the path of the car in which plaintiff was riding when distant too short a space to enable the driver to avoid the collision. *Held:* Judgment as of nonsuit was properly entered as to the driver of the car in which plaintiff was riding.

APPEAL by plaintiff from *Bone, J.*, at June Term, 1940, of CARTERET.

E. W. Hill, W. F. Ward, and R. A. Nunn for plaintiff, appellant.
L. I. Moore for defendant, appellee.

PER CURIAM. This is an action to recover damages for personal injuries received in an automobile collision alleged to have been caused by the joint and concurring negligence of the defendants. The defendant Chadwick failed to answer and judgment by default and inquiry was awarded as to him. The court sustained a motion to dismiss the action and for a judgment as in case of nonsuit as to the defendant Williams lodged when the plaintiff had introduced her evidence and rested her case and renewed after all the evidence on both sides was in. C. S., 567. From judgment as in case of nonsuit as to the defendant Williams, the plaintiff appealed assigning as error the granting of the defendant's motion therefor.

The evidence, both of the plaintiff and of the defendant, tended to show that the plaintiff was riding as a guest in the automobile of the defendant Williams, which was being driven on a State Highway in a westerly direction, that the automobile of the defendant Chadwick was being driven on the same highway in an easterly direction, that the Chadwick automobile was directly behind a large truck going in the same direction, that the driver of the Chadwick automobile tried to pass the truck on its left side, and in so doing threw his automobile in the direct path of the Williams automobile in too short a distance to enable him to avoid the collision between the two automobiles, which caused the injuries to the plaintiff.

We are of the opinion, and so hold, that under the evidence in this case the judgment of nonsuit was properly entered.

Affirmed.

ZERO MURRAY v. ATLANTIC COAST LINE RAILROAD COMPANY, AND MRS. NORMAN ELLIOTT.

(Filed 7 November, 1940.)

1. Negligence § 1—Definition of actionable negligence.

In negligent injury actions, plaintiff must show: First, that defendant failed to exercise proper care in the performance of some legal duty which defendant owed plaintiff under the circumstances in which they were placed; and second, that such negligent breach of duty was the proximate cause of the injury, which is that cause that produces the result in continuous sequence and without which it would not have occurred, and one from which a man of ordinary prudence could have foreseen that such result was probable under all the facts as they existed.

2. Negligence § 17b—

Where the facts are admitted or established, it is for the court to determine as a matter of law whether negligence exists, and if negligence does exist, whether it was the proximate cause of the injury.

3. Negligence §§ 19a, 19d—

A nonsuit should be granted in negligent injury actions when all the evidence, taken in the light most favorable to plaintiff, fails to show any actionable negligence on the part of defendant, or when it clearly appears from the evidence that the injury was independently and proximately caused by the wrongful act, neglect or default of an outside agency or responsible third person.

4. Negligence § 7—

The intervening act of a third person will not insulate the primary negligence if such intervening act and the resulting injury could have been reasonably foreseen.

5. Master and Servant § 14a—Master must exercise ordinary care to provide reasonably safe place to work.

A master is not an insurer of the safety of his servant and his duty to provide a reasonably safe place to work and to furnish reasonably safe and suitable machinery, implements and appliances is not absolute, but he is required to exercise that degree of care which an ordinary prudent man would exercise under like circumstances for his own safety in furnishing himself a reasonably safe place to work and reasonably safe and suitable machinery, implements and appliances.

6. Automobiles § 8—

The operator of a motor vehicle, independent of statutory requirements, is required to exercise that degree of care which an ordinarily prudent person would exercise under similar circumstances.

7. Same—

In the exercise of due care, the operator of a motor vehicle is required to keep same under control and to keep a reasonably safe lookout so as to avoid collision with persons and vehicles on the highway.

8. Automobiles § 11—

It is negligence *per se* for the operator of a motor vehicle to overtake and pass another vehicle traveling in the same direction at a railroad grade crossing. Public Laws of 1937, ch. 407, sec. 112 (c).

9. Automobiles § 9b—

It is negligence *per se* for the operator of a motor vehicle to follow another vehicle on the highway more closely than is reasonable and prudent under the circumstances, with regard to the speed of the vehicles, the traffic, and the condition of the highway.

10. Highways § 19—

A laborer engaged in repairing a highway may assume that motorists will use reasonable care and caution commensurate with visible conditions, will keep their cars under reasonable control, and will obey and observe the rules of the road, and he is not required to anticipate negligence on their part in failing to do so.

11. Same: Master and Servant § 14a—

A railroad company, engaged in repairing a grade crossing, is under duty to the traveling public and under duty to its employees in providing a safe place to work, to use due care to provide and maintain suitable warnings to the traveling public of the presence of its employees at work on the highway crossing, but it has the right to assume that the traveling public will exercise ordinary care and observe the law of the road in the operation of motor vehicles, and the sufficiency of its warning signals must be determined in the light of this circumstance.

12. Same—Evidence held not to show negligence on part of master proximately causing injury to servant who was struck by car while repairing grade crossing.

The evidence tended to show that plaintiff, together with other employees of defendant railroad company, was engaged in repairing a grade crossing, that the railroad barricaded half the highway on either side of the crossing, on one side by a railroad dump car and on the other by a railroad motor car, that the employees were working between these barricades, that the barricades were on the same side of the highway and were about three and one-half feet high, and that a standard red warning flag was placed on each on the corner nearest the center of the highway, that the highway was straight and the barricades could be seen for half a mile, that the individual defendant traveling toward the crossing, although she saw the usual crossing warnings and knew she was approaching a crossing, speeded up her car to pass another car traveling in front of her in the same direction, that she thought the other car was slowing up and that she gained speed to pass it when it pulled to the left to go around the barricade, that she did not see the barricade until the other car turned to its left, and that then she was so close to the barricade that she had to hit either the barricade or the other car, that she hit the barricade and struck plaintiff, causing serious injury. *Held:* Defendant railroad company, in the discharge of its duty to exercise due care to maintain proper warnings of the presence of its employees working on the highway, was not required to anticipate negligence on the part of motorists, and the sufficiency of the warnings maintained by it must be determined in this light, but even conceding that there was some evidence of negligence on its part in this respect, the evidence discloses intervening negligence on

the part of the individual defendant which was the efficient, independent, and proximate cause of the injury, and thus insulated any negligence on the part of the railroad company, and its motion to nonsuit was properly allowed. *Held further:* The evidence discloses no reasonable ground for defendant railroad company's foreman to anticipate that the driver would not bring her car under control before colliding with the barricade until too late to warn plaintiff of the impending danger.

SEAWELL, J., dissenting.

CLARKSON, J., concurs in dissent.

APPEAL by plaintiff from *Burney, J.*, at May Term, 1940, of BEAUFORT.

Civil action to recover damages for personal injury allegedly resulting from actionable negligence.

Plaintiff was injured on morning of 1 February, 1939, by an automobile operated by defendant, Mrs. Norman Elliott, while he was at work as a member of a bridge force of defendant, Atlantic Coast Line Railroad Company, composed of seven others and the foreman, J. T. Daily, engaged in repairing or reflooring the grade crossing where the Plymouth-Tarboro Branch of said defendant's railroad intersects with the State Highway from Robersonville to Bethel in the State of North Carolina.

On the trial below evidence for plaintiff discloses that his injury occurred under factual conditions and circumstances substantially these: At the point of the accident the highway crosses the railroad "on something of an angle," estimated by one witness to be forty to forty-five degrees. The highway is surfaced with concrete sixteen or eighteen feet wide to within inches of the ends of the crossties on each side of the railroad. The intervening space is so floored with boards by the defendant Railroad Company as to provide a traveling surface even with the concrete surface of the highway. The bridge force of which plaintiff was a member was engaged in the usual way in repairing the flooring at the crossing in question. The foreman and members of the force, in going to work at 7:30 o'clock on said morning, rode on a railroad motor car to which was attached a railroad dump car on which their working tools and implements were transported. Upon arriving at the crossing the dump car was lifted from the railroad track by the plaintiff and others and placed as a barricade on the concrete portion of the highway on the right side of one traveling from Robersonville toward Bethel, at a distance stated by plaintiff to be ten steps, and by another forty-five feet, from and on the Robersonville side of the railroad track so as to leave one-half or more of the paved portion of the highway on the left side open to traffic. The motor car was lifted and similarly placed on the paved portion of the highway and on the same side thereof, but next to Bethel. The men of the force were working between these barriers and

on the same side. A standard red flag was placed on the dump car and on the motor car, respectively, on the corner nearest the center of the highway. On the dump car there were also "a lot of tools . . . some drift bolts . . . in a bucket, saws, hammers, axe, jack and spike hammer. The jacks were standing up about three feet high; the tools were laying down, and were not piled as much as a foot high." The dump car has four wheels and is about 5 feet long, about 3½ feet wide, and about 2 feet high. The floor of the motor is about same height as the dump car—and with the railing and seats it is about 3½ feet high.

In approaching the crossing from Robersonville: (1) There was a "perfectly open view" and the dump car could be seen for a half mile; (2) at a point variously estimated to be from 125 to 200 feet before reaching the railroad there was a regular railroad cross-arm sign and "there was a North Carolina Stop sign about 125 or 150 feet from the track." (3) The railroad could be seen on both sides of the highway.

The witness J. H. Womble testified: ". . . I passed there the morning of the collision about 9 o'clock. There were hands at work and other signs of operation going on at the place . . . there was a hand car sitting on the side of the road . . . not square but at about a forty to forty-five degree angle. There was a flag laying on the flat car two and a half to three feet from the ground. . . . We did not stop. We passed by riding. There were regular crossing signs, the railroad arm above and the State has got railroad crossing signs. . . . I was riding in a truck. . . . Some hundred and fifty or two hundred feet before you reach the railroad is a railroad warning sign, a cross-arm standing several feet up and the boards were about four feet long, I judge, and I guess the letters were six inches high." Q. "Anybody that had any kind of eyes could see that sign? A. Yes, sir." "After you pass the cross-arm you come to another sign the Highway Commission put up. As I recall it has got 'Railroad' and represents a stop at that time, . . . a regular highway sign showing that there was a railroad ahead of it. There was no vehicle ahead of me. Hanging over from the side of the dump car was a *stall* (staff) with a flag, standard red warning flag. I pulled slightly to my left and went around it in perfect safety. . . . I saw the dump car. . . ."

The defendant, Mrs. Norman Elliott, traveling in an automobile with her mother, sister and two children, on their way from Hertford to Rocky Mount, passed through Robersonville and up to the crossing on the side of the highway on which the dump car and motor car barricades were placed as above stated. As she approached the crossing she overtook another car traveling in the same direction and on the same side of the highway. She speeded up to pass that car and just at that moment it turned to the left to go around the barricade. It went over

the crossing in safety and without colliding with the barricade or injuring any of the workmen. But she kept straight on into the dump car and crossing where plaintiffs and others were at work, striking and seriously injuring plaintiff, who was facing toward Bethel, and also injuring the foreman, who was standing by, directing plaintiff in his work.

Mrs. Elliott, testifying as witness for plaintiff, states in part: "I was driving and there was another car just ahead of me and I didn't see the barricade until he pulled out to go around it and I was right on it, in fact I was just getting ready to pass the other car as he pulled out to the left. I couldn't say exactly how far I was from where plaintiff was working but it was only a short distance; I would say it wasn't much further than from here to the front bench. Before the other car pulled over in front of me he pulled out to the left and went around it and that left the road blocked on both sides. I had nowhere to go but to hit the obstruction or the other car. . . . I had just begun to pass him; I was speeding up the car to pass him as he pulled out and blocked that side and I had to keep straight ahead. He pulled out to his left and I hit the barricade. He had pulled out to go around it. The only warning of any kind that I saw was a faded-out red flag—it wasn't a brilliant new flag, and it was hanging from the end of the car down the center of the highway. . . . On both sides the land was open. . . . The reason I hadn't passed this other car before I saw the railroad sign and was staying back of him—I was going to pass him after I crossed the track. . . . There was a North Carolina Stop sign about a hundred and twenty-five or a hundred and fifty feet from the track. Q. Then after you passed the Stop sign there were railroad cross-arms? A. Yes, they were there—I don't recall that—I have seen them at a number of crossings of course. Q. You saw them at that crossing? A. I suppose I did. I knew I was approaching a railroad and that is why I was staying behind the other car. I was driving on my right-hand side of the highway and had come up behind a car some little distance and was going to pass him as soon as I crossed the railroad. I thought he slowed down and that I would go on and pass him. I didn't start pulling to the left, I started gaining speed to pass him and about time I put on speed he pulled to his left. Q. He slowed down and you put on speed? A. I suppose so. Q. When he pulled to the left he was about as far as from you to the first bench? A. I don't know as he was. I think I was a little nearer him. . . . I was coming almost to the back of his car. . . . Q. You put on speed? A. I think so. . . . I had not driven over fifty miles an hour all day. . . . It couldn't have been over fifty—I don't think at the time I was going that fast. . . . It couldn't have been over that I am sure, probably forty-five. Somewhere

between forty-five and fifty is my estimation. When he pulled out the sign was about as far from me as to the front bench and that is the first time I had seen it. Q. You ran into it and hit the dump car? A. I think so. . . . I do not know just how close I was following the car in front of me, it was pretty close, not over the distance of the length of the car back of him. I was staying back of him with the intention of passing him. . . . It was my intention to pass the other car ahead of me when they slowed down. I did not expect them to pull to the left. I realized I was approaching the railroad just a minute before he pulled out. I did not know that I was approaching a railroad until about a minute before he pulled out in front of me—in just a flash you might say—just as I put my foot on my accelerator to pass him he turned out."

At the close of plaintiff's evidence, the court sustained motion of defendant Railroad Company for judgment as in case of nonsuit. Thereupon plaintiff submitted to judgment of voluntary nonsuit as to defendant, Mrs. Norman Elliott, and appeals to Supreme Court and assigns error.

John A. Wilkinson and H. S. Ward for plaintiff, appellant.
Thomas W. Davis and Rodman & Rodman for defendant, appellee.

WINBORNE, J. When considered in the light most favorable to plaintiff, we are of opinion that as to the defendant Railroad Company the evidence is insufficient to require that an issue of negligence be submitted to the jury. *Harton v. Telephone Co.*, 146 N. C., 430, 59 S. E., 1022; *Lineberry v. R. R.*, 187 N. C., 786, 123 S. E., 1; *Thompson v. R. R.*, 195 N. C., 663, 143 S. E., 186; *Craver v. Cotton Mills*, 196 N. C., 330, 145 S. E., 570; *Boyd v. R. R.*, 200 N. C., 324, 156 S. E., 507; *Hinnant v. R. R.*, 202 N. C., 489, 163 S. E., 555; *Baker v. R. R.*, 205 N. C., 329, 171 S. E., 342; *Newell v. Darnell*, 209 N. C., 254, 183 S. E., 374; *Smith v. Sink*, 211 N. C., 725, 192 S. E., 108; *Powers v. Sternberg*, 213 N. C., 41, 195 S. E., 88; *Butner v. Spease*, 217 N. C., 82, 6 S. E. (2d), 808.

In an action for the recovery of damages for injuries allegedly resulting from 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; *Evans v. Con-*

struction Co., 194 N. C., 31, 138 S. E., 411; *Hurt v. Power Co.,* 194 N. C., 696, 140 S. E., 730; *Thompson v. R. R.,* 195 N. C., 663, 143 S. E., 186; *Templeton v. Kelley,* 215 N. C., 577, 2 S. E. (2d), 696; *Gold v. Kiker,* 216 N. C., 511, 5 S. E. (2d), 548.

The principle prevails in this State that what is negligence is a question of law, and, when the facts are admitted or established, the court must say whether it does or does not exist. "This rule extends and applies not only to the question of the negligent breach of duty, but also to the feature of proximate cause." *Hicks v. Mfg. Co.,* 138 N. C., 319, 50 S. E., 703; *Russell v. R. R.,* 118 N. C., 1098, 24 S. E., 512; *Lineberry v. R. R., supra; Clinard v. Electric Co.,* 192 N. C., 736, 136 S. E., 1.

In *Lineberry v. R. R., supra, Clarkson, J.,* said: "It is well settled that where the facts are all admitted, and only one inference may be drawn from them, the court will declare whether an act was the proximate cause of the injury or not." Again in *Russell v. R. R., supra,* it is stated that "Where the facts are undisputed and but a single inference can be drawn from them, it is the exclusive duty of the court to determine whether an injury has been caused by the negligence of one or the concurrent negligence of both of the parties."

Furthermore, it is proper in negligence cases to sustain a demurrer to the evidence and enter judgment as of nonsuit, "1. When all the evidence, taken in the light most favorable for the plaintiff, fails to show any actionable negligence on the part of the defendant . . . 2. When it clearly appears from the evidence that the injury complained of was independently and proximately produced by the wrongful act, neglect, or default of an outside agency or responsible third person . . ." *Smith v. Sink, supra,* and cases cited. See, also, *Boyd v. R. R., supra; Powers v. Sternberg, supra;* and *Butner v. Spease, supra.*

"Foreseeability is the test of whether the intervening act is such a new, independent and efficient cause as to insulate the original negligent act. That is to say, if the original wrongdoer could reasonably foresee the intervening act and resultant injury, then the sequence of events is not broken by a new and independent cause, and in such event the original wrongdoer remains liable." *Brogden, J.,* in *Hinnant v. R. R., supra; Harton v. Telephone Co., supra; Herman v. R. R.,* 197 N. C., 718, 150 S. E., 361; *Beach v. Patton,* 208 N. C., 134, 179 S. E., 446.

In the case in hand the relationship between defendant Railroad Company and the plaintiff is that of master and servant, or employer and employee.

What, then, is the standard of duty owed by the defendant Railroad Company to the plaintiff under the circumstances existing at the time and place of plaintiff's injury? While the books are full of writing on the subject, the accepted and well settled rule is that the master owes to

the servant the duty to exercise ordinary care to provide a reasonably safe place in which to do his work and reasonably safe machinery, implements and appliances with which to work. The master is not an insurer, however. Nor is it the absolute duty of the master to provide a reasonably safe place for the servant to work, or to furnish reasonably safe machinery, implements and appliances with which to work. He meets the requirements of the law, in the discharge of his duty, if he exercises or uses ordinary care to provide for the servant such a place, or to furnish such machinery, implements and appliances, that is, that degree of care which a man of ordinary prudence would exercise or use under like circumstances, having regard to his own safety, if he were providing for himself a place to work, or if he were furnishing for himself machinery, implements and appliances with which to work. This rule of conduct of "the ordinarily prudent man" measures accurately the duty of the master and fixes the limit of his responsibility to his servant. *Marks v. Cotton Mills,* 135 N. C., 287, 47 S. E., 432; *Nail v. Brown,* 150 N. C., 533, 64 S. E., 434; *Rogers v. Mfg. Co.,* 157 N. C., 484, 73 S. E., 227; *Ainsley v. Lumber Co.,* 165 N. C., 122, 81 S. E., 4; *Smith v. R. R.,* 182 N. C., 290, 109 S. E., 22; *Gaither v. Clement,* 183 N. C., 450, 111 S. E., 782; *Tritt v. Lumber Co.,* 183 N. C., 830, 111 S. E., 872; *Owen v. Lumber Co.,* 185 N. C., 612, 117 S. E., 705; *Murphy v. Lumber Co.,* 186 N. C., 746, 120 S. E., 342; *Shaw v. Handle Co.,* 188 N. C., 222, 124 S. E., 325; *Michaux v. Lassiter,* 188 N. C., 132, 123 S. E., 310; *Cable v. Lumber Co.,* 189 N. C., 840, 127 S. E., 927; *Riggs v. Mfg. Co.,* 190 N. C., 256, 129 S. E., 595; *Lindsey v. Lumber Co.,* 190 N. C., 844, 130 S. E., 713; *Hall v. Rhinehart,* 191 N. C., 685, 132 S. E., 787; *Craver v. Cotton Mills, supra,* and numerous other cases.

In *Murphy v. Lumber Co., supra,* it is said: "It is not the absolute duty of the master to provide for his servant a reasonably safe place to work and to furnish him reasonably safe appliances with which to execute the work assigned—such would practically render the master an insurer in every hazardous employment, but it is his duty to do these things in the exercise of ordinary care. *Owen v. Lumber Co., supra.* This limitation on the master's duty is not a mere play on words, nor a distinction without a difference, but it constitutes a substantial fact, or circumstance, affecting the rights of the parties. *Tritt v. Lumber Co., supra.*" See, also, *Cable v. Lumber Co., supra; Lindsey v. Lumber Co., supra.*

In *Riggs v. Mfg. Co., supra, Clarkson, J.,* said: "It will be noted that it is the duty of the master to 'use or exercise reasonable care' or 'use or exercise ordinary care' to provide the servant a reasonably safe and suitable place in which to do his work. The master is not an insurer." See, also, *Hall v. Rhinehart, supra.*

In *Gaither v. Clement, supra, Adams, J.*, speaking of the character and extent of the master's duty, quotes from Bailey's Law of Personal Injuries (2 ed.), sec. 162, as follows: "The underlying doctrine of the master's duty towards his servant, with respect to the character of the appliances furnished and place of work, as well as other duties that rest upon him, is that of the exercise of ordinary care. His duty does not extend to providing reasonably safe places and appliances, but only to the exercise of reasonable care to provide such, and in determining the liability of the master in the matter of their sufficiency, this rule should be the guiding test."

Under these principles, it was the duty of the defendant Railroad Company, in the present case, to exercise ordinary care to provide for plaintiff a reasonably safe place in which to work, that is, that degree of care which a man of ordinary prudence would exercise under like circumstances, having regard for his own safety, if he were providing for himself a place to work. A breach of such duty would be negligence. The plaintiff charges such breach of duty.

But if it be conceded that there is evidence of negligence on the part of the Railroad Company, we are of opinion and hold that such negligence is insulated by the negligence of the defendant, Mrs. Norman Elliott. In ascertaining the circumstances under which the parties in the present action were placed, it is pertinent to consider what duty, if any, the defendant, Mrs. Elliott, owed to the plaintiff. At the outset let it be noted that it is not contended that the defendant Railroad Company required the plaintiff to work at a place in which it had no right to assign him work. It appears to be taken for granted that the Railroad Company was obligated to keep the flooring of the grade crossing in question in repair so as to provide smooth passage over the railroad track for those traveling upon the highway—and that the plaintiff was lawfully upon the highway and in the performance of his duty as a member of the crew of workmen assigned to do such work.

It is a general rule of law, even in the absence of statutory requirements, that the operator of a motor vehicle must exercise ordinary care, that is, that degree of care which an ordinarily prudent person would exercise under similar circumstances. In the exercise of such duty it is incumbent upon the operator of a motor vehicle to keep same under control, and to keep a reasonably careful lookout, so as to avoid collision with persons and vehicles upon the highway. 5 Am. Jur. Automobiles, sections 165, 166, 167.

In this connection it is appropriate to note, among others, certain limitations the Legislature has placed upon the privilege accorded operators of motor vehicles of overtaking and passing as well as following vehicles proceeding in the same direction. The statute, Public Laws

1937, chapter 407, provides in section 112, subsection "c," that "the driver of a vehicle shall not overtake and pass any other vehicle proceeding in the same direction at any steam or electric railway grade crossing nor at any intersection of highway unless permitted to do so by a traffic or police officer"; and in section 114, subsection "a," that "the driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, with regard for the safety of others and due regard to the speed of such vehicles and the traffic upon and condition of the highway." A violation of either of these statutes would be negligence *per se,* and, if injury proximately results therefrom, it would be actionable. *Williams v. Woodward, ante,* 305.

Applying these principles to instant case, it was the duty of defendant, Mrs. Elliott, to exercise ordinary care in the operation of her automobile, having same under control and keeping a reasonably careful lookout, and to observe the law of the road so as to avoid collision with plaintiff in lawful pursuit of work upon the highway.

A laborer whose duties require him to be on the highway may assume that operators of motor vehicles will use reasonable care and caution commensurate with visible conditions, and that they will approach with their cars under reasonable control, and that they will observe and obey the rules of the road.

"One is not under a duty of anticipating negligence on the part of others, but in the absence of anything which gives or should give notice to the contrary, a person is entitled to assume, and to act on the assumption, that others will exercise ordinary care for their own safety." 45 C. J., 705; *Shirley v. Ayers,* 201 N. C., 51, 158 S. E., 840. See, also, *Cory v. Cory,* 205 N. C., 205, 170 S. E., 629; *Jones v. Bagwell,* 207 N. C., 378, 177 S. E., 170; *Hancock v. Wilson,* 211 N. C., 129, 189 S. E., 631; *Sebastian v. Motor Lines,* 213 N. C., 770, 197 S. E., 539; *Guthrie v. Gocking,* 214 N. C., 513, 199 S. E., 707. The principle has been applied in the courts of other states.

In *Nehring v. Chas. M. Monroe Stationary Co.* (1917), Mo. App., 191 S. W., 1054, where a street sweeper was struck by an automobile, the Court held that he was lawfully upon the roadway and in the performance of his duty, in plain view, and the driver of any vehicle was bound to take notice of him, and to exercise the care enjoined by law upon drivers of such vehicles not to injure him; and that he could rightly assume that this would be done.

In *Papic v. Freund* (1916), Mo. App., 181 S. W., 1161, where a truck ran over plaintiff's leg while he was repairing the floor of a subway entrance to a terminal station, a board having been placed across the side of the entrance to the subway, thus blocking entrance to the side on which he was working, the Court considered the case similar to those

involving, and that it should be disposed of in accordance with, the principle which attends the use of a public street, and said: "In such circumstances, the law devolves the duty upon the defendant's driver to anticipate the presence of persons engaged as plaintiff was, as within the range of reasonable probability, and to exercise due care in making observations to the end of rendering them reasonably secure from injury by being run upon." And further, speaking of plaintiff, the Court there said: "It is certain that the law does not require one so situated to anticipate negligence on the part of others."

In *Ferguson v. Reynolds* (1918), 52 Utah, 583, 176 Pac., 267, where a street sweeper was struck by an automobile, the Court, in upholding an instruction, said, "The instruction, in effect, merely informed the jury that the plaintiff had a right to assume that the driver of the automobile would exercise ordinary care in driving the car. This is certainly the law everywhere. No one using a public street, or being lawfully thereon, is required to assume otherwise than that all persons using the same will exercise ordinary care in doing so and will not expose anyone on the street to unnecessary danger."

In the present case, in accordance with the general rule, the plaintiff had the right to assume, and to act upon the assumption, that the defendant, Mrs. Elliott, and others traveling upon the highway in question, would, in the operation of their motor vehicles, exercise ordinary care, that care which an ordinarily prudent person would exercise under like circumstances, and that they would observe the statutory rules of the road.

Such was the situation of plaintiff with respect to those traveling upon the highway.

Now, then, it may be appropriately stated here that the defendant Railroad Company, while it was engaged in working on the crossing in the highway, also owed to its codefendant, Mrs. Elliott, and others traveling upon the highway, the duty to exercise ordinary care in providing and maintaining reasonable warnings and safeguards against conditions existent at the time and place in question. *Gold v. Kiker, supra.* Likewise, in performing its duty to the plaintiff to exercise reasonable care to provide for him a reasonably safe place in which to work, the defendant Railroad Company owed the duty to plaintiff to exercise ordinary care in providing and maintaining reasonable warning to travelers upon the highway of the presence of plaintiff at work on the crossing in the highway. In the performance of this duty and bearing upon the care to be exercised by it, the defendant Railroad Company, in accordance with the general rule, had the right to assume that its codefendant, Mrs. Elliott, and others using the highway, would exercise

ordinary care and observe the law of the road in the operation of their automobiles.

Applying these principles to the facts in the case in hand, did the Railroad Company exercise ordinary care, under the existing circumstances, in providing reasonable warnings of the fact that its servants were working in the highway? We think so. The highway was straight for half a mile. The railroad could be seen on both sides of the highway. There were both railroad crossing and highway stop signs to indicate the presence of the railroad crossing. In addition, the defendant Railroad Company barricaded the side of the highway with a railroad dump car on one side of the crossing and a railroad motor car on the other—on each of which a standard sized red flag was displayed. The dump car could be seen for a half mile by one approaching from Robersonville. It was in broad daylight.

In this situation, the rule of the ordinarily prudent man does not require Railroad Company, in the performance of its duty to exercise ordinary care to provide plaintiff a reasonably safe place in which to work, to anticipate that the driver of an oncoming car will not see that which is plainly before her—or drive with her car so out of control that she cannot stop when she does see the barricade, or person, in the line of her travel, when, ordinarily, she would have plenty of time and space within which to avoid the injury. Nor was it required in exercise of such care to anticipate that she would violate the provisions of the statute with regard to overtaking and passing and following motor vehicles traveling in the same direction. Public Laws 1937, chapter 407, sections 112 (c) and 114 (a).

The case of *Boyd v. R. R., supra,* enunciates and applies to a similar factual situation the principles of law involved in the case in hand, with respect to question of negligence as well as of proximate cause. There the intestate was employed by defendant as watchman or flagman at a street crossing. On the night in question, upon noting the approach of a freight train, he went upon the crossing with a red lantern, a regular flagman's lantern, and began "flagging the crossing." The operator of one automobile saw the intestate and as he began to stop his car, another car passed him, driving rapidly, and without stopping or attempting to stop, moved on to the crossing at a rapid rate of speed and struck the watchman and knocked him under the train which was then passing over the crossing. *Brogden, J.,* speaking for the Court in sustaining judgment of nonsuit, said: "The only theory upon which the plaintiff seeks to recover is that the lantern furnished by defendant to the flagman was not a proper instrumentality in that it was an oil lantern and did not throw out sufficient light. This theory, however, is not supported by the evidence. The only eye-witness to the killing saw the light and

stopped. The red lantern is a sign of danger. Its size and source of illumination are not material if, in fact, the instrumentality actually gave reasonable warning of danger. The function performed by the appliance is more important upon the facts and circumstances of this case than mere mechanical construction. Moreover, it is manifest that the unfortunate death of plaintiff's intestate was proximately caused and produced by the negligence and reckless act of a third party, and that such reckless and negligent act was in no wise related to, growing out of, or dependent upon any omission of duty upon the part of defendant. Even if there was evidence of negligence upon the part of defendant, the applicable principle of liability is stated in *Craver v. Cotton Mills, supra,* in these words: '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 primary negligence. This principle would apply if it should be granted that the defendant was negligent with respect to the light in the tower.' Indeed, the ruling of the trial judge was in strict accordance with the principles of law announced in *Lineberry v. R. R., supra; Thompson v. R. R., supra.*"

It is pertinent to compare that case with the one in hand. The principle of law is the same. While in the *Boyd case, supra,* the breach of duty charged against the defendant Railroad Company, the master, was the failure to exercise ordinary care to furnish to the plaintiff's intestate, the servant, a reasonably safe lantern with which to work, here the alleged breach of duty against the defendant Railroad Company, the master, is the failure to exercise ordinary care to provide for the servant a reasonably safe place in which to work, in that it failed to provide sufficient warning to travelers upon the highway that plaintiff was working on the crossing in the highway. The factual situations are strikingly similar. Here the warning sign placed upon the dump car is a red flag of standard size. It was in fact seen and observed and the warning heeded by others traveling the highway just as in the *Boyd case, supra.* It is not contended that the red flag and the dump car could not be seen. While Mrs. Elliott described the flag as "a faded out red flag" not "a brilliant new flag," it was nevertheless red, according to all the testimony. In truth, she says that she saw it and that "it was hanging from the end of the car down the center of the highway." The witness Womble saw the dump car, with the red flag on it, heeded the warning and passed by in safety and without injury to the plaintiff and others working on the crossing in the highway. The driver of the car which was being overtaken by defendant, Mrs. Elliott, saw the warning, slowed down, turned to the left and passed in safety and without injuring anyone. On the other hand, as stated in brief of counsel for plaintiff, "She (Mrs. Elliott) dashed by in her car with perhaps a reckless

degree of negligence and ran over the plaintiff from behind him." But it is contended that Mrs. Elliott was prevented by the car ahead from seeing the dump car and red flag and that she did not see it until the car ahead turned to the left, when it was too late for her to stop in time to have averted the accident. However, Mrs. Elliott, testifying for plaintiff, frankly admits that she saw the railroad crossing sign and the State Highway stop sign, and that she knew she was approaching the crossing, and that she was traveling at a speed of forty-five to fifty miles per hour. While she stated that she intended to pass the car ahead after she had crossed the railroad track, she said, "I thought he slowed down and that I would go on and pass him. . . . I started gaining speed to pass him and about time I put on speed he pulled to the left." In this situation, she said, "I had nowhere to go but to hit the obstruction or the other car." However, evidence points unerringly to the conclusion that this situation was created by her failure to exercise ordinary care and to observe the law of the road in the operation of her automobile, and that the injury to plaintiff was proximately caused thereby, independent of any act of omission of duty upon the part of the defendant Railroad Company. *Boyd v. R. R., supra.* See, also, *Powers v. Sternberg, supra,* and *Butner v. Spease, supra,* where the subject of intervening negligence has been recently treated and applied.

The evidence discloses no reasonable ground for the foreman of defendant, present at the crossing, to anticipate that defendant, Mrs. Elliott, would not bring her car under control before colliding with the barrier placed as warning, until too late to warn plaintiff of the impending danger.

It is argued in favor of plaintiff's position that two permissible inferences of negligence are deducible from the evidence, first, that the notice to travelers on the highway was inadequate, and, second, that the use of the dump car as a barrier created "a dangerous obstruction in the line of travel." Neither view is predicated on the rule of ordinary care as the correct standard of conduct. The one suggests less, the other more, than ordinary prevision or foresight in providing the plaintiff a reasonably safe place to work. They both miss the mark. The rights of travelers on the highway are not involved in the case. We hold that on the record as presented, the plaintiff has failed to make out a case of actionable negligence against the defendant.

The pertinent authorities sustain the judgment below.

Affirmed.

SEAWELL, J., dissenting: I regard the decision in this case as a very serious departure from recognized principles of the law of negligence, which may have an important and injurious effect on the safety of the

highway. In all three of its major aspects, I must dissent from the deciding opinion.

I do not agree that the court has been vested with the power to sum up the things done by the defendant in discharge of its duty to furnish plaintiff, its employee, a reasonably safe place in which to work, and to affirmatively declare them to be a sufficient compliance with the rule of the ordinarily prudent man, and that defendant, as a matter of law, was free from negligence. I do not agree with the Court in its holding that the defendant Railroad Company, in the performance of its duty to its employee, might rely on the observance by a stranger of the highway regulations, and that defendant was not required to anticipate negligence from that source. I do not agree that any negligence of which Mrs. Elliott may have been guilty was such an intervening or insulating cause as to exonerate the defendant, since it was competent for the jury to find, by applying common sense, that many of the precautions ordinarily prudent men take under similar circumstances, if they had been taken by the defendant, would have greatly reduced the chances that the accident would occur, and other precautions, just as ordinary, would, without doubt, have prevented it occurring at all.

All these things are matters for the jury.

I confess to an antipathy to legal truisms like "The physician is not an insurer of results," "The storekeeper is not an insurer of the safety of his customers," "The master is not an insurer of the safety of his servants," unless they have an obvious application, or the principle has been attacked. Otherwise, they usually indicate that we are gathering momentum for a skid. They should not obscure the approach to actual negligence or condone it where found. An insistence that defendant be held to the rule of the ordinarily prudent man in providing the plaintiff a safe place in which to work affords no occasion for it to cry out: "You make me an insurer." I find nothing approaching that theory urged upon us in the brief.

We are reminded that "what is negligence is a question of law for the court, when the facts are properly determined," and "the court has the power to say when it exists and when it does not exist." Under what circumstances is the court permitted to say when negligence exists and when it does not exist? Under all circumstances, one might infer, since there is no tie-in of this general statement with the facts of the instant case. To this all-inclusiveness, I demur. The court has no right to exercise such a power over the raw evidence, not a single fact of which it has any authority to "properly determine." But no matter what may be said as to the power of the court to declare what negligence is, or to say when it exists or does not exist upon the facts—all of the rules relating to the exercise of this extraordinary power, whether enlarging

or restricting, are focused in one inescapable proposition: The court cannot take a case away from the jury unless, taking the evidence in the light most favorable to the plaintiff, only a single inference can be drawn from it by reasonable minds, and that inference is unfavorable to the plaintiff. Approach it how we may, there is no compromise with this rule.

It is of the essence of the standard of duty we employ—the rule of the ordinarily prudent man—that these duties are relative, not absolute. Nevertheless, they are *positive;* they are duties which may not be ignored; they are duties of the master, not those of a stranger.

The section foreman met the demand to furnish the plaintiff a reasonably safe place in which to work in a simple and forthrightly manner—he rolled out a dump car in the lane of traffic a few yards from the crossing and rested his case on the public conscience, the statutes in such case made and provided, and the bureau of statistics. The majority of the Court seem to hold that reliance on the statutes, at least, must be accepted as a saving faith. I incline to the view that faith without works is dead. This obstruction was about two feet high, had hanging from it a dingy red flag, and was not attended in any way, nor was it protected by any warning sign down the road or by a flagman. No lookout was kept, nor was any person stationed in a position to warn motor vehicle drivers either of the barricade or the fact that persons were working in the road behind it. There was the usual crossing sign, but how either this or the knowledge that she was approaching a crossing could give any warning to Mrs. Elliott that there were men working in the highway at the crossing, or that a dangerous obstruction had been placed in the lane of travel less than ten yards from where the plaintiff was working, is not explained. Since the road was straight and Mrs. Elliott was traveling in her own right side lane, the obstruction was completely hidden until the car in front suddenly turned aside and left it visible, almost at the moment of the crash. This is not noted here for the purpose of exonerating Mrs. Elliott from negligence. It is set down so that it may be made clear under what circumstances the court permitted the defendant to appropriate her negligence as a part of its own defense against the innocent plaintiff, and as a complete exoneration of its own conduct. That phase of the case will be discussed later.

The plaintiff received no warning of the approach of the car from his foreman or any other person, although the evidence discloses that the foreman could have seen the Elliott car approaching the crossing at a speed now claimed by defendant to have been unlawful and dangerous.

Placing and maintaining this unattended and unwarned of obstruction in the highway was in itself negligence, unrelieved by any negli-

gence of the unfortunate driver. *Keiper v. Pacific Gas & Elec. Co.*, 36 Cal. App., 362, 172 P., 180; *Jackson v. City of Malden* (Mo. App.), 72 S. W. (2d), 850; *Paup v. American Telephone & Telegraph Co.*, 124 Neb., 550, 247 N. W., 411. It was also under the circumstances, whatever its purpose, a violation of the laws prohibiting obstructions in the highway.

If the defendant was negligent in this regard, as the jury might have found, the effect of the opinion is, in this connection at least, to exonerate the defendant company from liability, because, as contended, Mrs. Elliott ought to have discovered its negligence toward its own employee in time to have avoided the injury.

But I pass to the more important evidence of defendant's negligence found in the omission of precautions which the jury, if permitted, might have found to indicate a want of due care.

We cannot travel any distance on the highways without coming upon and observing practices and devices which prudent men employ as safety measures under like circumstances. They are matters of common knowledge and experience. At proper distances from the point of danger we find signs, "Danger, Men Working," "Slow," "Barricade 500 feet ahead," "One-Way Road"; and where the highway has been narrowed by barricade we find men posted to slow traffic and warn of the condition ahead in apt time. Neither the court nor the jury can say that any one or more of these specific things should have been done, but in the light of *what was done* and *what was omitted,* the jury has the right to consider these things as bearing upon the question whether the defendant Railroad Company had given its employee a safe place to work, and had properly protected him, according to the rule of the ordinarily prudent man, under the circumstances as they existed.

Here we must note that plaintiff testified, and this was uncontradicted, that the custom of the defendant had been to place a flagman on each side of the crossing when men were at work in the highway, or a warning sign down the road "Men Working." I copy this here, as it is omitted in the statement and main opinion:

"Q. You have been with them long enough to know what the custom and practice of the railroad has been with them for two years with respect to warnings down the railroad track?

"A. Yes, sir.

"Q. What kind of warnings have they been giving in the two years as a matter of custom?

"A. Sometimes have two boys flagging, one on each end with a flag, and another time we have had a sign down the road 'men working.'"

The opinion frankly holds that the defendant had the right to rely on traffic rules and regulations relating to the conduct of a third party,

or stranger; that the defendant in the performance of its duty to its own employee was not required to anticipate negligence on the part of such third person in nonobservance of these rules—thus ruling out the possibility of concurring negligence. This is, in fact, the basis of the decision. It was, and is, necessary to the conclusion reached by the Court.

Speaking of defendant's duty to plaintiff to exercise ordinary care in providing and maintaining reasonable warning to travelers upon the highway of the presence of plaintiff at work on the crossing in the highway, it is said in the opinion: "In the performance of this duty, and bearing upon the care to be exercised by it, the defendant Railroad Company, in accordance with the general rule, had the right to assume that its codefendant, Mrs. Elliott, and others using the highway, would exercise ordinary care and observe the law of the road in the operation of their automobiles."

And of the care required of defendant: "Nor was it required, in exercise of such care, to anticipate that she would violate the provisions of the statute with regard to overtaking and passing and following motor vehicles traveling in the same direction. Public Laws 1937, chapter 407, sections 112 (c) and 114 (a)." There is no mistaking the absolute character of the immunity thus extended.

I find many cases cited in the opinion which hold that an injured person was not required to anticipate negligence on the part of one whose negligence caused the injury—a sound principle which I am not disposed to dispute, although this Court has been somewhat frugal in its application. *Watkins v. Raleigh,* 214 N. C., 644, 200 S. E., 424. But there is a noticeable and, I think, necessary, break with authority when it is attempted to extend this principle to the employer, who is not on the receiving end, so as to transfer to him, as an immunity, a merely logical protection afforded to the victim of a negligent injury—for example, its own employee. I consider it both novel and dangerous. Taken at its face value, as promulgated by the Court, it wipes out the doctrine of concurring negligence.

I think it is safe to say that this theory is not accepted by textwriters on the subject, is opposed to current legal opinion throughout the country, and is at variance with the holding of this Court. *Groome v. Davis,* 215 N. C., 510, 2 S. E. (2d), 771; Shearman and Redfield on Negligence, 6th Ed., Vol. 1, section 38-A; Harper, Law of Torts, section 123; Restatement of the Law, Negligence, Torts, p. 1198; *Turner v. Page,* 186 Mass., 600, 72 N. E., 329; *Hinnant v. R. R.,* 202 N. C., 489, 163 S. E., 555.

The laws of the highway, and the regulations relating to its use which have the force of law, have put specific duties and burdens on those

operating motor vehicles wholly unknown to the common law, under which the rule of the prudent man was developed, and under which the principle (always much qualified and restricted) that one is not required to anticipate negligence on the part of another found its limited application. *Groome v. Davis, supra.* The right of any person to rely upon the strict observance of a highway regulation by another has always been relative, in no sense absolute, usually to be left with the jury upon the facts, even when we are considering the rights between the injured party and the tort-feasor. It has no application when we are dealing with the interrelated conduct of two or more persons charged with the violation of duty to a third person who is free from negligence, except on the question of reasonable foreseeability, which of itself is ordinarily a matter for the jury; always so when, as with any other fact, reasonable minds might draw different inferences. We are here dealing with the rights of such a third person. In so far as he is concerned, those things which according to common experience are likely to happen on the road when there is a lack of due care on the part of the person who owes him the duty, must be considered within the limits of foreseeability, regardless of how they arise. The failure to take them into account will bring the resulting injury into the category of natural and probable consequence.

Speaking to this identical question, it is said in *Queeney v. Willi,* 225 N. Y., 374, 122 N. E., 198: "Courts should not speak too confidently in determining as a matter of law what may be ignored by prudent people, whose duty it is to be reasonably careful for the personal safety of others." The prudent man must have regard for "occasional negligence, which is one of the incidents of human life." Restatement of the Law, *supra,* p. 1198.

In the same connection, and upon the question of foreseeability, we find in Shearman & Redfield on Negligence, 6th Ed., Vol. 1, section 38-A, the following:

"The familiar proposition that one is ordinarily under no obligation of duty to foresee or anticipate the negligence of another has no application. *It is merely a question of fact for the jury.*"

The effect of the main opinion is to make the test of the employer's duty to his employee to lie in the duty which the defendant was under to its codefendant and other travelers upon the highway, to give to them proper warning; regardless of the fact that negligence on their part might invade the too scanty provision—if the jury should so find—which it made for the safety of its own employee. The slightest contributing negligence on the part of such codefendant, or other third person, would relieve the defendant company from liability to her, and also would have the extraordinary effect of relieving the defendant from

liability to its employee, since defendant was not required to anticipate such negligence.

A person is not excused from liability for failure to perform a duty because another failed to perform his duty. *Wilmington Star Mining Co. v. Fulton,* 205 U. S., 60, 51 L. Ed., 708; *De Funiak Springs v. Perdue,* 69 Fla., 326, 68 So., 234; *Pastene v. Adams,* 49 Calif., 87, 90; *Newcomb v. New York Central Railway Co.,* 169 Mo., 409, 69 S. W., 348.

The duty of the employer to furnish the employee a safe place in which to work is always measured by the rule of ordinary prudence. When that place of work is ambulatory and becomes seated in the middle of a much-used highway, exposing the employee to new hazards, the mere existence of laws on the statute books supposed to prevent or curtail accidents, which as a matter of common experience are frequently violated, will not serve as a substitute for the performance of the duty demanded by ordinary care.

It is said that the road to Hell is paved with good intentions. In the same manner, figuratively speaking, there is scarcely a mile of highway in this State, or, indeed, in the whole country, that is not monumented with violations of traffic laws. Keeping the administration of law in reasonable nearness to the realities of life and social facts, we cannot blind ourselves to actual conditions we know exist—to the experience flooding in upon us every day through press, radio, and the medium of our own eyes. Neither can the defendant. Even the ostrich, believe it or not, no longer buries his head in the sand. In the exercise of ordinary care for the protection of its employee, it was the duty of the defendant to take into consideration those dangers which are within every-day experience, from whatever source they come, and make such provision against them as ordinary prudence requires. Modern legal opinion recognizes the right of the employee to rely upon the rule of the ordinarily prudent man as exemplified in the conduct of his employer, rather than to depend upon its vicarious interpretation by a third person or stranger to whose protection he has not committed himself.

"Consequences caused by defendant's conduct and an intervening independent but foreseeable negligent act of a third person are proximate, and the intervening negligence does not insulate the defendant's original fault. While some cases have been decided contrary to this rule on the theory that we need not anticipate the failure of others to conduct themselves in a lawful manner, the modern view is as stated. Experience assures us that men do in fact frequently act carelessly, and when such action is foreseeable as an intervening agency, it will not relieve the defendant from responsibility for his antecedent misconduct." Harper's Law of Torts, p. 265.

There can be no question here of insulated negligence. If omissions of duty existed of the character pointed out in the complaint and indicated in the evidence, bearing as they do preventively upon the very factors in the conduct of Mrs. Elliott, from which the Court supposed the injury to have come, this negligence cannot be separated out from the chain of causation, and its incidence upon the result. There is never any insulation of the primary negligence except when the intervening negligence of the responsible agency is the sole, or at least the *excluding,* proximate cause of the injury. Otherwise, the negligence is at least concurrent. *Hinnant v. Power Co.,* 187 N. C., 288, 121 S. E., 540; *Earwood v. R. R.,* 192 N. C., 27, 133 S. E., 180.

Where there is omission of a continuing duty, there is continuing negligence. We are not here dealing with a single act of negligence on the part of the defendant to which the conduct of the intervening agency is wholly unrelated. Too, the question is but one phase of proximate cause. Recurring to the omissions on the part of the defendant upon which the plaintiff predicates negligence, I feel sure that no candid mind can deny that some of them which the jury might consider (since they regard devices commonly employed) would have altogether prevented the negligence and conduct held to insulate defendant's negligence. So long as this primary negligence contributes to the final injury, it is not remote; it is proximate.

"The intermediate cause . . . must be self-operating and disconnected with the primary wrong." *Munsey v. Webb,* 37 App. (D. C.), 185, 189; *Ward v. Inter-Island Steam Nav. Co., Ltd.,* 22 Hawaii, 66, 72; citing Cyc.; 45 C. J., p. 926, section 489.

It is to the quality of the intervening act and not to the fact of its subsequence that we must look to determine its effectiveness in displacing the original negligence as proximate cause. Shearman & Redfield on Negligence, 6th Ed., Vol. 1, section 34. In no case where there is, as here, a logical interdependence, which the jury might find, between the original negligence and the intervening negligence, is the original *tort-feasor* relieved of liability. The negligence is concurrent.

Here we come again to the question of foreseeability and to the action of the court in taking the case away from the jury as a matter of law. This power does not seem to be predicated on the assumption that the negligence or behavior of Mrs. Elliott was unforeseeable because of its extraordinary character. Rather, the opinion seems to adhere to the original theory, prominent throughout the case, that the defendant was not bound to anticipate even ordinary negligence on the part of the traveler. As a matter of fact, there is nothing in the record to bear out any assumption that Mrs. Elliott's conduct or negligence was of such an extraordinary character as to be unforeseeable. In the opinion her

negligence is said to consist in the failure to observe certain sections of the law relating to overtaking and passing and following motor vehicles traveling in the same direction; that she drove at a speed of above 45 miles per hour; that she followed the leading car too closely; that she failed to see the barricade. What is so extraordinary in this catalogue of things which occur every day, sometimes with immunity, often with disaster?

Negligent she may have been, but in so far as this plaintiff is concerned, the disaster began when, as the jury might well have found, the defendant company omitted the duty of giving timely warning that men were working in the highway, and placed a dangerous obstruction in the line of travel, especially of such a character as to be concealed, as it was, by the motor vehicle traveling ahead of her in the same direction. This obstruction was a patent factor in the final smash and injury to plaintiff. It is a typical instance of concurring negligence, and the plaintiff may say, with Mercutio: "A plague o' both your houses!"

It is a mistake, therefore, to magnify Mrs. Elliott's negligence into "unforeseeability." With the same respect for the sincerity of my colleagues that I hope to have accorded my own, we have only succeeded in making a bad precedent if we attach such a label to the facts of this case as will make the negligence of Mrs. Elliott of such a character as to make it the sole proximate cause of the injury. Any distortion of the standards applied to the intervening negligent act will correspondingly affect the liability of the original tort-feasor for his own negligence, however great and however it may persist as a contributing cause.

It is not necessary that the exact manner and form of the injurious occurrence should be within the limit of foreseeability. Such prescience is not required either by law or reason as a condition of liability. It is enough if the person guilty of the negligent act or omission of duty could reasonably foresee that it was not improbable that something might occur not wholly unrelated in origin and kind to the actual happening. *Hudson v. R. R.*, 142 N. C., 198, 55 S. E., 103; *Drum v. Miller*, 135 N. C., 204, 47 S. E., 421; *White v. Sharp*, 219 Mass., 393, 107 N. E., 56; *Milwaukee, etc., R. Co. v. Kellogg*, 94 U. S., 469, 24 L. Ed., 256. "The liability of a person charged with negligence does not depend upon the question whether, with the exercise of reasonable prudence, he could or ought to have foreseen the very injury complained of; but he may be held liable for anything which, after the injury is complete, appears to have been a natural and probable consequence of his act." *Fishburn v. Burlington, etc., Railway*, 727 Iowa, 483, 103 N. W., 481; *Edginton v. Burlington, etc., Railway Co.*, 116 Iowa, 410, 90 N. W., 95, 57 L. R. A., 561; Shearman & Redfield on the Law of Negligence, Vol. 1, 6th Ed., section 34.

At any rate, the question whether a supervening negligent act, or an intervening act, in the technical sense, could have been foreseen reasonably, has been consistently dealt with by juries immemorially in determining proximate cause, and the question as presented in the case at bar involves considerations of fact and of fact inference with which the jury alone should be permitted to deal. *Balcum v. Johnson,* 177 N. C., 213, 98 S. E., 532; *Hinnant v. Power Co., supra; Earwood v. R. R., supra; Hinnant v. R. R., supra,* 493.

Divested of confusing technicalities, I think the case boils down to this: The jury might well have held, under the evidence, that the defendant omitted many precautions which common sense, experience of the road, and the practice of prudent men, indicate as reasonably necessary to the safety of men working in the avenue of travel; and yet it is held, as a matter of law, that the defendant is free from negligence. We have an occurrence which the evidence tends to show, and the jury might have found, was the natural and probable result of these omissions; and the Court holds, as a matter of law, it was not foreseeable. We have an injury which the jury might well have inferred would not, and could not, have happened except for the contributing negligence of the defendant—and the Court holds that the supposed negligence of Mrs. Elliott intervened and insulated it from liability.

In this dissent I am not departing from or varying anything this Court has heretofore said upon this subject. There is not a case cited in the main opinion relating to intervening negligence which I might not also cite in support of the views here presented. All of them, where motion to nonsuit was sustained, proceed on the principle (and that alone) that in those particular cases only a single inference as to foreseeability could be drawn. *Hinnant v. R. R., supra,* 493; *Harton v. Telephone Co.,* 141 N. C., 455, 54 S. E., 299; *Taylor v. Stewart,* 172 N. C., 203, 90 S. E., 134; *Lineberry v. R. R.,* 187 N. C., 786, 123 S. E., 1. That is not the case here. At every step in the process of taking this case from the jury, as a matter of law, the presence of undetermined fact, like Banquo's ghost, haunts the exercise of judicial power.

In the very complex situation disclosed by the facts, the inferences cannot be all one way and against plaintiff. *Cole v. Koonce,* 214 N. C., 188, 198 S. E., 637. The case should have been left to the jury, with appropriate instructions.

I am authorized to state that *Justice Clarkson* joins in this dissent.

STATE v. AZOR BROWN.

(Filed 7 November, 1940.)

1. Criminal Law § 52b—

Upon motion to nonsuit, all the evidence upon the whole record tending to sustain conviction is to be considered in the light most favorable to the State, and it is entitled to every reasonable intendment thereon and every reasonable inference therefrom, and only the evidence favorable to the State will be considered. C. S., 4643.

2. Criminal Law § 52a—

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

3. Homicide § 25—Evidence held sufficient for jury on question of defendant's guilt of murder in the first degree.

Defendant admitted he shot his wife, but testified that the shooting took place in a scuffle and was accidental. Defendant's employer, as a witness for defendant, testified that defendant told him he had seen his wife in bed with another man, that he went to the plant where he was employed as a night watchman, stayed there all night, and then went back to the house where his wife was, got into an argument with her and intentionally killed her. The State's evidence tended to show that defendant procured the pistol from his employer's plant, that the shots fired caused death, and that defendant stated to officers that he intentionally killed his wife because "she did not treat me right." *Held:* The evidence is plenary to be submitted to the jury as to murder in the first degree.

4. Homicide § 27a—

In this prosecution for homicide, the charge of the court in defining the degrees of homicide, and premeditation and deliberation, and in charging the law as to voluntary drunkenness, and in applying the law to the facts adduced by the evidence, *is held* complete and accurate and without prejudicial error.

5. Homicide § 4c—

The mental processes of premeditation and deliberation do not require any fixed length of time, it being sufficient if these mental processes occur prior to the killing, and the killing be executed in accordance with a previously formed, fixed intent to kill.

6. Criminal Law §§ 59, 81a—

A motion to set aside a verdict as being contrary to the weight of the evidence is addressed to the discretion of the trial court and its decision thereon is not reviewable.

7. Criminal Law § 56—

A motion in arrest of judgment is properly denied in the absence of a vital defect appearing upon the face of the record.

8. Criminal Law § 53b—

An inadvertence of the court in stating defendant's testimony was called to the court's attention, and the court thereupon stated that it

might be in error in regard thereto and that the jury should rely upon its recollection of the evidence upon the point. *Held:* The inadvertence was sufficiently corrected in the absence of a request by the defendant that the court review the evidence on that particular aspect.

9. Criminal Law § 78b—

Ordinarily, only exceptive assignments of error will be considered on appeal, but where defendant has been convicted of a capital felony the Supreme Court will nevertheless review defendant's contentions as to error in the trial and will review the record for error appearing upon its face.

APPEAL by defendant from *Phillips, J.*, and a jury, at July Term, 1940, of CATAWBA. No error.

The bill of indictment is as follows: "The jurors, for the State, upon their oath present, that Azor Brown, late of the County of Catawba, on the 26th day of May, in the year of our Lord one thousand nine hundred and forty, with force and arms, at and in the County aforesaid, unlawfully, willfully, and feloniously with premeditation and deliberation, and of his malice aforethought, did kill and murder one Bertha Brown, a human being, against the form of the Statute in such case made and provided and against the peace and dignity of the State. L. S. Spurling, Solicitor."

The defendant pleaded "Not guilty." The jury returned a verdict of guilty of the crime of murder in the first degree as charged in the bill of indictment. The court below pronounced judgment, in part, as follows: "Shall cause the body of the said Azor Brown to be placed in the gas chamber in the said State's Prison, and shall then and there cause the said Azor Brown to inhale and consume a sufficient quantity of lethal gas, or other gases provided for the purpose of execution in the State's Prison until he, the said Azor Brown shall be dead—and to you, the said Azor Brown, the Court prays that God may have mercy on your soul."

Facts: Witnesses for the State: Dr. H. E. Barnes testified, in part: "I examined Bertha Brown, wife of the prisoner at the bar, on the day it is alleged she was killed, on the 26th day of May of this year. She was on the floor in the room of the house where she is alleged to have been killed. She was lying on the floor on her left side. The examination revealed that she had a hole through the right thumb with powder burns; another one in the left cheek with powder burns, that went backward and upward in the skull; and a third one on the right of the neck just above the collar bone with powder burns, and ranged downward and out just under the shoulder blade. I found three different bullet wounds in the body. She was dead when I got there. I do have an opinion satisfactory to myself as to what caused her death, either one of the bullets through her chest or her cheek could have caused the death."

Beulah Brown: "I married Azor Brown's brother. . . . He (defendant) came in the back door. He said: 'Bertha, I want to speak to you about a minute.' . . . Yes he left his wife at my home when he went away that time, she did not go with him. He said, 'Bertha, I want to speak to you a minute,' and they went in the same room they went in the first time, and was laughing and talking and stayed in there a while—about a half hour—I heard a gun shoot and I was in the back room, and I ran in there and before I could get in there he had done shot three times; he shot about three times, he shot three times before I got in there and she was . . . I heard one shot and then two more. Yes, he was in the room where she was when I went in, he was standing there rubbing her leg. I said, 'What in the world have you done, you killed Sis,' and I backed out of the room and called Mr. Lentz. Azor ain't opened his mouth yet, he did not answer me, he went back out the back door. I can't say whether he had anything in his hand or not, I didn't look. It was getting along about ten or eleven o'clock when he shot her. From the time he left my house when they put the dog in the car until he came back was about something like thirty minutes. . . . (Cross-examination) The doctor came to see about Bertha. I don't know whether Azor was drunk or not, I wasn't close enough to him to tell. I don't think Bertha was drunk, I don't know whether she was drinking or not. I don't know what they done in that bedroom, but whatever they done, it was done quietly, there was no disturbance in that room."

Chief E. W. Lentz testified, in part: "I looked in the room where she was lying on the floor and saw that she was dead, blood was over the floor and I went out looking for Azor. I went out on the outside and I came back and as I came back he stepped out of the other room and went to the front door and Sheriff Barrs and Mr. Shuford met him there, and he had this gun on him, buckled around him; it is a forty-five caliber, and I opened it, it had three empty shells in the gun. When I went up to Azor I said, 'What in the world is wrong, was this an accident or did you do it on purpose?' He said, 'It wasn't no accident, I shot her myself.' He was drinking—drinking pretty heavy and I put him in the car. . . . He told me later why he shot her. I talked to him after he went to the jail. I could not get him up for several hours to talk, and he said that she had been spending the nights down there with Ernest Hewitt and that he was tired of it and was fussing with him that morning about it, and he went up to Mr. Cox' where he night-watched and got the gun and shot her. He said he called the taxi at John Brown's and went back up to Cox', a little over two miles, and came back. Said the pistol belonged to the Cox Manufacturing Company. He said he went up there for the pistol and came back. The

pistol had just been fired and there were three empty shells in the pistol. The woman was dead. (Cross-examination) I found Azor soon after I arrived at the house, I had not been there but three to five minutes before I found him. Yes, at that time he was pretty drunk, pretty full. He was still drunk that afternoon. Yes he said it was not an accident, he said 'I shot her.' "

T. W. Shuford: "I met this boy Azor Brown coming through the hall and he walked up to Sheriff Barrs and started out to the car and I noticed this gun hanging on his side and I took the gun off him and gave it to the Chief, and we took him and put him in the car and Chief said, 'Was this an accident?' and he said, 'It was not no accident,' and Chief went back in the house and Officer Barrs and myself sat in the car and asked Azor 'How come you to shoot that woman?' and he says, 'She did not treat me right, if I had it to do over I would do it again.' (Cross-examination) He did not tell me how the shooting took place other than what I have told. At the time I put Azor in the car he was drunk, in fact he was very drunk."

Defendant testified, in part: "I went up the hill and Sis was on the front porch by herself looking out at the street, and I called 'Sis, come here,' and she came to me and I said, 'Well, we got to walk home, I spent all my money riding around in the taxi.' She laughed and said, 'I got some money,' and I said, 'How about another drink if you got some money,' and she said 'Oh.' She went out the door and I went in the room and lay on the bed. She was gone three or four minutes, and she came back with a half pint of whiskey and we sat down and drunk the whiskey. I don't know where it come from, and we drunk the whiskey all but about that much (measured off about an inch of his finger in the opinion of the reporter). She said, 'I can't drink no more' and I said, 'I can't either,' and I said, 'Let's go home before we fall down.' The gun was in the holster, and I got the gun from between the mattress and laid the gun on the bed while I fastened the holster on me around my waist. I reached for the gun and she said, 'Let me carry the gun,' and I said, 'No, I ain't going to let you carry nothing.' She said, 'You don't carry nothing,' and I said, 'You ain't woman enough.' She grabbed hold of the gun and I said, 'Turn the gun aloose,' and she said, 'No, I am going to show you that I am woman enough to take it.' It fired and fired again, and she snatched the gun again, and she fell in my arms, and she held the gun, and she went down on her knee, and I laid her down on my knee, and I called her and I said, 'Sis,' and she said, 'I am shot.' . . . I put the gun in my pocket and went out the back door and came around to the front door. . . . They put me in the car and carried me to jail, and as for Mr. Lentz asking me about the shooting and me telling him I meant to do it, I don't remember

telling him that, but I am not disputing his word. . . . No, sir, I did not have any intention of shooting my wife. I had not had any thought in my mind that I would kill my wife that day. I am telling you the truth. I carried that pistol on my rounds as night watchman sometimes every hour. I would take a nap and when I would wake up and make my rounds I carried the gun with me, carried it in the holster when I was making my rounds. The gun belongs to Mr. Cox. . . . No, sir. I did not shoot her at all and she did not shoot herself. We were scuffling over it. No, sir, I didn't pull back three different times and fired. *We were scuffling, and my hand might have been on the trigger, it would have to been, but I did not know it was on the hammer each time before it fired.*" He denied what the officers said he told them about the shooting. "No sir, I did not go back to get the pistol. Yes I know Ernest. We were good friends, we never had any trouble over my wife and him. She told me it was his liquor. . . . Yes sir, I tell this jury that the pistol actually went off three different times and accidentally shot her and all the shots hit her, none struck me."

William Cox, a witness for defendant, testified that defendant worked for him about 12 to 15 years, that his reputation was good. On cross-examination he said: "Yes, I permitted him to carry a pistol there at night, he just had it there on the job. I permitted him to keep this pistol there with the understanding that he was never to take it off the place. . . . About eleven o'clock I went to the plant Sunday morning and while I was in the plant I heard a car drive up, and I looked out and saw a Yellow Taxi out there, and I did a little something and went out to the front and started to go home and Brown came out of the basement and got in the car. . . . I saw him Sunday night in the jail, and I asked him how it happened and he told me how it happened. He said he came down there Saturday evening and fooled around there until about dark, I believe he said, and got a taxi and tried to get his wife to come back with him, and she would not come, and he said, 'I got in the taxi and went to the top of the hill to make her think I had gone to the plant, and *I circled around back and saw her in bed with this man Hewitt,' and then he said 'I came up to the plant and stayed up there all night and went back down there Sunday morning about eight o'clock and we got in an argument and I killed her and I meant to kill her.'* Now whether he knew what he was talking about I don't know, but I don't think he was so drunk that he did not know what he was saying. I think he was sober enough that he knew what he was saying when he talked to me and Chief Lentz there. He said he came up and got the gun on Sunday morning. He did not say anything about taking the gun with him and hiding it in the bed. He told me he came up and got the gun and came back and shot his wife. The

gun was kept in the room in the basement at the plant, that is the room I saw him coming out of when he did not speak. The same evening he told me that he went up there and got the gun that morning."

The defendant made several contentions and appealed to the Supreme Court. These and other necessary facts will be set forth in the opinion.

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

G. A. Warlick, Jr., for defendant.

CLARKSON, J. The defendant's case on appeal is defective in several respects in not complying with the Rules of Practice in the Supreme Court, secs. 19 (3), 21, 27½, 28—192 N. C., 837. This being a criminal case with penalty of death, we will consider defendant's contentions.

At the close of the State's evidence and at the close of all the evidence, N. C. Code of 1939 (Michie), sec. 4643, the defendant made a motion in the court below for judgment of nonsuit. The motions were denied and in this we can see no error.

We repeat again, the well settled law in this jurisdiction: In *S. v. Lawrence,* 196 N. C., 562 (564), it is written: "On motion to dismiss or judgment of nonsuit, the evidence is to be taken in the light most favorable to the State, and it is entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom. 'An exception to a motion to dismiss in a criminal action taken after the close of the State's evidence, and renewed by defendant after the introduction of his own evidence does not confine the appeal to the State's evidence alone, and a conviction will be sustained under the second exception if there is any evidence on the whole record of the defendant's guilt.' *S. v. Earp, ante,* at p. 166. See *S. v. Carlson,* 171 N. C., 818; *S. v. Sigmon,* 190 N. C., 684. The evidence favorable to the State is considered—defendant's evidence is discarded. *S. v. Utley,* 126 N. C., 997. The competency, admissibility and sufficiency of evidence is for the court to determine; the weight, effect and credibility is for the jury. *S. v. Utley, supra; S. v. Blackwelder,* 182 N. C., 899." *S. v. Coal Co.,* 210 N. C., 742 (746).

Defendant admitted that he shot his wife, Bertha Brown, three times, either of which wounds could produce death. He claimed on the trial, when a witness, that the shooting took place in a scuffle with his wife and he had no intention of shooting her. On cross-examination, he stated, "We were scuffling, and my hand might have been on the trigger, it would have to have been, but I did not know it was on the hammer each time before it fired." He told Chief Lentz, "It wasn't no accident, I shot her myself." He told Shuford (who asked him), "How come you

to shoot that woman?" "She did not treat me right, if I had to do it over I would do it again." William Cox, his employer, testified that defendant told him, "I circled around back and saw her in bed with this man Hewitt," and then he said, "I came up to the plant and stayed up there all night and went back down there Sunday morning about eight o'clock and we got in the argument and I killed her and I meant to kill her." The evidence is plenary to be submitted to the jury as to murder in the first degree.

The court below, on this aspect, under the allegations in the bill of indictment, charged: "There are three degrees of unlawful homicide: Murder in the first degree, murder in the second degree, and manslaughter. Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. Premeditation means thought beforehand, for some length of time, however short. Deliberation means that the act is done in a cool state of the blood, it does not mean brooding over it or reflecting upon it for a week, or a day, or an hour, or any other appreciable length of time, but it means an intention to kill executed by the defendant in a cool state of the blood, in furtherance of a fixed design to gratify a feeling of revenge, or to accomplish some unlawful purpose, and not under the influence or a violent passion suddenly aroused by some lawful or just cause, or legal provocation. When we say a killing must be accompanied by premeditation and deliberation it is meant there must be a fixed purpose to kill which preceded the act of killing for some length of time, however short, although the manner and length of time in which the purpose is formed is not very material. If the purpose to kill was formed simultaneously with the killing, then there is no premeditation and deliberation and the homicide would not be murder in the first degree." *S. v. Burney,* 215 N. C., 598 (614).

In *S. v. Steele,* 190 N. C., 506 (511-12), *Varser, J.,* for the Court, said: "The requirement, in first degree murder, in order to constitute 'deliberation and premeditation' does not require any fixed time beforehand. These mental processes must be prior to the killing, not simultaneous, 'but a moment of thought may be sufficient to form a fixed design to kill,' " citing authorities. *S. v. Hammonds,* 216 N. C., 67 (75); *S. v. Hudson, ante,* 219 (232-3).

The court below charged accurately the law of murder in the second degree, manslaughter and the phase of not guilty as to accidental killing; defined reasonable doubt and placed the burden of proof on the State in regard to first degree murder; charged the law of voluntary drunkenness. The charge covered every aspect of the law applicable to the facts. It was complete and accurate and gave the contentions fairly and impartially for both sides.

The defendant contends that the court below should have set aside the verdict as being contrary to the weight of the evidence. This court has consistently held that this is a discretionary matter and not reviewable on appeal. *S. v. Caper,* 215 N. C., 670 (671), and cases cited.

The court below, in the exercise of its discretion, denied the defendant's motion to set aside the verdict and its decision on this matter is final.

The defendant made a motion in arrest of judgment. The defendant makes only a formal motion and does not undertake in the record to specify on what particular alleged defect his motion is based. A motion in arrest of judgment must be based on some matter which appears, or for the omission of some matter which ought to appear, on the face of the record. *S. v. McKnight,* 196 N. C., 259 (260), and cases cited.

There is no defect appearing on the face of the record such as would entitle the defendant to have the judgment arrested and his motion was, therefore, properly denied. *S. v. Linney,* 212 N. C., 739 (741), and cases cited.

The inadvertence of the court below in quoting the evidence was called to the attention of the court by defendant and we think was sufficiently corrected.

The court charged the jury: "Gentlemen of the jury, the court may be in error as to that; you will remember the evidence as to that, you will not take the court's recollection. Counsel may be correct in that, the court is not certain as to that, but you will rely upon your recollection as to what the evidence was as to that." If defendant wanted exactly what was said, he could have requested the court to review the evidence on that aspect. If error, it was harmless and not prejudicial.

We have considered the exceptions, although not in compliance with the Rules of this Court. There is no exception or assignment of error to the charge or the evidence.

The whole matter of appeals to this Court, as a guide to the legal profession, is set forth in *Rawls v. Lupton,* 193 N. C., 428. This case has been repeatedly approved. In *S. v. Parnell,* 214 N. C., 467 (468), we find: "Five assignments of error, all directed to the charge, are attached to the 'case on appeal'—considering it now as 'deemed approved' —but these assignments are based on no exceptions. *Rawls v. Lupton,* 193 N. C., 428, 137 S. E., 175. Only exceptive assignments of error are availing on appeal. *In re Beard,* 202 N. C., 661, 163 S. E., 748; *S. v. Freeze,* 170 N. C., 710, 86 S. E., 1000."

In the case of *S. v. Bittings,* 206 N. C., 798 (800), is the following: "If this were not a capital case it would be necessary to affirm the judgment on motion of the Attorney-General for failure properly to present exceptive assignments of error. *S. v. Freeze,* 170 N. C., 710, 86 S. E.,

1000; *S. v. Kelly, ante,* 660. . . . No exceptions were taken to the admission or exclusion of evidence and none properly to the charge. There was a formal motion to set aside the verdict and one in arrest of judgment, to which exceptions were entered, but otherwise the assignments of error are without exceptions to support them."

In this case there are only four formal exceptions contained in the record and no assignments of error. We have examined the record carefully. We think the case was tried in accordance with the law in this jurisdiction. The charge was able and covered every aspect of law applicable to the facts.

On the whole record we can find no prejudicial error.

No error.

PAULINE BOWEN, BY HER NEXT FRIEND, FANNIE BOWEN, v. MARVIN MEWBORN AND GEORGE MEWBORN.

(Filed 7 November, 1940.)

1. Parent and Child § 7—

The mere fact of the relationship does not render the father liable for the torts of his child, and the parent may be held liable only if the child commits the tort while acting as his agent or servant, or if the parent procures, commands, advises, instigates or encourages the commission of the tort, or is guilty of negligence in permitting the child to have access to some dangerous instrumentality.

2. Same—Facts alleged held insufficient to support liability of parent for assault committed by child.

Plaintiff instituted this action to recover for alleged willful, malicious, wrongful, and lustful assault made upon her by a minor. The complaint alleged that the minor defendant was using his father's car with the knowledge and consent of his father, that he invited plaintiff to take a pleasure trip therein with him, parked the car and made a willful, malicious and lustful assault upon plaintiff, and that the father had theretofore advised the minor to indulge in illicit sexual intercourse, and that the minor committed the tort because of the counsel and advice of the father. *Held:* The complaint nowhere alleges that the father counseled the son to commit an assault upon anyone, and fails to relate the counsel and advice of the father to the particular tort complained of, nor could the father have reasonably foreseen that his son would commit the assault as a natural and probable consequence of the advice, and the father's demurrer to the complaint should have been sustained.

STACY, C. J., concurring.

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

APPEAL by defendant George Mewborn from *Bone, J.,* at March Term, 1940, of PITT. Reversed.

This is an action brought by plaintiff against defendants to recover $20,000 against defendants for "willful, malicious, wrongful, lustful attack and assault upon her."

The material parts of the complaint, for the decision of this case, alleges:

"6. That on the night of the ..... day of May, 1939, the defendant, Marvin Mewborn, then being under the age of sixteen years, came to the home occupied by plaintiff and procured plaintiff to accompany him on a pleasure trip to Greenville in an automobile owned by the defendant, George Mewborn, and being driven and operated on the night in question by Marvin Mewborn with the knowledge and consent of his father.

"7. That the defendant Marvin Mewborn, after leaving another couple at the Greenville Municipal Stadium, drove away with the plaintiff ostensibly to visit a picture show in the City of Greenville; but said defendant turned away from Greenville and drove the automobile along a country road and thereupon began to make improper advances upon the said plaintiff; said improper advances being made both by uttering vile, lewd, indecent and lascivious words to and about the plaintiff and also by placing his hands upon the person of the plaintiff in a rude, indecent, and corrupt manner and both by word and deed the defendant Marvin Mewborn thereupon violently and maliciously insisted and demanded that he have illegal, unlawful, and immoral relations, to wit: sexual intercourse, with the plaintiff; whereupon the plaintiff resisted with all the means at her command the unwelcome, improper and indecent advances of the said defendant.

"8. That the plaintiff thereupon resisted the advances of the defendant with all the means at her command and begged him to cease and desist from such actions and pleaded with him to turn the automobile back in the direction of Greenville and proceed to the moving picture show as he had promised and said that he would do; that the plaintiff tried to reason with the defendant Marvin Mewborn and prevail upon him to stop his improper, indecent, outrageous advances; but the defendant Marvin Mewborn continued his wrongful, violent and malicious conduct toward the plaintiff, notwithstanding plaintiff's protests and reproofs, stating that he intended to have sexual intercourse with her and then and there repeatedly stating that he was acting in such manner because all men had 'to have some of it,' and that his father, the defendant George Mewborn, had told him to do such things; that Marvin Mewborn then and there to the great hurt, alarm, humiliation and embarrassment of this plaintiff forcibly assaulted her and attempted to rape and ravish her.

"9. That, as plaintiff is advised and believes, prior to the night of May ....., 1939, on numerous occasions and in the presence of divers

persons, the defendant George Mewborn had advised and counseled the defendant Marvin Mewborn to indulge in illicit sexual intercourse, and because of the aforesaid counsel, advice and conduct, procured, instigated and influenced his said son to maliciously assault and abuse the plaintiff in the manner aforesaid. . . .

"12. That, at the August, 1939, Term of Pitt Superior Court, in the case of 'State of North Carolina *v.* Marvin Mewborn,' wherein Marvin Mewborn was charged with the crime of committing an assault upon a female, to wit, on Pauline Bowen, the defendant there being one of the defendants here, entered a plea of guilty as charged and went upon the witness stand in his own behalf and in his testimony made a full and complete confession to the crime as charged; and then and there admitted all the matters and things as related above. . . .

"15. That, the willful, malicious, wrongful, lustful attack and assault made upon her person as aforesaid set forth by the defendant Marvin Mewborn proximately resulted in the damages and injuries above described and that the wrongful act and conduct of the said defendant, with its consequences, as fully above related, was proximately caused and instigated and influenced and produced by the words and counsel and assistance of the defendant, George Mewborn, as above related—all to the great hurt and damage of this plaintiff."

The defendant George Mewborn demurred to the complaint on the following ground:

"(A) The action is based upon an alleged assault upon the plaintiff, Pauline Bowen, by one Marvin Mewborn who the plaintiff alleges was under the age of sixteen years on the day of the alleged assault, and the plaintiff attempts to join the demurring defendant only so far as it may connect him with sections 6 and 9 of the complaint.

"(B) Section 6 alleges that the automobile in which the defendant Marvin Mewborn was riding was owned by this demurring defendant and at the time and on the night in question was being operated with the knowledge and consent of the said George Mewborn.

"(C) Section 9 is as follows: 'That as the plaintiff is advised and believes, prior to the night of May ....., 1939, on numerous occasions and in the presence of divers persons, the defendant George Mewborn had advised and counseled the defendant Marvin Mewborn to indulge in illicit sexual intercourse, and because of the aforesaid counsel, advice and conduct, procured, instigated and influenced his said son to maliciously assault and abuse the plaintiff in the manner aforesaid.'"

The court below overruled the demurrer. The defendant George Mewborn excepted, assigned error and appealed to the Supreme Court.

Sam B. Underwood, Jr., and Albion Dunn for plaintiff.

Walter G. Sheppard and J. B. James for defendant George Mewborn.

CLARKSON, J. In Cooley on Torts (4th Ed.), Vol. 1, pp. 197-8, it is said: "A father is not liable, merely because of the relation, for the torts of his child, whether the same are negligent or willful. He is liable only on the grounds that he would be liable for the wrong of any other person, as that he directed or ratified the act, or took the benefit of it, or that the child was at the time acting as his servant. There is no necessary presumption that the child is acting as a servant of the father, but it will be so presumed when the child is living at home and using his father's team with which he does the wrong. A parent may, however, be held liable for his own negligence in permitting his child to have access to some instrumentality potent to mischief."

In 20 R. C. L. (Parent and Child), p. 627, sec. 33, in part, says: "It has been shown in a previous article that infants, even those of tender age, are liable in a civil action for torts committed by them. Conversely, parents are not liable for torts committed by their minor children without participation in the fault by the parent." Madden on Domestic Relations (Handbook Series), pp. 398-9; The Law of the Domestic Relations (2nd Ed.), Eversley, p. 564; Burdick's Law of Torts (4th Ed.), sec. 121, p. 159; *Brittingham v. Stadiem,* 151 N. C., 299 (300); *Ballinger v. Rader,* 153 N. C., 488; *Linville v. Nissen,* 162 N. C., 95; *Taylor v. Stewart,* 172 N. C., 203.

In *Linville v. Nissen, supra,* at p. 99, we find: "A parent is not liable for the torts of his minor son. 'The relationship does not alone make a father answerable for the wrongful acts of his minor child. There must be something besides relationship to connect him with such acts before he becomes liable. It must be shown that he has approved such acts or that the child was his servant or agent.' *Johnson v. Glidden,* 74 Am. St., 795, which cites a large number of cases."

In *Watts v. Lefler,* 190 N. C., 722 (725-6), is the following: "There is a conflict of decisions, but we think the greater weight sustains the position in the above cited authorities. 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. With full knowledge of an instrumentality of this kind, he turns over the machine to his family for 'family use.' When he does this, under the 'family doctrine,' which applies in this State, he is held responsible for the negligent operation of the machine he has entrusted to the members of his family." *Matthews v. Cheatham,* 210 N. C., 592 (597-8).

The fact that the son, Marvin Mewborn, was driving his father's car was no evidence that this was the instrumentality of plaintiff's wrong. The injury and assault was caused by the lust and lasciviousness of defendant Marvin Mewborn. The charge against defendant George Mew-

born is that he had given the plaintiff lustful and lascivious advice. "The defendant George Mewborn had advised and counseled the defendant Marvin Mewborn to indulge in illicit sexual intercourse."

In *S. v. Davenport,* 156 N. C., 596 (614), is the following: "A person aids and abets when he has 'that kind of connection with the commission of a crime which, at common law, rendered the person guilty as a principal in the second degree. It consisted in being present at the time and place, and in doing some act to render aid to the actual perpetrator of the crime, though without taking a direct share in its commission.' Black's Dict., p. 56, citing Blackstone, 34. An abettor is one who gives 'aid and comfort,' or who either commands, advises, instigates, or encourages another to commit a crime—a person who, by being present, by words or conduct, assists or incites another to commit the criminal act (Black's Dict., p. 6); or one 'who so far participates in the commission of the offense as to be present for the purpose of assisting, if necessary; and in such case he is liable as a principal,' citing a wealth of authorities. *S. v. Epps,* 213 N. C., 709 (713-14).

It is stated in *Drum v. Miller,* 135 N. C., 204 (214-15): "In the case of conduct merely negligent, the question of negligence itself will depend upon the further question whether injurious results should be expected to flow from the particular act. The act, in other words, becomes negligent, in a legal sense, by reason of the ability of a prudent man, in the exercise of ordinary care, to foresee that harmful results will follow its commission. The doctrine is thus expressed, and many authorities cited to support it, in 21 A. & E. Ency. Law (2nd Ed.), page 487: 'In order, however, that a party may be liable for negligence, it is not necessary that he should have contemplated, or even been able to anticipate, the particular consequences which ensued, or the precise injuries sustained by the plaintiff. It is sufficient, if, by the exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or omission, or that consequences of a general injurious nature might have been expected.'"

In *S. v. Cope,* 204 N. C., 28 (30), citing the *Drum case, supra,* it is said: "Actionable negligence in the law of torts is a breach of some duty imposed by law or a want of due care—commensurate care under the circumstances—which proximately results in injury to another."

We cannot say that defendant George Mewborn, by the immoral advice given his son, could have reasonably foreseen, or expected as the natural and probable consequences, that his son would commit a crime and assault on plaintiff. We cannot hold him on this record for such unnatural and vicious advice. It is not alleged that the defendant George Mewborn participated in the act complained of by the plaintiff, nor do we think it can be said that he aided and abetted, counseled, advised or

encouraged his son in doing the act alleged, that is, committing an assault on plaintiff. The complaint fails to allege that the defendant George Mewborn counseled or advised or encouraged his son to commit an assault on anyone. Nowhere does it allege that this counsel and advice is related to this act, and without connecting the time at which the advice was given to the act itself, we think that it was too remote. It may have been years prior to the act complained of. Where an individual counsels the commission of an act which may be committed either lawfully or unlawfully, it must be presumed that the counsel intended only the lawful act; such counsel and advice, standing alone, is insufficient to make the adviser a party responsible legally for the unlawful act following it. The complaint of this serious charge against the father is taken as true for the purpose of this demurrer, if he had answered the complaint, it may have been another story.

For the reasons given, we think the demurrer below should have been sustained.

Reversed.

STACY, C. J., concurring: The demurrer interposed by the defendant George Mewborn challenges the sufficiency of the facts stated in the complaint to constitute a cause of action against him. C. S., 511, subsec. 6. The gravamen of the complaint, in so far as the demurrant is concerned, is to be found in paragraph 9. The facts stated therein, taken singly or in connection with the other facts set out in the complaint, are not sufficient to constitute a cause of action against the appellant. The demurrer is good, and stays the action as against George Mewborn.

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 of fact as are fairly deducible therefrom, and this without any concession of legal inferences or conclusions of law asserted by the pleader. *Leonard v. Maxwell,* 216 N. C., 89, 3 S. E. (2d), 316. Such admission, however, is only for the purpose of the demurrer, and is not available for any other use. *S. v. Whitehurst,* 212 N. C., 300, 193 S. E., 657. It is axiomatic that unless the conclusion deduced is supported by the facts stated, it is a mere *brutum fulmen. Andrews v. R. R.,* 200 N. C., 483, 157 S. E., 431.

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

MINNIE LEE THOMAS, MOTHER OF JAMES THOMAS, DECEASED, v. THE RALEIGH GAS COMPANY (EMPLOYER), AND LIBERTY MUTUAL INSURANCE COMPANY (CARRIER).

(Filed 7 November, 1940.)

1. Master and Servant § 55d—

While it may be admitted that in some instances the question of dependency may be a mixed question of fact and of law, where the facts admitted or found by the Commission upon competent evidence support the conclusion of the Commission in regard thereto, its award is binding on the Court.

2. Master and Servant § 43—Evidence held to sustain finding that claimant was totally dependent upon deceased employee, notwithstanding small sums earned by claimant in casual employment.

The evidence tended to show that the mother of the deceased employee lived with him, that he paid the rent, bought groceries and supported her for a period of years, but that for two months prior to his death she did washing and nominal services for, and stayed with, an aged bedridden person and earned $5.75 per week thereby, which she deposited in a bank or used to buy small luxuries. *Held:* The fact that the mother earned small amounts of money in temporary and casual employment does not indicate any dependable source of income other than that she received from her son, and the conclusion of the Industrial Commission that she was totally dependent upon her son within the meaning of the Compensation Act, is sustained.

3. Master and Servant § 37—

The Workmen's Compensation Act must be liberally construed and liberally applied.

APPEAL by defendants from *Harris, J.*, 29 June, 1940. From WAKE. Affirmed.

The plaintiff, Minnie Lee Thomas, brought this proceeding before the Industrial Commission to have an award made to her, as dependent, because of the death of her son, James Thomas, while in the service of the defendant Gas Company. At the final hearing before the Full Commission an award was made to the plaintiff, and from the order of the Industrial Commission the defendants appealed to the Superior Court, where the matter was heard by Judge Harris on 29 June, 1940. From the judgment affirming the award the defendants appealed to this Court.

We quote from the record certain admissions which narrow the scope of inquiry on the hearing before the Commission, and which are effectual here: "When this case was called for a hearing counsel agreed that both the plaintiff and defendant employer are subject to and bound by the provisions of the Act; Liberty Mutual Insurance Company is the carrier for the defendant employer; and an average weekly wage of the deceased

employee at the time of his accident resulting in his death was $14.66; the deceased employee suffered an accident November 2, 1939, arising in the course of and out of his employment, from which injuries resulting from the accident he died, met his death. The sole question involved at the hearing was the party or parties to whom compensation should be paid on account of the death of the said deceased employee."

Upon that question the pertinent evidence is substantially as follows: The son, James Thomas, at the time of his death was living in a house on East Martin Street in Raleigh, and the mother made her home with him. She testified: "I lived by my boy. He took care of me. He took me to Raleigh and I lived there from 1936 up to the time of his death. During the four years or three years and a half I did no work myself. I didn't have any income during that time. Shortly before his death I stayed with Mrs. Haywood, who lived at 200 East Edenton Street. She is an old lady in her eightieth year, the mother of Mr. Holt Haywood and Mr. Alt Haywood. She is an invalid. I had been there with her two months and a half prior to James' death. She paid me $5.75 a week for that two months and a half. That is all the income I have had for the last three years. It was my duty to go there and sleep with her. My daughter-in-law prepared the meals and fixed them and all I had to do was eat mine and carry Mrs. Haywood's to her, to her bed. I had not been able to do any work since the early spring of 1937 when I had a stroke. I had been under a doctor's care from time to time since. I had not done any work nor earned any income other than Mrs. Haywood paid me for the eight weeks, and I was totally dependent upon my son James for my livelihood. He supported me all the time.

"She didn't furnish me breakfast. I got all my meals at home but sometimes I et (ate) supper with her. I did her laundry for her—that was the 75 cents. I started doing her laundry in 1937. I had my nephew, Sam Arthur, with me and my son James. Out of the money James gave me and the money I earned the three of us lived. James paid all the bills and the rent. We paid fifteen dollars a month rent. He paid for all the groceries. I don't know how much that was. He bought the groceries and brought them to me. All I had to do was tell him when I needed it and he brought it. I helped Mrs. Bailey who lived there nine years ago; haven't been doing it during the last three years. Mrs. Haywood didn't ask me to do nothing; she didn't do anything but stay in bed. I was there to do whatever was necessary, and for that she paid me $5.00 and in addition paid me seventy-five cents for the laundry.

"I am fifty-eight years old. Since 1936, when my husband died, my son had supported me entirely. I did not work during that period except for this lady for two months prior to my son's death. During

those two months my son bought all my groceries and paid the house rent. I had my money in the bank; didn't use any of it for my support. After he died that was the money I had to fall back on. He bought my clothes during this period, everything. He paid my house rent. He didn't support anybody else that I know of; he didn't have a wife. He had no children. He had never been married. He didn't support any brothers or sisters. I was the only one dependent upon him."

Another son of plaintiff, with his family, lived in one end of the house, paying the rent on rooms occupied by him. James (the deceased), paid the rent on the rooms occupied by himself and his mother. There was temporarily with her at some times a grandson, who furnished her no support.

Plaintiff testified that she had about $600.00 insurance from her husband at his death, but that all of it had been spent for bills.

In its main particulars the testimony of the plaintiff was supported by a son who occupied rooms in another part of the house, and there was much evidence from this source that the mother was entirely dependent upon the deceased son, James Thomas.

Upon this evidence the Industrial Commission found that the plaintiff was wholly dependent upon the deceased employee, James Thomas, for support; that since 1936 she has been physically unable to perform average manual labor; that she has during that time earned 75c per week for washing, and for two months immediately previous to his death she had slept in the room with an ill lady and performed some nominal services for her, receiving a sum of $5.00 a week, and that she had saved and placed in the bank the principal portions of these earnings, but used a small part for buying minor luxuries she desired to obtain; and, again, "that specifically the said Minnie Lee Thomas was wholly dependent upon the deceased James Thomas for support at the time of his death." There is a further finding that the deceased had no other dependent with the exception of Sam Bonaparte, who was partially dependent. Thereupon, the Full Commission followed its findings of fact with the conclusion of law that the plaintiff was wholly dependent upon her deceased son and that Sam Bonaparte was only partially dependent, and made an award (based upon the average weekly wage of $14.66), of $8.80 per week, for a period of 350 weeks, and, in addition thereto, ordered the defendants to pay the burial expenses, not to exceed $200.00, and all costs of the case.

Wm. H. Yarborough, Jr., and Robert C. Howison, Jr., for defendants, appellants.

Clem B. Holding for plaintiff, appellee.

SEAWELL, J. The Industrial Commission took the view that the casual and temporary employment of the plaintiff for a short time at a wage of $5.00 a week for two months during the period of the four preceding years, did not take her out of the category of entire dependency upon her deceased son.

We may concede that dependency may in some instances become a mixed question of fact and law. *Re: Carroll* (1917), 65 Ind. App., 148, 116 N. E., 844. But where the factual element is admitted, or has been determined on competent evidence consistently with its counterpart of legal definition, that is the end of the trail. *Walker v. Wilkins,* 212 N. C., 627, 194 S. E., 89; *Winslow v. Conference Assn.,* 211 N. C., 571, 191 S. E., 403; *Carlton v. Bernhardt-Seagle Co.,* 210 N. C., 655, 188 S. E., 77; *Swink v. Asbestos Co.,* 210 N. C., 303, 186 S. E., 258; *Tomlinson v. Norwood,* 208 N. C., 716, 182 S. E., 359; *Reed v. Lavender Bros.,* 206 N. C., 898, 172 S. E., 877. We are satisfied that the conclusion reached by the Industrial Commission and the lower reviewing court, both as to fact and law, is in accord with the best considered cases dealing with similar situations, and with the spirit and purpose of the Workmen's Compensation Act.

The determining facts in this case, including the condition of the plaintiff and the fact of her actual support by her deceased son, the small amount of money received by her during a period of years, and its deposit in the bank, cannot be held to affect her status as being wholly dependent upon her deceased son. The receipt of the small amount involved, temporary and casual in character, does not indicate any dependable source of income other than that received from her son.

In this respect the Court feels that there is sound reason and justice in the view taken of similar situations in the decisions noted:

"Total dependency exists where the dependent subsists entirely on the earnings of the workman. But in applying this rule courts have not deprived claimants of the rights of total dependents, when otherwise entitled thereto, on account of temporary gratuitous services rendered them by others, or on account of occasional financial assistance received from other sources, or on account of other minor considerations or benefits which do not substantially modify or change the general rule as above stated. *Stone Co. v. Phillips,* 65 Ind. App., 189, 116 N. E., 850; *Williams case,* 122 Me., 477, 120 A., 620; *Coal Co. v. Frazier,* 229 Ky., 450, 17 S. W. (2d), 406; *State ex rel. v. Dist. Court,* 128 Minn., 338, 151 N. W., 123; *McKesson Co. v. Industrial Com.,* 212 Wis., 507, 250 N. W., 396." *Maryland Casualty Co. v. Campbell,* 34 Ga. App., 311, 129 S. E., 447. Adopted in *Garbutt v. State et al.,* 287 Mich., 396, 283 N. W., 624.

In *Blue Diamond Coal Co. v. Frazier et al.*, 17 S. W. (2d), 406, the principle is thus expressed: "One of the purposes of the Act is to provide for the dependents of the workman injured in the course of his employment, for their right to sue and obtain compensation for his death, under the constitutional provision, is taken away. The statute, therefore, should be liberally construed in their favor. A person may be wholly dependent on an employee, although he may have some slight savings of his own, or some other slight property, or be able to make something by his own services."

Any award made to an employee whose injury arises out of and in the course of his employment, or to a dependent in case of his death, is measured by a hard fact rule—his earnings for a definite period of time. In view of the inconsiderable sum received by the plaintiff, and the uncertainty of further income, it would be unjust to make a purely speculative deduction from such an award.

It is a familiar rule that the terms of the Workmen's Compensation Act must be liberally construed and liberally applied. *Wick v. Gunn*, 66 Okla., 316, 169 P., 1087, 4 A. L. R., 107; *Cole v. Minick*, 123 Neb., 871, 244 N. W., 785, 787. In *Blue Diamond Coal Co. v. Frazier, supra*, it will be noted that this rule is applied to the same factual situation we have in the case at bar. That rule has become standard in reviewing compensation cases in this State. *Smith v. Light Co.*, 198 N. C., 614, 620, 152 S. E., 805; *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.

The judgment is

Affirmed.

MOYE ARNOLD v. STATE BANK & TRUST CO., GREENVILLE, N. C.

(Filed 7 November, 1940.)

1. Trial § 29c—

While the burden of proof is a substantial right, the failure of the court to define the terms "greater weight" or "preponderance of the evidence" in its charge correctly placing the burden of proof, will not be held for error in the absence of a prayer for special instructions.

2. Banks and Banking § 8a—

In an action against a bank by a depositor to recover money deposited, an instruction to the effect that the burden is upon the bank to prove by the greater weight of the evidence the defense of proper disbursement of the funds on checks signed by the depositor or by some person under the depositor's authority and direction, *is held* without error.

3. Trial § 32—

It is not error for the trial court to refuse to give requested instructions which are not predicated on the jury's finding of the essential facts from the greater weight of the evidence.

4. Banks and Banking § 8a—Fact that depositor permitted convicted forger to stay in house is not contributory negligence exculpating bank from liability for paying forged checks.

In this action against a bank to recover money deposited, defendant requested instructions to the effect that it would not be liable if its payment of forged checks on the depositor's account was proximately caused by the contributory negligence of the depositor. *Held:* The refusal of the court to give the requested instructions was not error, first: because the instructions requested failed to refer to the burden of proof, and second: because evidence that plaintiff's brother-in-law who forged the checks and who had theretofore been convicted of forgery, stayed in plaintiff's house, is insufficient to impute to plaintiff contributory negligence.

5. Appeal and Error § 6f—

An exception to the charge on the ground that it did not explain the evidence and did not declare and explain the law arising thereon as required by C. S., 564, *is held* ineffective as a "broadside" exception, it being necessary that an exception to the charge specifically refer to the particular point claimed to be erroneous.

STACY, C. J., concurs in result.

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

APPEAL by defendant from *Hamilton, Special Judge,* and a jury, at February Term, 1940, of PITT. No error.

This action was brought before a justice of the peace to recover $91.55, deposited in defendant bank and not accounted for by defendant to plaintiff. The judgment of the justice of the peace was in favor of plaintiff, for amount sued for, which was appealed from to the Superior Court. The appeal certificate has this in it: "Plaintiff complained for the sum of Ninety One and 55/100 Dollars, with interest and cost, due by and on account of money deposited with said defendant and paid out without authority by said defendant and refusal, and now demanded by said plaintiff. Defendant failed to answer or demur to the complaint. Mr. V. M. Forrest stating that his only purpose of being present was to file notice of appeal."

In the Superior Court the following answer was made by defendant: "The defendant State Bank & Trust Company, in answer to the complaint of the plaintiff, in which it is alleged that the defendant is indebted to the plaintiff in the sum of $91.55, with interest thereon from April 1, 1939, until paid, and on account of money deposited with the defendant and by it paid out without authority of plaintiff to do so, and which the defendant has refused to pay to the plaintiff though he is justly due the same, alleges and says: 1. That the said allegations are untrue and therefore denied. 2. That if the Court should find that the

defendant has paid out money of the plaintiff on deposit with the defendant, as alleged, that the same was done on account of the plaintiff's neglect which proximately contributed to the payment of checks as alleged."

The issue submitted to the jury was: "In what amount, if any, is the defendant indebted to the plaintiff?" The jury answered "$91.55." The court below gave judgment on the verdict. The defendant made several assignments of error and appealed to the Supreme Court. The material ones and necessary facts will be set forth in the opinion.

S. O. Worthington for plaintiff.
Blount & Taft for defendant.

CLARKSON, J. The first question presented by defendant: "Was the court in error in not defining 'greater weight' or 'preponderance of the evidence'?" We think not.

The burden of proof is a substantial right. *Fisher v. Jackson,* 216 N. C., 302 (304).

In *Wilson v. Casualty Co.,* 210 N. C., 585 (590), it is written: "The defendant contended that in the first two above excerpts from the charge it was the duty of the court below in the charge to the jury to have defined what constituted the greater weight of the evidence, and in failing to do so the court committed error. C. S., 564. We cannot so hold. The burden of proof is on the party who substantially asserts the affirmative of the issue, whether he be nominally plaintiff or defendant. The burden of proof is on the party holding the affirmative. It constitutes a substantial right. *Hunt v. Eure,* 189 N. C., 482; *Boone v. Collins,* 202 N. C., 12; *Stein v. Levins,* 205 N. C., 302 (306). A preponderance of the evidence, or by the greater weight, is all that is required in a civil action. If the defendant desired more elaborate instructions on a subordinate feature, it should have submitted an appropriate prayer. *S. v. Gore,* 207 N. C., 618; *S. v. Anderson,* 208 N. C., 771 (788)."

The court below instructed the jury: "The court instructs you as a matter of law that where a deposit is made in a bank the burden is upon that bank to satisfy the jury by evidence and by its greater weight, that is, by a preponderance of the evidence, that payments on that account were made by the bank in a proper and orderly way, that is, upon the authority of the depositor. . . . And the burden is upon the bank to show the disposition made of the funds of a depositor into that bank." Again, on page 27 of the Record, we find: "And if the defendant bank has carried that burden and has satisfied you from the evidence and by its greater weight, or by a preponderance of the evidence, that the disbursements of the funds was regularly made, that is, made upon the

order of the depositor upon checks being presented on that account bearing the signature of the depositor, and the depositor himself was the author of that signature, or the signature had been placed thereon by somebody else under his direction or acting for and on behalf of the depositor, then the bank would not be entitled to pay to the plaintiff the sum of $91.55. If the bank has satisfied you by a preponderance of the evidence or by its greater weight that these payments were made upon the authority of the depositor either by checks drawn by him bearing his own signature or by checks drawn by somebody else under his authority and direction, the bank would have discharged its full duty and would not be indebted to the plaintiff in any sum whatsoever." There was no specific exception to this charge. We see no error in the charge.

In *Bank v. Thompson,* 174 N. C., 349, we find: "Where a bank sues its depositor on a note, with counterclaim set up in the answer that the bank had funds of the defendant on deposit which it had paid out on unauthorized checks, and both the execution of the note sued on and the amount of the deposit are admitted: *Held,* banks assume the responsibility for the erroneous payment of checks not drawn or authorized by the depositor, with the burden on the bank, pleading proper payment of the checks, to show it."

In apt time and in proper manner, the defendant filed, in writing, with the court the following requested instruction: "That if the jury should find that the payment of the forged checks, if any, was made on account of the plaintiff's neglect or negligence which proximately contributed to the payment of the checks as alleged, then the plaintiff is guilty of contributory negligence and is entitled to recover nothing against the defendant."

The prayer does not set forth "if the jury find from the greater weight or preponderance of evidence." The lack of this is erroneous. Besides, we cannot hold on the evidence that there was any contributory negligence, the proximate cause of which caused the defendant to pay out the plaintiff's deposit on forged checks. The fact that the brother-in-law of plaintiff, who had stayed in their home several months, had theretofore been convicted of being a forger and forged these checks in controversy and had been convicted for so doing, cannot be imputed to plaintiff as contributory negligence. It cannot be said that if a father should have a son who had committed a forgery in time and knowing such should permit that son to come home and live, after he had served his sentence, and he should then forge a check on the father, that the father would be guilty of such negligence as to prevent his recovering from the bank. A person who attempts to rehabilitate one who has served a sentence in prison should be commended rather than condemned.

The banks of the State are protected by a special statute. N. C. Code, 1939 (Michie), sec. 220 (h): "No bank shall be liable to a depositor for payment by it of a forged check or other order to pay money unless within sixty days after the receipt of such voucher by the depositor he shall notify the bank that such check or order so paid is forged." This section is a substantial reënactment of the C. S., sec. 231, except that formerly the depositor had six months within which to give notice of the forgery. *Fuel Co. v. Bank,* 210 N. C., 244.

The exception and assignment of error, as follows, cannot be sustained: "Defendant excepts to the whole charge as given for that it is too meager and did not explain in a correct manner the evidence of the case and declare and explain the law arising thereon as required by section 564, C. S. of North Carolina, and it does not and did not satisfy the requirements of said statute in law."

In *Rawls v. Lupton,* 193 N. C., 428 (430), we find: "Error must be specifically assigned. An 'unpointed, broadside' exception to the 'charge as given' will not be considered. *McKinnon v. Morrison,* 104 N. C., 354. Exception to the charge of the court in general terms, not sufficiently specific to call the attention of the court to the particular point claimed to be erroneous, cannot be considered by an appellate court. . . . (citing a wealth of authorities)—(p. 431). Under C. S., 643 (N. C. Code, *supra,* sec. 643), and the decisions of this Court, the appellant must make 'specific' exceptions to the charge of the court below, stating separately in articles numbered the errors alleged."

For the reasons given, we see no prejudicial or reversible error.

No error.

STACY, C. J., concurs in result, but dissents in part from the reasons assigned.

1. There is no exception to the refusal of the defendant's request for special instruction, and no assignment of error based thereon. Hence, the correctness of the prayer is not presented for review.

2. The exception based upon the court's failure to comply with C. S., 564, is dismissed on authority of *Rawls v. Lupton,* 193 N. C., 428, 137 S. E., 175, because of its alleged broadsidedness. With this I do not agree. The form of the exception is not unlike the one held sufficient in *Smith v. Bus Co.,* 216 N. C., 22, 3 S. E. (2d), 362. The exception should be overruled on its lack of merit rather than on its deformity.

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

STATE HIGHWAY & PUBLIC WORKS COMMISSION v. FRANK J. HARTLEY.

(Filed 7 November, 1940.)

1. Eminent Domain § 8—

In proceedings to take land for a public highway, the measure of damages is the difference in the fair market value of respondent's land immediately before and immediately after the taking, the elements upon which the damages are predicated being the fair market value of the land taken and injury to respondent's remaining land, less any general and special benefits accruing to respondent from the construction of the highway.

2. Same—

Damages recoverable in condemnation proceedings must be ascertained as of the time of the taking, but evidence of the value of respondent's land within a reasonable time before and after the taking is competent, the reasonableness of the time being dependent upon the nature of the property, its location and surrounding circumstances, and whether the evidence offered fairly points to its value at the time in question.

3. Same—Evidence of value of respondent's land some four years subsequent to taking held too remote under the facts of the case.

Respondent's land was taken for a scenic highway in December, 1935. Testimony of witnesses as to the value of respondent's land in 1938 and 1939 was admitted over objection, although the witnesses stated on *voir dire* that they knew nothing of the condition and accessibility of the land at the time of the taking. The evidence disclosed that the only entrance to the land before the construction of the parkway was by private road. Respondent testified that there had been no change in the land between these dates except for the construction of the parkway. There was evidence that the value of the land in the community fluctuated and that its value had increased after the construction of the parkway. *Held:* Respondent's testimony that there had been no change in the land between the dates except for the construction of the parkway is not equivalent to a statement that there had been no change in its value, and the testimony objected to should have been excluded as being too remote to be competent upon the question of the value of the land at the time of the taking.

5. Trial § 12—

Whether the jury should be allowed to view the *locus in quo* is within the discretion of the trial court, although a jury view is usually had by consent of the parties rather than over the objection of one of them, but appellant's exception to the action of the trial court in permitting a jury view need not be determined on this appeal, since a new trial is awarded on other exceptions.

CLARKSON, J., not sitting.

APPEAL by petitioner from *Bobbitt, J.*, at June Term, 1940, of WILKES.

Special proceeding to determine compensation to be paid for land taken in area of Blue Ridge Parkway.

On 18 December, 1935, the State Highway & Public Works Commission, pursuant to the law as set out in section 3846 (bb), Michie's Code of 1939, appropriated 167 acres of respondent's land on Tompkin's Knob and conveyed it to the United States Government for use in the construction of the Blue Ridge Parkway. The land appropriated was part of a 337-acre tract, without buildings or other improvements thereon. A few spots had in time been cultivated, and the major portion of it gave the appearance of having been cleared land. Originally it had been covered with chestnut trees, but these had died from blight. It was good grazing land. The only approach to the property prior to the construction of the Parkway, was by means of a private road. It is now a part of the Scenic Highway and is traversed by a motor road. Its elevation is about 4,000 feet above sea level.

It was conceded on the hearing that the value of the property was to be fixed as of the time of the taking, to wit, 18 December, 1935.

The respondent offered T. E. Story as a witness, who said that he had gone over the property with Mr. Hartley in 1939 for the purpose of forming an estimate of its value, but that he had never seen it theretofore and was not familiar with its condition, accessibility, etc., in 1935. The court ruled that the witness was not competent to express an opinion as to the value of the property on 18 December, 1935. Whereupon, the respondent was recalled to the stand and testified: "There has been no change in the land since 1935, except the construction of the Scenic Highway," albeit the respondent had previously testified: "The park people have cleaned up some of the dead stuff since the land was taken, some on the knob." The court then ruled that the witness Story would be permitted to give his opinion as to the value of the property in 1939. He fixed the value as of that time at $200 an acre. Objection; exception.

Following this ruling, and over objections duly entered, the respondent was allowed to offer the testimony of other witnesses who expressed opinions that in 1939, when they saw the property for the first time, its value was (1) $200 an acre (Charlie Miles and P. E. Brown), (2) $150 an acre (C. C. Faw, W. W. Turner and C. C. Siddon), (3) from $125 to $150 an acre (C. A. Lowe), and two witnesses (Ralph Duncan and C. E. Jenkins) expressed opinions that in 1938, when they first saw the property which had been taken, its total value was $22,000. All of these witnesses stated on the *voir dire* that they were not familiar with the property in 1935 and knew nothing of its condition, accessibility, etc., on 18 December of that year.

There was evidence on behalf of the petitioner tending to show that the value of the property, at the time of the taking, was from $20 to $35 an acre.

At the conclusion of the evidence, on motion of respondent and over objection of the petitioner, the jury was allowed to view the premises. Exception.

The jury returned the following verdict:

"What sum, if any, is respondent entitled to recover of petitioner for the appropriation of the lands described in paragraph 3 as amended of the petition, together with the damages, if any, to the remainder of the 337-acre tract described in the answer, over and above all general and special benefits, if any, accruing to respondent's lands by reason of the construction of the Parkway? Answer: '$20,000.'"

From judgment thereon, the petitioner appeals, assigning errors.

W. H. McElwee, Charles Ross, and Ernest Gardner for petitioner, appellant.

A. H. Casey, Trivette & Holshouser, and John R. Jones for respondent, appellee.

STACY, C. J. It is conceded that the measure of damages, presently applicable, is the difference in the fair market value of respondent's land immediately before and immediately after the taking. *Elks v. Comrs.*, 179 N. C., 241, 102 S. E., 414. The items going to make up this difference are understood to embrace compensation for the part taken, and injury to the remainder, which is to be offset by any general and special benefits accruing to the landowner from the construction of the Parkway. *Bailey v. Highway Com.*, 214 N. C., 278, 199 S. E., 25; *Wade v. Highway Com.*, 188 N. C., 210, 124 S. E., 193; *Power Co. v. Power Co.*, 186 N. C., 179, 119 S. E., 213; *Brown v. Power Co.*, 140 N. C., 333, 52 S. E., 954.

It is further conceded that the time of the taking was 18 December, 1935, and that the award is to be made as of this date. *Hart v. R. R.*, 144 N. C., 91, 56 S. E., 559.

In determining the fair market value of property taken in condemnation, it is generally regarded as competent to show the value of the property within a reasonable time before and/or after the taking as bearing upon its value at the time of the appropriation. *Ayden v. Lancaster*, 197 N. C., 556, 150 S. E., 40; *DeLaney v. Henderson-Gilmer Co.*, 192 N. C., 647, 135 S. E., 791; *Wyatt v. R. R.*, 156 N. C., 307, 72 S. E., 383; *Grant v. Hathaway*, 118 Mo. App., 604; 8 R. C. L., 489. The rule is necessarily one of variableness in the time limits, depending upon the nature of the property, its location and surrounding circumstances, and whether the evidence offered fairly points to its value at the time in question. *Newsom v. Cothrane*, 185 N. C., 161, 116 S. E., 415; *Powell*

v. R. R., 178 N. C., 243, 100 S. E., 426; *Myers v. Charlotte,* 146 N. C., 246, 59 S. E., 674; *Wade v. Tel. Co.,* 147 N. C., 219, 60 S. E., 987.

It follows, therefore, that when the evidence is too remote in point of time to throw any light on the fact in issue, to wit, the fair market value of the property at the time of the taking, it is incompetent and should be excluded. *City of Portland v. Tigard,* 64 Or., 404, 129 Pac., 755, on rehearing, 130 Pac., 982. "The general rule is, that testimony as to market value at a time too remote from the date in question to be of any probative value should be excluded"—*Baugh, J.,* in *Reed v. So. Pac. Co.,* 99 S. W. (2d) (Tex.), 1026. Such evidence can be of no assistance to the jury in arriving at a proper conclusion. *Oregon R. & N. Co. v. Eastlock,* 54 Or., 205, 102 Pac., 1014, 20 Ann. Cas., 692. On the other hand, it may be particularly damaging to the petitioner's cause. *Moore v. Hutchinson,* 107 W. Va., 275.

Speaking directly to the question here presented, in *Power Co. v. Hayes,* 193 N. C., 104, 136 S. E., 353, *Connor, J.,* delivering the opinion of the Court, said: "Respondents are entitled to recover as just compensation for the 29.5 acres of land described in the petition its value at the time it was taken. . . . No change in the value of said land after said date, whether caused by the use for which it is to be condemned or not, can be considered in determining the amount which respondents shall receive and petitioner shall pay as just compensation for same."

Again, speaking to a kindred situation in *Beedle v. Campbell,* 100 Fed. (2d), 798, it was said: "Evidence of value in 1927 was not competent. Damages must be fixed as of the time the property was converted (1933). Especially must that be true here, when the court judicially knows that between 1927 and 1933 there had been a marked decline in real estate values, which continued up to the time of the trial of the action." See *Ohio Bell Tel. Co. v. Public Utilities Commission,* 301 U. S., 292.

And in *Olson v. United States,* 292 U. S., 246, the court of last resort made this pronouncement: "But the value to be ascertained does not include, and the owner is not entitled to compensation for any element resulting subsequently to or because of the taking. Considerations that may not reasonably be held to affect market value are excluded. Value to the taker of a piece of land combined with other parcels for public use is not the measure of or a guide to the compensation to which the owner is entitled."

We think the challenged evidence offered by the respondent was too remote in point of time. 22 C. J., 182. There is no evidence that the value of the property remained the same from the time it was taken in 1935 to the time it was examined by the witnesses in 1938 and 1939.

The respondent said there had been no change in the land, except the construction of the Scenic Highway (and some cleaning up), but this is far from saying there had been no change in its value. Indeed, one of respondent's own witnesses (Harrison Baker) testified that "he could not give an opinion as to the fair market value just before the Parkway was located, because he didn't know what road facilities the property then had, but the value he is now putting on it is the value after the Parkway went through and there was a good way to get to it." He further opined: "Market values fluctuate so much on real estate in this country. At one time it would have a market value that was pretty high during the war period, but since then it has not been so high until the last few years it has been advancing. Since the Blue Ridge Parkway has been built through here it has sort of picked up. Before that it was pretty dead at times and then again it was in the market."

The cases of *Powell v. R. R., supra,* and *Martin v. Ince,* 148 S. W. (Tex. App.), 1178, cited and relied upon by the respondent, are distinguishable by reason of different fact situations.

Having reached the conclusion that there was error in the admission of evidence as presented by the respondent, it is unnecessary to consider the exception addressed to the jury view. Mr. McIntosh in his valuable work on Procedure, page 618, summarizes the decisions on the subject as follows: "It is within the discretion of the court to allow the jury to view the premises involved in the controversy, but the practice is not commended." A jury view is usually had by consent of the parties rather than over the objection of one of them. See *Forbes v. United States,* 268 Fed., 273, and *Snyder v. Mass.,* 291 U. S., 97.

For the error in admitting incompetent evidence, the petitioner is entitled to another trial of the issue. It is so ordered.

New trial.

CLARKSON, J., not sitting.

STATE v. STEWART CHAMBERS.

(Filed 7 November, 1940.)

1. Criminal Law §§ 53d, 81c—When supported by evidence, court must submit to jury question of defendant's guilt of less degrees of the crime charged.

Where there is evidence tending to support a conviction of less degrees of the crime charged, or a conviction of an attempt to commit the crime charged, or an attempt to commit less degrees of the crime, the defendant is entitled to have the court charge the jury upon the different aspects of

the evidence, and a conviction of the crime as charged does not cure the error, since it cannot be determined on appeal whether the jury might have found defendant guilty of a less degree of the crime had the different views been correctly presented to it. C. S., 4640.

2. Burglary and Unlawful Breakings § 10—Failure of the court to submit question of defendant's guilt of nonburglarious breaking, presented by evidence, held error.

The evidence tended to show unlawful entry into a dwelling at nighttime while same was actually occupied, and the actual commission therein of the felony charged in the bill of indictment. The evidence also tended to show that the window of the room in which the felony was committed was open, and that the perpetrator of the crime was first seen in this room, and that after the commission of the crime he escaped by the open window. There was also circumstantial evidence that entry was made by opening a window of another room of the house. There was also sufficient evidence tending to identify defendant as the perpetrator of the crime. *Held:* Although there is no evidence of burglary in the second degree, the evidence tends to show burglary in the first degree, C. S., 4232, or a nonburglarious breaking and entering with intent to commit a felony, C. S., 4235, depending upon whether the perpetrator of the crime entered by the open window or burglariously "broke" into the dwelling, and therefore the trial court should have charged that the defendant might be found guilty of burglary in the first degree, guilty of a nonburglarious breaking and entering of the dwelling house with intent to commit a felony or other infamous crime therein, or not guilty, and its failure to submit the question of defendant's guilt of nonburglarious entry constitutes reversible error. C. S., 4640.

APPEAL by defendant from *Bone, J.,* at August Term, 1940, of LENOIR.

Criminal prosecution tried upon an indictment charging "that Stewart Chambers, late of Lenoir County, on the 28th day of July, in the year of our Lord One Thousand Nine Hundred and Forty, with force and arms, at and in the county aforesaid, feloniously and burglariously did break and enter on or about the hour of ten o'clock in the nighttime of said day, the dwelling house of said J. L. Whaley, there situate, and then and there actually occupied by the said Whaley, his wife and family, with the felonious intent, he, the said Stewart Chambers, to forcibly and violently ravish and carnally know Mrs. J. L. Whaley, a female occupying and sleeping in said dwelling house at the time, without her consent and against her will, and did actually ravish the said Mrs. J. L. Whaley, against the form of the statute in such case made and provided and against the peace and dignity of the State."

The evidence offered in the trial court tended to show that on 28 July, 1940, Mrs. J. L. Whaley was residing with her husband and three children in a four-room house at Field's Siding, on the farm of A. T. Suggs near LaGrange, in Lenoir County, North Carolina; that on the night of said date she and her three children were asleep in the said dwelling house and her husband was at the tobacco barn, a short distance away,

curing tobacco; that the children were asleep in one room and she was in bed in the adjoining room, the door between the two rooms being open; that all of the outside doors were closed, and all the windows were closed except the window in her room; that the first thing which aroused her that night after she had put her children to bed and gone to bed herself was "feet scraping the floor"; that a lighted lamp, turned down low, was in the corner of the room; that when she heard the scraping on the floor, she awoke and as she opened her eyes she "just glimpsed the bulk of a man" as he blew out the lamp; that she then made an outcry; that the man then jumped on the bed and assaulted her and was in the act of ravishing her when he was frightened away by the noise of a passing automobile; that "he headed for the window and jumped out"; that he left through the open window; that Mrs. Whaley then gave an alarm and her husband came; that the sheriff's office was notified, and a deputy sheriff and a policeman went immediately to the Whaley house; that these officers, upon investigation, found shoe tracks on the west end of the house at the kitchen window; that there were three tracks on the floor but one could not tell whether they were barefoot tracks or shoe tracks; that there were shoe tracks at the window where the man went out of the house; that the officers went "right back of this house and got a fellow Best and took his shoes and tried them in the track and they were not his tracks"; that they then did the same thing with D. Ward Moore with same result; that then the officers went to the home of defendant at Falling Creek three or four miles away, and carried him to the Whaley home; and that his tracks corresponded with the tracks found there and Mrs. Whaley identified his voice as that of her assailant. There was other evidence tending to connect the defendant with the crime.

Verdict: Guilty of the felony of burglary in the first degree whereof he stands indicted.

Judgment: Death by asphyxiation.

Defendant appeals therefrom to Supreme Court and assigns error.

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

Louis I. Rubin and Sutton & Greene for defendant, appellant.

WINBORNE, J. The appellant assigns as error:

1. The charge of the court to the jury that "all of the evidence of the State tends to show that the house was occupied at the time of the alleged crime. Therefore, in this case you can return only one of two verdicts: Guilty of burglary in the first degree, or not guilty."

2. The failure of the court to charge the jury that upon all the evidence one of three verdicts might be rendered by them, to wit: (1) Guilty of burglary in the first degree; (2) guilty of a nonburglarious breaking and entering of the dwelling house of another, with intent to commit a felony or other infamous crime therein; or (3) not guilty—there being evidence from which the jury could infer that the entry of the person so entering might have been through an open window and therefore a nonburglarious entry.

We are of opinion and hold that the assignments are well taken.

The crime of burglary, as defined at the common law, is by statute in this State divided into two degrees, burglary in the first degree and burglary in the second degree. C. S., 4232. The statute specifies that "if the crime be committed in a dwelling house, or in a room used as a sleeping apartment in any building, and any person is in the actual occupation of any part of said dwelling house or sleeping apartment at the time of the commission of such crime, it shall be burglary in the first degree." The punishment for such crime is death.

There is another statute, C. S., 4235, which provides in part that "if any person, with intent to commit a felony or other infamous crime therein, shall break or enter . . . the dwelling house of another otherwise than by a burglarious breaking . . . he shall be guilty of a felony, and shall be imprisoned in the State's Prison or county jail not less than four months nor more than ten years."

In this connection it is a well recognized rule of practice in this State, as is stated in *S. v. Allen,* 186 N. C., 302, 119 S. E., 504, by *Stacy, J.,* that where one is indicted for a crime, and under the same bill it is permissible to convict him of "a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime" (C. S., 4640), and there is evidence tending to support a milder verdict, the prisoner is entitled to have the different views presented to the jury, under a proper charge, and an error in this respect is not cured by a verdict convicting the prisoner of the crime as charged in the bill of indictment, for in such case it cannot be known whether the jury would have convicted of a less degree or of an attempt if the different views, arising under the evidence, had been correctly presented to them by the trial court." To the same effect are the cases of *S. v. Williams,* 185 N. C., 685, 116 S. E., 736; *S. v. Lutterloh,* 188 N. C., 412, 124 S. E., 752; *S. v. Robinson,* 188 N. C., 784, 125 S. E., 617; *S. v. Kline,* 190 N. C., 177, 129 S. E., 417; *S. v. Newsome,* 195 N. C., 552, 143 S. E., 187; *S. v. Ratcliff,* 199 N. C., 9, 153 S. E., 605; *S. v. Spain,* 201 N. C., 571, 160 S. E., 825; *S. v. Lee,* 206 N. C., 472, 174 S. E., 288; *S. v. Keaton,* 206 N. C., 682, 175 S. E., 296; *S. v.*

Burnette, 213 N. C., 153, 195 S. E., 356; *S. v. Feyd,* 213 N. C., 617, 197 S. E., 171.

Where the bill of indictment, as here, charges the breaking and entering, with intent to commit a designated felony, and also charges the actual commission of said felony, "the prisoner" as is declared by this Court in *S. v. Allen, supra,* "may be convicted of burglary in the first degree, or of burglary in the second degree, depending on whether or not the dwelling house was actually occupied at the time, or of an attempt to commit either of said offenses, or he may be convicted of a nonburglarious breaking and entering of the dwelling house of another, under C. S., 4235, or of an attempt to commit said offense, though the State may fail to prove the commission of the felony as charged. *S. v. Fleming,* 107 N. C., 905; *S. v. Spear,* 164 N. C., 452. On the other hand, the defendant may be convicted of the designated felony as charged, '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,' though the State may fail to prove burglary." C. S., 4640; *S. v. Ratcliff, supra.*

In the present case all of the evidence tends to show that the dwelling house was actually occupied at the time of the alleged crime. There is no evidence tending to show that the crime might have been committed under circumstances which would make it burglary in the second degree. All the evidence tends to show the actual commission of a felony in the dwelling house of J. L. Whaley as charged. There is no direct evidence as to how the entry was effected. There is evidence of tracks tending to show that the entry into the dwelling house was effected by the raising of and through a window in the kitchen. There is also evidence tending to show that the window in the room in which Mrs. J. L. Whaley was asleep was open. There is also evidence tending to show that when discovered the man was in the room where the window was open. Hence, the evidence in the case, and every inference fairly and reasonably to be drawn therefrom, are not such as to require the jury to find that the entry was effected by the raising of the kitchen window. In fact, it appears of record that the presiding judge considered that the evidence is such that the jury might fairly and reasonably infer that the entry was through the open window.

For, in stating the contentions of the defendant, the court told the jury, among other things, that: "The defendant on the other hand contends that the evidence is not sufficient to satisfy you of his guilt beyond a reasonable doubt. He contends that in the first place the evidence is not sufficient to show beyond a reasonable doubt that whoever went in there broke with the meaning of the definition of burglary. He contends that one window was open, and that you could just as easily believe

that whoever went in went in through that window; or that under this evidence you should have some doubt as to whether all the windows were closed down firmly and that you might easily believe that other windows were raised and open and that the fact that the officer found a stick under the west window with the stick edgewise under it indicated that that window was not closed down." This contention is appropriate in considering whether the defendant be guilty of a nonburglarious breaking and entering of the dwelling house of J. L. Whaley, with intent to commit a felony or other infamous crime therein.

It was, therefore, error to limit the jury to one of two verdicts, burglary in the first degree, or not guilty.

Under the present bill of indictment and the evidence disclosed of record, the jury should be instructed that one of three verdicts may be rendered by it, depending upon how it finds the facts to be: (1) Guilty of burglary in the first degree; (2) guilty of a nonburglarious breaking and entering of the dwelling house of another, with intent to commit a felony or other infamous crime therein; or (3) not guilty.

Though the crime charged be atrocious, the life and liberty of the prisoner are at stake, and he is entitled to have the different views presented to the jury under a proper charge.

For error designated, let there be a

New trial.

J. P. ROBERTSON, EXECUTOR OF J. H. ROBERTSON, DECEASED, AND J. P. ROBERTSON AS AN INDIVIDUAL, v. B. F. ROBERTSON AND WIFE, BERTIE ROBERTSON; BESSIE COLEMAN AND HUSBAND, E. D. COLEMAN; INA WILLIFORD AND HUSBAND, R. D. WILLIFORD; RUBY WILLIFORD (WIDOW); WALTER T. ROBERTSON; ETTA ROBERTSON (WIDOW); MARY ROBERTSON PHILLIPS AND HUSBAND, WILLIAM PHILLIPS; JAMES PROCTOR ROBERTSON AND MARGIE MAY ROBERTSON, A MINOR 18 YEARS OF AGE.

(Filed 7 November, 1940.)

1. Wills § 45—Debts of husbands of beneficiaries held not chargeable against beneficiaries under provision of will that debts of beneficiaries inter se should be chargeable against their respective shares.

This action was instituted by the testator's son in his individual capacity and as executor, seeking to enforce, against his sisters the provisions of the will that debts of the children *inter se* should be paid out of the indebted child's share in the personalty. It appeared from the evidence, including plaintiff's testimony, that testator devised to the daughters the respective tracts of land which testator had rented on a cash annual basis to their husbands, that the debts asserted by plaintiff were balances due him on accounts for goods purchased from plaintiff's mercan-

tile store for expenses of operating farms on the said tracts, and that the accounts were in the names of the respective husbands. *Held:* The debts were debts of testator's sons-in-law and testator's daughters were not liable therefor, since, even granting the debts were incurred for necessary living expenses, such debts are the liability of the husbands alone, and the daughters not being the owners of the land at the time the debts were incurred, they may not be held liable therefor on any equitable principle, and it may not be held that the debts were contracted by their husbands as their implied agents, nor may the debts be held to come within the intent of the testamentary provision in the face of its clear, unambiguous provision specifying only the debts of one child to another.

2. Husband and Wife § 2—

The duty to support the family is that of the husband and not of the wife, and debts contracted for living expenses are his individual, separate obligation.

3. Same—

Where the husband rents land for farming operations from his wife's father, the wife is not liable for debts contracted for necessary farming operation upon any principle of equity, since she is not the owner of the land and the husband cannot be held to have contracted the debts for her under an implied agency.

4. Executors and Administrators § 29—

Testator's son instituted this action in his individual capacity and as executor to recover against testator's daughters for debts alleged to be due by them to him and to charge the distributive shares of the daughters respectively with the debts under provision of the will. *Held:* The action was instituted and maintained for the benefit of plaintiff in his individual capacity, and upon judgment for defendants, the costs of the action must be taxed against plaintiff individually.

APPEAL by defendants Bessie Coleman and Ina Williford from *Williams, J.*, at August Term, 1940, of WAKE. Reversed.

Civil action for debt and to require payment thereof out of assets in hands of plaintiff executor.

J. H. Robertson died testate in June, 1937. Plaintiff, J. P. Robertson, and the defendants, Ina Williford and Bessie Coleman, are children of the deceased.

The will of plaintiff's testator contains the following provision: "Item 12: If any one of my children at the time of my death should be indebted to any other one of said children, then the portion of the personal estate to be paid to such child as may be so indebted shall be used to pay off the indebtedness of such child or as much thereof as same will pay, and my executor hereinafter named shall carry out this provision of my will."

Plaintiff, during the lifetime of his father, conducted a mercantile business. E. D. Coleman, husband of defendant Bessie Coleman, and her son Hubert Coleman, ran charge accounts with the plaintiff. At

the time of the death of plaintiff's intestate the balance due on these two accounts amounted to $973.41. R. D. Williford, husband of the defendant Ina Williford, also had a charge account in his own name and another in the name of R. D. Williford and Cecil Langley, a tenant. At the time of the death of plaintiff's testator the total amount due on these accounts was $761.79.

About 1927 or 1928 J. H. Robertson divided his land and on one tract he built a house and rented the same to the husband of defendant Bessie Coleman. He likewise built a house on another tract and rented the same to the husband of defendant Ina Williford. Each has been in possession of the respective tracts since, cultivating same on a rental basis. In his will plaintiff's testator devised the tract occupied by E. D. Coleman to the defendant Bessie Coleman and devised the tract rented by R. D. Williford to the defendant Ina Williford.

The plaintiff, alleging that the respective accounts contracted by E. D. Coleman and by R. D. Williford "was incurred for living expenses of said defendants and their respective families and for farming operations on the lands devised to each respective devisee, and it was the intention of J. H. Robertson, deceased, that these debts should be paid out of the interest of the respective beneficiaries under his will," instituted this action to recover judgments for the amounts due and to subject the respective shares of Bessie Coleman and Ina Williford to the payment of the debts contracted and owing by their respective husbands.

The cause having been referred, the referee found the facts and concluded "that the intention of the testator was that the indebtedness of the two sons-in-law, E. D. Coleman and R. D. Williford, to the son J. P. Robertson, said debts being contracted for the use and benefit of their said wives, daughters of testator, should be a charge on the residuary share of said daughters in the net personal estate."

When the cause came on to be heard by the court below on exceptions to the referee's report, the court overruled the exceptions filed, affirmed the findings of fact and conclusions of the referee and entered judgment on the report. The defendants Bessie Coleman and Ina Williford excepted and appealed.

Little & Wilson for plaintiff, appellee.
Thomas W. Ruffin for defendant Ina Williford, appellant.
W. H. Rhodes for defendant Bessie Coleman, appellant.

BARNHILL, J. The debt due J. P. Robertson, which he seeks to have declared a charge upon the interest of Bessie Coleman in the personal estate of her deceased father, is not her debt but the debt of her husband. The referee so found. Not only are these findings binding upon the plain-

tiff, who did not appeal, but they are supported by the plaintiff's own testimony. In respect thereto he testified as follows: "It was all charged to E. D. Coleman and Hubert. . . . I have not charged a single item of this account to Bessie Coleman. I have never charged one cent to Bessie Coleman. . . . I would not say that Bessie Coleman ever authorized me to charge anything against her." The same may be said as to the account plaintiff seeks to charge against the interest of Ina Williford. This account was the account of R. D. Williford. The finding in respect thereto is likewise supported by the evidence of the plaintiff, who testified: "The entire account is charged to R. D. Williford. His wife's name does not appear on my books and she is not charged with the account. I always charged the account to Mr. Williford. Mr. Williford made all arrangements about opening this account and trading with me. Whatever he said is what went. If his wife came and wanted anything it was all charged to him on one account. I do not have any writing of any kind whereby Mrs. Ina Williford promised to pay the account of R. D. Williford."

The mere statement of facts makes it clearly appear that these accounts do not come within the language of the will through which the testator sought to charge against the distributive share of each child any debt due any one of his other children.

Nor can the plaintiff's contention that, as the accounts were contracted for living expenses for the defendants and their families, these debts come within the spirit and purpose of the language of the will. The duty to support the family is that of the husband and not of the wife. The debts were contracted to meet this obligation. The wife was not liable therefor in the first instance and may not be made so now by such specious interpretation of the will.

Neither can the contention of the plaintiff that these accounts constitute debts of the *feme* defendants for the reason that they were contracted in connection with farming operations on land belonging to the respective daughters be sustained. At the time the debts were contracted neither owned the tract upon which she and her family lived. It still belonged to her father. Her husband was in possession as tenant upon an annual cash rent basis. The farming operations were for his benefit. There is no principle of equity which the plaintiff can now invoke to have the court to declare that such debt is, in truth and in fact, the debt of the daughter and not of the son-in-law so as to bring it within the terms of the will.

But, the plaintiff says that under a proper interpretation of the will of the deceased the referee and the court below were justified in concluding that it was the intention of the testator to include the debt of an in-law, as well as a debt of a child, within the provisions of item

twelve of his will. This position is without merit. The pertinent language of the will is clear and unambiguous. It relates only to the debts of one child to another child. No purpose or intent to include an in-law is disclosed either by this section or by the will as a whole. This Court has no authority to amend or enlarge the clear language used by the testator but must interpret his will as it is written.

There is no evidence in the record to support the theory that the husband contracted the debt as agent of the wife. As stated, she did not own the land and there could be no implied agency. Therefore, *Guano Co. v. Colwell,* 177 N. C., 218, 98 S. E., 535; *Croom v. Lumber Co.,* 182 N. C., 217, 108 S. E., 735, and other cases relied on by plaintiffs are not in point.

While this action is instituted in the name of the executor and J. P. Robertson individually, it was, in fact, instituted and maintained for the benefit of the individual plaintiff. He seeks judgments against the defendants and to have such judgments charged against the respective interests of the defendants in their father's estate to the end that he may collect the amount due him. As executor he is only incidentally interested in the outcome. Therefore, the costs must be taxed against the plaintiff J. P. Robertson, individually.

The judgment below is

Reversed.

JOHN J. SUMMERELL, EMPLOYEE, v. CHILEAN NITRATE SALES CORPORATION, EMPLOYER, AND THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, CARRIER.

(Filed 7 November, 1940.)

1. Master and Servant § 55c—

Since the Workmen's Compensation Act does not provide any specific machinery governing appeals to the Superior Court, resort may be had to statutes regulating appeals in analogous cases, ordinarily those regulating appeals from a justice of the peace, so far as same are reasonably applicable and consonant with the language of the statute and the legislative intent.

2. Same—Appellant from Industrial Commission may docket appeal at next term of Superior Court, civil or criminal, beginning after the expiration of the 30 days allowed by the act for appeal.

An appellant from an award of the Industrial Commission is required to docket his appeal at the next term of the Superior Court, civil or criminal, beginning after the expiration of the 30 days from the award, or receipt of notice of the award by registered mail, allowed by the statute for appeal, Public Laws of 1929, ch. 120, sec. 60, this being consonant

with the legislative intent and the language of the statute, and with the analogous statute requiring appeals from a justice of the peace to be taken to the next term of the Superior Court beginning after the expiration of the 10 days allowed for service of notice of appeal, C. S., 1530, and the fact that notice of appeal from the award of the Industrial Commission is given prior to a term of the Superior Court beginning prior to the expiration of 30 days after appellant's receipt of notice of the award by registered mail, does not vary this result, and the appeal is improperly dismissed for failure to docket same before or during such intervening term of court.

APPEAL by defendants from *Williams, J.*, at May Term, 1940, of WAKE.

Proceeding under the North Carolina Workmen's Compensation Act for an award of compensation for injury by accident to John J. Summerell, while employed by Chilean Nitrate Sales Corporation.

When the proceeding came on for hearing in the Superior Court of Wake County at May Term, 1940, upon appeal thereto by defendants from an award of the Industrial Commission, claimant entered special appearance and moved to dismiss the appeal for the reason that same was not docketed in the Superior Court within the time allowed by law. The record discloses and the court finds these facts: (1) The Industrial Commission made award on 21 February, 1940, and gave notice thereof to defendants by registered mail, which was received by them on 27 February, 1940. (2) Defendants gave notice, dated 9 March, 1940, of appeal from said award to Superior Court of Wake County, service of which notice was duly accepted by counsel for claimant on 11 March, 1940, and same was received by the North Carolina Industrial Commission on 13 March, 1940. (3) On 3 April, 1940, the North Carolina Industrial Commission certified and returned transcript of the proceedings had by and before it, and same was docketed in the office of the clerk of the Superior Court of Wake County on 10 April, 1940. (4) In the meantime, a two weeks term of Superior Court of said county convened on 18 March, 1940. Upon these facts the court, being of opinion that the appeal was not docketed in said Superior Court within the time prescribed by law, allowed the motion of claimant, and dismissed the appeal.

Defendants appeal to Supreme Court and assign error.

A. J. Fletcher and Franklin T. Dupree, Jr., for plaintiff, appellee.
King & King and Harry Rockwell for defendant, appellant.

WINBORNE, J. This appeal presents one question: May an appeal from the award of the North Carolina Industrial Commission to the

Superior Court be dismissed for failure to docket same prior to or during a term of court which begins within thirty days next after appellant has received notice of award by registered mail?

The answer is "No."

The North Carolina Workmen's Compensation Act, Public Laws 1929, ch. 120, section 60, regarding appeals from an award of the North Carolina Industrial Commission to the Superior Court, provides that "either party to the dispute may, within thirty days from the date of such award, or within thirty days after receipt of notice to be sent by registered mail of such award, but not thereafter, appeal from the decision of said Commission to the Superior Court of the county in which the alleged accident happened, or in which the employer resides or has his principal office, for errors of law, under the same terms and conditions as govern appeals in ordinary civil actions."

No specific machinery is provided by the act except the clause, "under the same terms and conditions as govern appeals in ordinary civil actions."

The trend of decisions of this Court is that where a statute regulating appeals to the Superior Court does not prescribe any rules, the courts may look to other general statutes regulating appeals in analogous cases and give them such application as the particular case and the language of the statute may warrant—keeping in mind always the intention of the Legislature, and that ordinarily when practicable the practice in appeals from a judgment of a justice of the peace will control. McIntosh, N. C. P. & P., 818. *Blair v. Coakley,* 136 N. C., 405, 48 S. E., 804; *Cook v. Vickers,* 141 N. C., 101, 53 S. E., 740; *Sutphin v. Sparger,* 150 N. C., 517, 64 S. E., 367.

Generally "an appeal," as stated by *Ruffin, J.,* in *Hahn v. Guilford,* 87 N. C., 172, "means an appeal to the next term of the appellate court." The case of *Boing v. R. R.,* 88 N. C., 62, holds likewise.

In accordance with the practice in appeals from a judgment of a justice of the peace to the Superior Court, the decisions of this Court are uniform in holding that "the next term" or "the next succeeding term" means the first term of the Superior Court, whether civil or criminal, which shall begin after the expiration of the ten days allowed by statute, C. S., 1530, for service of notice of appeal. *Sondley v. Asheville,* 110 N. C., 84, 14 S. E., 514; *Davenport v. Grissom,* 113 N. C., 38, 18 S. E., 78; *Pants Co. v. Smith,* 125 N. C., 588, 34 S. E., 552; *Johnson v. Andrews,* 132 N. C., 376, 43 S. E., 926; *Blair v. Coakley, supra; MacKenzie v. Development Co.,* 151 N. C., 276, 65 S. E., 1003; *Peltz v. Bailey,* 157 N. C., 166, 72 S. E., 978; *Jones v. Fowler,* 161 N. C., 354, 77 S. E., 415; *Helsabeck v. Grubbs,* 171 N. C., 337, 88 S. E., 473;

Sneeden v. Darby, 173 N. C., 274, 91 S. E., 956; *Barnes v. Saleeby,* 177 N. C., 256, 98 S. E., 708; *S. v. Fleming,* 204 N. C., 40, 167 S. E., 483.

In *Sondley v. Asheville, supra,* where the appeal was from an assessment of damages for laying out of street, *Clark, J.,* said: "The provision for an appeal to the next term means no more than to the next term to which an appeal in orderly and regular course would go."

By analogy, giving the practice in appeals from a judgment of a justice of the peace such application as the language of the North Carolina Workmen's Compensation Act, Public Laws 1929, ch. 120, may warrant, keeping in mind the intention of the Legislature, an appeal from the decision of the North Carolina Industrial Commission to the Superior Court is taken to the next term of the Superior Court, whether civil or criminal, which begins after the expiration of the thirty days allowed by section 60 of the Act for appeal.

In the present case the defendants, having on 27 February, 1940, received notice of the award, given by registered mail, had thirty days next thereafter in which to appeal, and were not required to docket the appeal until the first term of the Superior Court, whether civil or criminal, which began after the expiration of such time allowed for appeal. Hence, the appeal should not have been dismissed for failure to docket it prior to or during the term of court which began on 18 March, 1940. The fact that defendants gave notice of appeal prior to that term is not material.

The decisions in the cases of *Higdon v. Light Co.,* 207 N. C., 39, 175 S. E., 710, and *Winslow v. Carolina Conference Assn.,* 211 N. C., 571, 191 S. E., 403, when applied to the facts of each, are not in conflict with this opinion.

The judgment below is

Reversed.

STATE v. J. E. BARNETT.

(Filed 7 November, 1940.)

Criminal Law § 77b—Record held sufficient, under presumption of regularity, to show that defendant entered plea to indictment.

Where the record shows that a true bill was found against defendant by the grand jury, that a petit jury was duly sworn and impaneled to "try the issues joined," and that the jury so impaneled found defendant guilty, the record is sufficient under the presumption of regularity to show that defendant entered a plea to the indictment, and defendant's contention that no judgment could have been rendered against him in the court below because it does not appear of record that defendant entered any plea to the indictment cannot be maintained.

STATE *v.* BARNETT.

APPEAL by defendant from *Harris, J.*, at February Special Term, 1940, of FRANKLIN. Affirmed.

The record brought to this Court by defendant shows (1) organization of court; (2) bill of indictment against defendant: "The Jurors for the State, upon their oath, present: that J. E. Barnett, late of the County of Franklin, on the 2nd day of July, 1939, at and in the County aforesaid, did unlawfully, willfully and feloniously assault Jessie Baker with a certain deadly weapon, to wit: a knife, with the felonious intent to kill and murder the said Jessie Baker, to wit: severe cuts about lungs and about the body, against the form of the statute in such case made and provided and against the peace and dignity of the State. W. Y. Bickett, Solicitor. This bill was returned a True Bill."

(3) "And thereafter, to wit; at the term of said Court begun and held for the aforesaid County on the 12th day of February, 1940, before the Honorable W. C. Harris, assigned Judge, duly commissioned by the Governor of the State of North Carolina, the following Jurors were duly chosen, sworn and impaneled to try the issues joined: Troy Wilder, Elmer Mullen, J. S. Dennis, Frank Edwards, J. H. Furguson, P. S. Foster, Maynard G. Baker, Dick Parrish, H. L. Gupton, J. G. Place, O. B. Burrows and Frank Swanson."

(4) Verdict: "After hearing the evidence and charge of the Court, the jury so impaneled returned the following verdict: That the defendant is Guilty of Assault with a Deadly Weapon."

(5) Judgment: "Thereupon the Court entered the following Judgment: It is Ordered by the Court that the defendant be confined in the Jail of Franklin County for a period of 18 months, to be assigned to work under the supervision of the State Highway and Public Works Commission."

(6) Appeal Entries: "The following notice of appeal was entered: To the judgment and verdict in this cause defendant excepts and appeals to the Supreme Court. Appeal bond fixed at $75.00; appearance bond fixed at $500.00. Defendant allowed 40 days to serve and file case on appeal. State allowed 30 days to file countercase or exceptions. Appearance bond given. Appeal Bond in the sum of $75.00 filed. Transcript certified by Clerk Superior Court."

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

Kemp P. Yarborough for defendant.

CLARKSON, J. N. C. Code, 1939 (Michie), sec. 643, is as follows: "The appellant shall cause to be prepared a concise statement of the case, embodying the instructions of the judge as signed by him, if there

be an exception thereto, and the request of the counsel of the parties for instructions if there be any exception on account of the granting or withholding thereof, and stating separately, in articles numbered, the errors alleged. A copy of this statement shall be served on the respondent within fifteen days from the entry of the appeal taken; within ten days after such service the respondent shall return the copy with his approval or specific amendments endorsed or attached; if the case be approved by the respondent, it shall be filed with the clerk as a part of the record; if not returned with objections within the time prescribed, it shall be deemed approved: Provided, that the judge trying the case shall have the power, in the exercise of his discretion, to enlarge the time in which to serve statement of case on appeal and exceptions thereto or counter statement of case."

In *Cressler v. Asheville,* 138 N. C., 482 (483-4), it is written: "There is no 'case agreed' on appeal and none 'settled' by the judge, and there being no error upon the face of the record proper the judgment must be affirmed. See numerous cases cited in Clark's Code (3d Ed.), p. 760. Errors occurring during the trial can be presented only by a 'case on appeal.' It is only when the errors are presented by the record proper, as in an appeal from a judgment upon a demurrer, or upon a case agreed, or judgment granting or refusing an injunction to the hearing heard upon the affidavits, that a case on appeal can be dispensed with. *Ibid.,* p. 770. When there is a defect of jurisdiction, or the complaint fails to state a cause of action, that is a defect upon the face of the record proper of which the Court will take notice. *Cummings v. Hoffman,* 113 N. C., 267; *Appomattox Co. v. Buffaloe,* 121 N. C., 37."

In *Dixon v. Osborne,* 201 N. C., 489 (493), citing numerous authorities, is the following: "Plaintiffs contend that there is error in the judgment in this action rendered at May Term, 1931. This contention is presented by their appeal from the judgment. It has been uniformly held by this Court that an appeal is itself an exception to the judgment and to any other matter appearing on the face of the record." *Orange County v. Atkinson,* 207 N. C., 593 (596); *Best v. Garris,* 211 N. C., 305 (308).

The defendant contends that no judgment could be rendered in the court below as it does not appear from the record that the defendant entered any plea to the bill of indictment found against him. We cannot so hold. The record discloses that a true bill was found against defendant: "Did unlawfully, willfully and feloniously assault Jessie Baker, with a certain deadly weapon, to wit: a knife, with the felonious intent to kill and murder the said Jessie Baker."

It further appears that the case was called for trial before the judge and a jury. The record is as follows: "The following Jurors were duly chosen, sworn and impaneled *to try the issues joined.*"

The verdict recites: "After hearing the evidence and charge of the court, the *Jury so impaneled* returned the following verdict: That the defendant is Guilty of Assault with a Deadly Weapon."

The record says in no uncertain language: "The following jurors were duly chosen, sworn and impaneled *to try the issues joined.*" What were the judge and jury doing? It goes without saying that they were *trying defendant on issues joined.* The issues were "Guilty" or "Not Guilty." Under the facts we think the record presumes regularity, and we so hold. *S. v. Harvey,* 214 N. C., 9 (11); 22 C. J., 626.

The judgment of the court below is

Affirmed.

MRS. SALLIE WATSON v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 7 November, 1940.)

1. Railroads § 9—Evidence held for jury on issue of negligence of railroad company causing accident at crossing resulting in injury to plaintiff.

Plaintiff's evidence tended to show that defendant's railroad tracks crossed at grade one of the main thoroughfares of a city, that the view of the tracks was obstructed by small buildings and vegetation on the right of way, that no gongs or signal devices were maintained thereat, that defendant's train operated at an excessive speed and without warning signals by bell or whistle, approached the crossing and struck an automobile which was attempting to cross the tracks, that the driver of the car was not guilty of negligence, that the train carried the car some 75 feet down the track and dropped it on plaintiff, who was working in her flower garden, causing her injury. *Held:* The Evidence was sufficient to overrule defendant's motion to nonsuit, notwithstanding evidence introduced by defendant contradicting plaintiff's evidence on every material aspect.

2. Trial § 22b—

Upon a demurrer thereto, the evidence must be construed in the light most favorable to plaintiff and he is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom. C. S., 567.

APPEAL by plaintiff from *Thompson, J.,* at April Term, 1940, of WAYNE.

Royall, Gosney & Smith and James Glenn for plaintiff, appellant.

D. H. Bland, W. B. R. Guion, Thomas W. Davis, and V. E. Phelps for defendant, appellee.

SCHENCK, J. This is an action to recover damages for personal injuries to the plaintiff alleged to have been caused by the negligence of

the defendant. After all the evidence on both sides was in, the court sustained the defendant's demurrer to the evidence and entered judgment as in case of nonsuit. C. S., 567. The plaintiff preserved exception and appealed.

The plaintiff alleges that while she was working among her flowers near the side of the defendant's railroad track the defendant's freight train struck the automobile of Miss Mitcham, which was crossing the railroad track at a highway intersection, and carried the automobile along the railroad track for some seventy-four feet and dropped it on the plaintiff, causing her injuries.

The plaintiff alleges that the defendant's negligence, which was a proximate cause of her injury, consisted of (1) its failure to maintain at a dangerous and much-used crossing a watchman, gates, gongs or other signalling device; (2) its operating its train at an excessive rate of speed; and (3) its failure to give adequate signal by whistle or bell of its approach to the highway and railroad track intersection.

The court below held that there was not sufficient evidence to be submitted to the jury upon the issues joined upon the allegations of the complaint and the denials thereof in the answer. We think this holding was erroneous.

The evidence of the plaintiff tended to show that the intersection of Ash Street and the railroad track of the defendant, where a collision between the automobile driven by Miss Mitcham and the train of the defendant occurred, was within the corporate limits of the city of Goldsboro, that the street was one of the main thoroughfares of the city, and was much used; that the view of the railroad track south of the intersection in the direction from which the train was approaching was obstructed by small buildings and vegetation on the right of way of the railroad company; that the train approached the intersection at a speed of 20 or 25 miles per hour, that no timely and adequate signal was given by whistle, bell or otherwise of the approach to the intersection of the train; that Miss Mitcham was driving her automobile on Ash Street in an easterly direction at a reasonable rate of speed and in a careful manner, that the brakes, as well as the general mechanical structure of her automobile, were good, and that as she entered the intersection she saw the train and turned her automobile slightly to the left in an endeavor to escape the collision, but her automobile was struck by the oncoming train of the defendant and she and her automobile were carried down the railroad track by the engine of the defendant some seventy-four feet and were thrown to the side of the track upon the plaintiff while working in her flowers.

The evidence of the defendant was sharply in conflict with that of the plaintiff, and tended to show that the crossing was not such a dangerous

one and so used as, in the exercise of reasonable care, to require the keeping of a watchman or the maintenance of gates, gongs or other signalling devices thereat, that the view to the south of the crossing was unobstructed, and that the whistle and bell on defendant's train were sounded, and the train was being operated at a reasonable rate of speed and in a careful manner; and that when Miss Mitcham, who was driving negligently and at an excessive rate of speed, saw that her automobile was going to strike the left side of the engine of the defendant's train which had entered well into the intersection, she turned her automobile to the left and drove it down the side of the railroad track till it fell therefrom upon the plaintiff—that the automobile was not struck by the defendant's engine but ran down the railroad track under its own power.

Upon a demurrer thereto we must construe the evidence in the light most favorable to the plaintiff, who is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom, annotations under C. S., 567, in N. C. Code, 1939 (Michie), and when we apply this rule we are constrained to hold that his Honor erred when he allowed the defendant's motion for judgment as in case of nonsuit. *White v. R. R.*, 216 N. C., 79; *Moseley v. R. R.*, 197 N. C., 628, and cases there cited.

The judgment below is

Reversed.

IN RE WILL OF CALEB HARRIS.

(Filed 7 November, 1940.)

1. Wills § 21c—

Undue influence which will justify the setting aside of a will is a fraudulent influence or such an overpowering influence as substitutes the will of the person exercising the influence for that of the testator so that the testator is constrained to act against his will.

2. Wills § 22—

The burden on the issue of undue influence rests upon caveators.

3. Wills § 24—Evidence held insufficient to sustain allegation of undue influence and peremptory instruction for propounders was without error.

The evidence viewed in the light most favorable to caveators tended to show only that testator's sole heirs at law were his nephews and niece, that he left more of his property to some of them with whom he had lived and associated more closely than to others, that he was a sporadic drinker, and that the will in question was executed by him in the office of an attorney, and that the day the will was executed he came home intoxicated, *is held* insufficient to support caveators' allegations of undue influence, and a peremptory instruction on the issue in favor of the propounders is not error.

IN RE WILL OF HARRIS.

APPEAL by caveators from *Burney, J.*, at June Term, 1940, of PASQUOTANK.

Motion for new trial for newly discovered evidence was allowed on 27 August, 1940. Petition to rehear motion for new trial for newly discovered evidence was allowed and order for new trial vacated. The case is now considered upon original record and briefs.

J. Kenyon Wilson, M. B. Simpson, R. Clarence Dozier, and Jack W. Jennette for propounders, appellees.

Robert B. Lowry and H. S. Ward for caveators, appellants.

SCHENCK, J. A paper writing purporting to be the last will and testament of Caleb Harris was offered for probate by his nephew, Charles H. Harris, who was named as executor therein, and was duly admitted to probate in common form and letters testamentary duly issued to the propounder. Charles H. Harris, Paul C. Harris, Claud D. Harris, Tram Harris, C. C. Harris and Mrs. J. B. Jennings, nephews and niece of the testator, were the beneficiaries named in the will. Elizabeth Harris *et al.*, nieces and nephews of the testator, in behalf of themselves and others, heirs at law and next of kin of the testator, filed a caveat, wherein it is alleged that the testator was without testamentary capacity at the time of the execution of the paper writing, and that the execution thereof was obtained by undue influence.

The court submitted four issues, (1) as to the formal execution of the paper writing, (2) as to the mental capacity of the deceased, (3) as to the procurement of the execution of the paper writing by undue influence, and (4) as to the paper writing propounded being the last will and testament of Caleb Harris, and instructed the jury that if they believed all the evidence and found the facts to be as the evidence tended to show, and by the greater weight thereof, it would be their duty to answer the issues in favor of the propounders. The jury answered the issues in favor of the propounders, and from judgment predicated on the verdict the caveators appealed, assigning as error the court's peremptory instruction.

The record and the caveators' brief indicate that the only assignment of error relied upon by the appellants is "that there is evidence in the record sufficient to go to the jury on the third issue (as to undue influence)." We have read the record with care and are of the opinion, and so hold, that this assignment cannot be sustained.

"To constitute 'undue influence' within the meaning of the law, there must be something operating upon the mind of the person whose act is called in judgment, of sufficient controlling effect to destroy free agency and to render the instrument, brought in question, not properly an ex-

pression of the wishes of the maker, but rather the expression of the will of another. 'It is the substitution of the mind of the person exercising the influence for the mind of the testator, causing him to make a will which he otherwise would not have made.'

"In short, undue influence, which justifies the setting aside of a will, is a fraudulent influence, or such an overpowering influence as amounts to a legal wrong. *In re Mueller's Will,* 170 N. C., 28, 86 S. E., 719; *Plemmons v. Murphey,* 176 N. C., 671, 97 S. E., 648; *In re Craven's Will,* 169 N. C., 561, 86 S. E., 587. It is close akin to coercion produced by importunity, or by a silent, resistless power, exercised by the strong over the weak, which could not be resisted, so that the end reached is tantamount to the effect produced by the use of fear or force. To constitute such undue influence, it is not necessary that there should exist moral turpitude, but whatever destroys free agency and constrains the person, whose act is brought in judgment, to do what is against his or her will, and what he or she otherwise would not have done, is a fraudulent influence in the eye of the law. *In re Lowe's Will,* 180 N. C., 140, 104 S. E., 143; *In re Abee's Will,* 146 N. C., 273, 59 S. E., 700." *Stacy, C. J.,* in *In re Will of Turnage,* 208 N. C., 130.

The evidence, when viewed in the light most favorable to the caveators, upon whom the burden of proof of the issue rested, tended to show no more than that the will was executed by Caleb Harris "sometime before 12 o'clock" on 7 December, 1927, in the law office of E. F. Aydlett, Esquire, that it was drawn and witnessed in a formal manner; that on the day preceding its execution the last surviving brother of the testator was buried; that on the night of the day of the execution of the will the testator came home drunk; that the testator drank more or less intoxicating liquors and occasionally got drunk; that at the time of his death in August, 1939, at the age of approximately 80 years, he had been living with his nephew Charles H. Harris for 8 or 9 years, that Charles H. Harris was named as executor and was the largest beneficiary under his will; that the testator was never married and his heirs and next of kin at the time of his death were his nephews and nieces."

The case is distinguishable from *In re Amelia Everett,* 153 N. C., 83, relied upon by the appellant.

Caleb Harris was free to dispose of his property, real and personal, as he saw fit, and the mere fact that he chose to give it to some of his nephews and a niece, with whom he had lived and associated more closely, to the exclusion of other nephews and nieces, coupled with the fact that he was a sporadic drinker of intoxicating liquors and the other facts made to appear by the record, is not sufficient evidence to sustain an allegation that his will was executed under undue influence.

The order heretofore entered for a new trial for newly discovered evidence is vacated.

In the trial and judgment of the Superior Court we find

No error.

IN THE MATTER OF LEANDER SMITH.

(Filed 7 November, 1940.)

1. Criminal Law § 63—Time when punishment is to begin is no part of judgment, and execution may be suspended with leave to solicitor to move for capias.

Upon conviction, defendant was sentenced to six months on the roads, *capias* to issue on motion of the solicitor. *Held:* The judgment was not suspended but the sentence was definitely imposed with execution thereon delayed until the solicitor should make motion in court for *capias*, and the judgment is valid, the time when sentence shall be executed and punishment begun being no part of the judgment and therefore execution of the sentence may be had at any time thereafter upon motion of the solicitor in open court in the presence of defendant.

2. Habeas Corpus §§ 2, 8—

The writ of *habeas corpus* may not be used as a substitute for appeal, and where defendant has been confined upon execution of a valid sentence in a criminal prosecution, his petition is properly denied.

CERTIORARI to review order of *Bone, J.*, in *habeas corpus* proceeding instituted by Leander Smith. From WILSON. Affirmed.

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

A. O. Dickens and Connor & Connor for petitioners.

DEVIN, J. The petitioner, Leander Smith, applied to Judge Bone for writ of *habeas corpus*, alleging that he was illegally restrained of his liberty under a judgment of the recorder's court of Wilson, North Carolina. After hearing the matter, Judge Bone was of opinion that petitioner's restraint was legal and declined to discharge him from custody. Thereafter petition for writ of *certiorari* to review the order of Judge Bone was allowed by this Court, and the case was brought here for determination of the question of the legality of petitioner's restraint.

The material facts were these: On 14 November, 1938, petitioner was tried in the recorder's court of Wilson on the charge of unlawful possession and sale of intoxicating liquor, and found guilty. The fol-

lowing judgment was entered: "After hearing the evidence, it is adjudged that the defendant is guilty of the offense charged. Fine $25.00 and costs and six months on the road, *capias* for road sentence to issue on motion of Solicitor."

On 17 June, 1940, petitioner was again tried in the same court on the charge of unlawful possession and sale of intoxicating liquor, and again found guilty. From sentence imposed in that case petitioner appealed to the Superior Court. At the same time the solicitor made a motion in the court for *capias* and commitment in the case tried 14 November, 1938. The motion was allowed and *capias* and commitment were ordered by the court to issue, and the petitioner was placed in custody. Writ of *habeas corpus* was sued out and hearing had 13 July, 1940. Petitioner's restraint was adjudged legal.

The question here presented is whether the recorder's court had the power, upon motion of the solicitor in open court, to cause *capias* and commitment to issue and to require petitioner to serve the sentence imposed by the judgment of 14 November, 1938.

Upon consideration of the original judgment entered by the recorder's court (which court had final jurisdiction of the cause and of the person of the petitioner), and of the subsequent proceedings as disclosed by the record, we are of opinion, and so decide, that the judge below has ruled correctly, and that the order denying petitioner's release under writ of *habeas corpus* must be affirmed.

This was not a case of judgment suspended upon condition. *S. v. Hardin,* 183 N. C., 815, 112 S. E., 593; *S. v. Gooding,* 194 N. C., 271, 139 S. E., 436. Here the sentence was definitely imposed by the judgment and the term of imprisonment was fixed. There were no conditions attached. The execution of the sentence was not at the time put into effect, but was delayed until the solicitor should make motion in court for *capias. S. v. Vickers,* 184 N. C., 676, 114 S. E., 168. Thereafter the petitioner being before the court, and it appearing that the sentence had not been served, upon motion of the solicitor, and in the exercise of the power of the court, the sentence already adjudged was ordered to be executed and service of sentence to be begun. *S. v. Cardwell,* 95 N. C., 643; *S. v. Cockerham,* 24 N. C., 204. The validity of the original judgment was not impaired by reason of the delay in putting it into effect. 15 Am. Jur., 147. "The time at which a sentence shall be carried into execution forms no part of the judgment of the court." *S. v. Vickers, supra.* "The essential part of the sentence is the punishment and not the time when the punishment shall begin." *S. v. Yates,* 183 N. C., 753, 111 S. E., 337; *S. v. Horne,* 52 Fla., 125; 7 L. R. A. (N. S.), 719. When the court's attention was called by the solicitor's motion to the fact that its judgment had not been enforced, it

had power to order the execution of the sentence. *S. v. McAfee,* 198 N. C., 507, 152 S. E., 391; *S. v. Manon,* 204 N. C., 52, 167 S. E., 493; *Bernstein v. United States,* 254 Fed., 955. The judgment of 14 November, 1938, was not void. *S. v. Edwards,* 192 N. C., 321, 135 S. E., 37. Nor may the writ of *habeas corpus* be substituted for appeal. *In re Adams, ante,* 379.

The judgment below declining to discharge the petitioner from custody is

Affirmed.

MINNIE FISHER MILLER, ADMINISTRATRIX OF THE ESTATE OF GEORGE W. MILLER, v. LEWIS AND HOLMES MOTOR FREIGHT CORPORATION.

(Filed 7 November, 1940.)

1. Automobiles §§ 7, 18c, 18e—Evidence held to show contributory negligence as matter of law on part of pedestrian turning to left on highway in path of defendant's truck.

The evidence tended to show that defendant's truck approached a pedestrian walking on his right side of the highway, traveling in the same direction, that the driver of the truck sounded his horn, that the pedestrian took a step to his right so that he was within about 18 inches of his right side of the highway, then suddenly turned to his left to cross the highway in front of the truck, that the driver of the truck turned to his left to avoid striking him, but that although the cab of the truck passed the pedestrian on his left side the pedestrian ran into the right side of the trailer, causing injury resulting in death. *Held:* The evidence discloses contributory negligence on the part of the pedestrian as a matter of law in walking on his right side of the highway, Public Laws of 1937, ch. 407, sec. 135 (d); Michie's Code, 2621 (320), and in his suddenly attempting to cross to his left-hand side of the highway in front of the oncoming truck, and *held further,* there being no evidence that the driver of the truck saw intestate's perilous condition in time to have stopped the truck or that the accident would not have occurred if he had turned the truck to the right, the refusal of the court to submit an issue of last clear chance was not error.

2. Negligence § 10—

The burden on the issue of last clear chance is upon plaintiff, and the court properly refuses to submit the issue in the absence of evidence on the part of plaintiff that defendant saw the perilous situation in time to have avoided the accident and that he failed to take appropriate action which would have avoided the injury.

APPEAL by plaintiff from *Phillips, J.,* at May Term, 1940, of ROWAN.

Robinson & Jones and Clyde E. Gooch for plaintiff, appellant.
J. A. Myatt for defendant, appellee.

SCHENCK, J. This is an action to recover damages for the wrongful death of plaintiff's intestate alleged to have been caused by the negligence of the defendant, wherein the pleas of contributory negligence and of the last clear chance were interposed.

The evidence when viewed most favorably to the plaintiff tends to show that the plaintiff's intestate was operating his automobile northward between Salisbury and Lexington on U. S. Highway No. 70—toward Lexington, that the automobile either became disabled or ran out of gas, and the intestate got out of it and was proceeding on foot on his right-hand side of the highway toward Lexington to get assistance; that the defendant's truck, with trailer attached, operated by its servant and agent within the scope of his authority, was on the same highway and was going in the same direction as was the intestate; that as the truck approached in 40 or 50 feet of the intestate the horn was sounded and the intestate took one step closer to his right edge of the pavement, within 18 inches of said edge, and then suddenly turned to his left to cross said highway, and the truck was turned to its left to avoid hitting the intestate; that the front of the truck passed the intestate on his left side, and intestate ran into the right side of the trailer and was knocked down and killed; that at the time of the sounding of the horn the truck was going 60 miles per hour and at the time the truck struck the intestate it was going 40 miles per hour, and after striking the intestate the truck ran on 60 feet and stopped in the ditch on its left side of the highway.

When the plaintiff had introduced her evidence and rested her case the court sustained the defendant's demurrer to the evidence and entered a judgment as in case of nonsuit, to which the plaintiff preserved exception and appealed.

While there was ample evidence to be submitted to the jury upon the issue of defendant's actionable negligence, we are of the opinion, and so hold, that the plaintiff's own evidence established the contributory negligence of her intestate, in that it disclosed that said intestate was walking on the traveled portion of the highway otherwise than on his extreme left-hand side thereof, as required by statute, Public Laws 1937, ch. 407, sec. 135 (d) (sec. 2621 [320], N. C. Code of 1939, Michie), and suddenly attempted to cross to his left-hand side thereof in front of the oncoming truck, of the approach of which he had knowledge, when he had a perfectly safe position on his right-hand side of the highway.

The plaintiff, however, argues that in the event the court should be of the opinion that the plaintiff's evidence establishes as a matter of law the contributory negligence of her intestate, that the case should have been submitted to the jury upon an issue of last clear chance. This argument is untenable for the reason that there is no evidence in the record tending to show that the driver of defendant's truck saw, or in

the exercise of due diligence could have seen, the dangerous position in which the intestate by his own negligence had placed himself in time to have avoided the fatal collision. There is no evidence as to distance in which the truck could have been stopped, no evidence that the truck had defective brakes or was otherwise mechanically defective, no evidence to the effect that had the truck proceeded straight ahead, or had turned to the right instead of to the left, the collision could have been avoided. "The burden of the issue of last clear chance is upon the plaintiff, and such issue is not applicable unless there is evidence to support it." *Miller v. R. R.*, 205 N. C., 17. "No issue with respect thereto (last clear chance) must be submitted to a jury unless there is evidence to support it." *Redmon v. R. R.*, 195 N. C., 764. "After the evidence was concluded, the court, being of the opinion that the issue (as to last clear chance) was not warranted, refused to submit it, and the plaintiff excepted. There was no error in this ruling of his Honor, for, as he said, there was no evidence tending to prove that the defendant could have averted the plaintiff's injury." *Ellerbe v. R. R.*, 118 N. C., 1024.

The judgment of the Superior Court is

Affirmed.

STATE v. HOWARD CANNON, AVERY WINSTON, FRANK SAPP, OSCAR PAGE, JAMES McNEILL, AND C. E. REECE.

(Filed 7 November, 1940.)

1. Larceny § 7—

Where the State's evidence tends to show the actual theft of the goods in question by others, and fails to connect defendant therewith in any manner until after the goods had been asported, the presumption arising from defendant's possession of the goods a short time thereafter is insufficient to justify the submission of the question of defendant's guilt of larceny to the jury.

2. Receiving Stolen Goods § 8—

A verdict of guilty of "receiving" is insufficient to support judgment for receiving stolen goods with knowledge that they had been stolen, C. S., 4250, "receiving," without more, not being a crime.

3. Criminal Law § 83—

Where the form of the verdict is insufficient to support the judgment, a *venire de novo* will be ordered.

APPEAL by defendant Howard Cannon from *Williams, J.*, at March Term, 1940, of WAKE.

STATE *v.* CANNON.

Criminal prosecution tried upon indictment charging the defendant Howard Cannon, and others, in three counts, (1) with breaking and entering a boxcar and building, (2) with the larceny of two cases of Phillip Morris cigarettes, of the value of $137.00, the property of the Seaboard Air Line Railway Company, and (3) with receiving said cigarettes, etc., knowing them to have been feloniously stolen or taken in violation of C. S., 4250.

The State's evidence tends to show that on 24 January, 1940, James McNeill and Frank Sapp, Negroes, stole some cigarettes from a boxcar of the Seaboard Air Line Railway, hid them in South Park, city of Raleigh, and on the following day sold them to C. E. Reece, who in turn sold them to his brother-in-law, Howard Cannon. Reece used Cannon's car in going after the cigarettes. Cannon admitted receiving the cigarettes from Reece, but denied any knowledge of their having been stolen.

The defendant's demurrer to the evidence was sustained on the first count and overruled as to the second and third counts in the bill of indictment.

Verdict: "Guilty of larceny and receiving."

Judgment: Imprisonment in the State's Prison from not less than three nor more than five years.

Defendant appeals, assigning errors.

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

Clyde A. Douglass, Ellis Nassif, and W. H. Yarborough, Sr., for defendant, appellant.

STACY, C. J. The record is barren of any evidence of larceny on the part of Howard Cannon, unless the possession by him of the goods on the day following their taking is evidence of such guilt. While it is very generally held that the recent possession of stolen property is a circumstance tending to show the larceny thereof by the possessor (*S. v. Best,* 202 N. C., 9, 161 S. E., 535), or that it raises a presumption of fact (*S. v. Anderson,* 162 N. C., 571, 77 S. E., 238), or a presumption of law (*S. v. Graves,* 72 N. C., 482), of such guilt, still it would seem that on the present record no such presumption should prevail because the State's evidence shows the larceny to have been committed by others, and fails to connect the defendant in any way with the felonious taking. *S. v. Lippard,* 183 N. C., 786, 111 S. E., 722; *S. v. Anderson, supra.* The larceny was completed when the cigarettes were taken from the boxcar and secreted in South Park. The thief himself, a witness for the State, testified that he did not know Mr. Cannon and had never seen

him prior to the day of trial when he was pointed out to him in the courtroom.

We are constrained to hold, therefore, that the demurrer to the evidence on the count of larceny should have been sustained. *S. v. English,* 214 N. C., 564, 199 S. E., 920.

The demurrer to the evidence was properly overruled as to the third count. But the verdict on this count is insufficient to support the judgment. *S. v. Lassiter,* 208 N. C., 251, 179 S. E., 891; *S. v. Barbee,* 197 N. C., 248, 148 S. E., 249. It neither alludes to the indictment nor uses language to show a conviction of the offense charged therein. *S. v. Shew,* 194 N. C., 690, 140 S. E., 621. It is entirely consistent with the defendant's contention that the receipt of the property was lawful. *S. v. Parker,* 152 N. C., 790, 67 S. E., 35. "Receiving," without more, is not a crime. C. S., 4250; *S. v. Beal,* 200 N. C., 90, 156 S. E., 140.

The defendant is entitled to a *venire de novo* on the third count in the bill.

Reversed on second count.

Venire de novo on third count.

SAMUEL H. HOBBS v. EFFIE HARRISON HOBBS,
and
EFFIE HARRISON HOBBS v. SAMUEL H. HOBBS.

(Filed 7 November, 1940.)

1. Appeal and Error § 31f—

Appellee's motion to dismiss the appeal will be allowed when the record contains no assignment of error, Rules of Practice in the Supreme Court, No. 19, sec. 3.

2. Divorce § 10—Decree of absolute divorce terminates all rights arising out of marriage, including right to alimony.

The husband's action for divorce on the ground of two years separation was consolidated for trial with the wife's subsequent action for alimony without divorce, C. S., 1667. The decree of divorce was granted in the first action and judgment entered against the wife in the second action upon the verdict of the jury, and the wife appealed in both actions. *Held:* The decree of absolute divorce terminates all the rights arising out of marriage, including the right to alimony, and upon dismissal of the appeal from the judgment of divorce, the judgment in the action for alimony will be affirmed.

APPEAL by Effie Harrison Hobbs from *Parker, J.,* at March Term, 1940, of SAMPSON.

Two civil actions, for divorce and for alimony without divorce, respectively.

In the first action instituted 29 June, 1939, by Samuel H. Hobbs for absolute divorce on the ground of two years separation, the defendant, Effie Harrison Hobbs, in her answer set up a further defense and cross action for alimony without divorce and for an allowance for counsel fees, on the ground of abandonment and failure to support. Plaintiff denied these averments.

In the second action, instituted 27 February, 1940, by Effie Harrison Hobbs for alimony without divorce on the ground that her husband had offered such indignities to her person as to render her condition intolerable and life burdensome. The defendant, in his answer, denies that such ground exists.

Upon the trial below the two cases were consolidated and tried together, separate issues in each case being submitted to the jury. In the first case the jury answered the issues as to residence, marriage and separation in the affirmative. But in answer to the fourth issue, the jury found that the separation was not caused by "plaintiff willfully abandoning his wife without providing adequate support" for her. From judgment thereon defendant appeals to Supreme Court.

In the second action, the jury answered the issue as to marriage in the affirmative. But as to the second and third issues, the jury answered that defendant, Samuel H. Hobbs, did not offer such indignities to the person of his wife, the plaintiff, as to render her condition intolerable and life burdensome, and that he did not separate himself from his wife and fail to provide her with necessary subsistence. From judgment thereon, the plaintiff appealed to Supreme Court, and assigns error.

J. D. Johnson, Jr., and P. D. Herring for plaintiff, appellee.
Butler & Butler and E. C. Robinson for defendant, appellant.

PER CURIAM. In the action instituted by Samuel H. Hobbs, he moves to dismiss the appeal for that the record contains no assignment of error. The motion is allowed. Rule 19, sec. 3, of the Rules of Practice in the Supreme Court, 200 N. C., 824.

The judgment in the first action, having absolutely divorced the plaintiff and defendant, all rights arising out of the marriage cease, C. S., 1663, including the right to alimony under C. S., 1667. *Duffy v. Duffy*, 120 N. C., 346, 27 S. E., 28. Hence, motion of appellee therein that the appeal be dismissed will be treated as motion to affirm, and as such is allowed.

On appeal in first action—Dismissed.

On appeal in second action—Affirmed.

STATE v. PAUL ABBOTT, CAPITAL AMUSEMENT COMPANY, AND H. E. LAING.

(Filed 20 November, 1940.)

1. Criminal Law § 78b—

Where defendant enters a plea of guilty and appeals from the judgment rendered, the appeal presents the single question of whether the facts alleged in the indictment and admitted by the plea are sufficient to constitute a criminal offense. In the present case, defendant having waived bill of indictment, the question of the sufficiency of the indictment is not necessarily presented, but it is held to properly charge a criminal offense under our statutes.

2. Indictment § 9: Gaming § 3—Indictment for statutory offense which follows the language of the statute is sufficient and it need not negative exceptions.

An indictment charging the ownership and distribution of slot machines adapted for use in such a way that as a result of the insertion of a coin the machine may be operated in such a manner that the user may secure additional chances or rights to use such machine and upon which the user has a chance to make various scores upon the outcome of which wagers may be made, follows the language of the statute and is sufficient to charge the offense therein defined. Chapter 196, Public Laws of 1937, Michie's Code, 4437 (t).

3. Gaming § 1—Revenue Act of 1939 held not to repeal Flanagan Act prohibiting gaming slot machines.

The provisions of the Flanagan Act, chapter 196, Public Laws of 1937, Michie's Code, 4437 (t), proscribing the possession and distribution of a coin slot machine in the operation of which the user may secure additional chances or rights to use the machine, is not repealed by the Revenue Act of 1939, Public Laws of 1939, chapter 158, section 130, since subsection 5 of the Revenue Act expressly negatives the intention to license or legalize any gaming slot machine or device, and since subsection 1 of the Revenue Act excludes from its licensing provisions slot machines which "automatically vend" any prize, coupon or reward which may be used in the further operation of such machine, the word "vend" being equivalent to the word "give" and the intent being to exclude from the licensing provisions a machine which provides a player with additional plays or games as a premium, prize, or reward irrespective of whether physical tokens of such premium, prize or reward, are, or are not, delivered to the player.

4. Same—

The mere fact of payment of State and county license on a slot machine does not render the possession or distribution of such machine legal when it is a machine proscribed and made illegal by valid statute.

5. Statutes § 5a—

A statute will be construed to effectuate the intent of the Legislature.

6. Gaming § 1: Constitutional Law § 7—

The Flanagan Act, prohibiting the possession or distribution of gaming slot machines, chapter 196, Public Laws of 1937, is a valid and constitutional exercise of the police power of the State.

STACY, C. J., concurring in result on the ground that the sufficiency of the indictment is not presented for review, defendant having waived bill and pleaded guilty to possession and distribution of slot machines prohibited by law.

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

APPEAL by defendant H. E. Laing from *Parker, J.*, at September Criminal Term, 1940, of WAKE. Affirmed.

This was a criminal action tried before Honorable R. Hunt Parker, Judge presiding at the September Criminal Term, 1940, for Wake County, for the Seventh Judicial District of the State of North Carolina, said case being tried upon the following bill of indictment:

"State of North Carolina—Superior Court,
Wake County—July Term, A.D. 1940.

"The Jurors for the State upon their oath present: That Paul Abbott, 327 S. Bloodworth St., and Capital Amusement Company and H. E. Laing, late of the County of Wake, on the 8th day of May, in the year of our Lord, one thousand nine hundred and forty, with force and arms, at and in the County aforesaid, *unlawfully and willfully did own, store, keep, possess, rent, let on shares, maintain, and keep in his and/or its possession for the purpose of operation in a certain building, owned, leased, and occupied* by him under his management and control a certain slot machine and device, to wit: A certain machine, apparatus and device adapted or readily converted into: *One that was adapted for use in such a way that as a result of the insertion of a piece of money or coin or other object the machine was caused to operate or might be operated in such manner that the user was entitled to secure or might secure additional chances or rights to use such a machine, apparatus or device and upon which the operator or user had a chance to make various scores or tallies upon the outcome of which wagers might be made.*

"And the Jurors for the State, upon their oath aforesaid, do further present, that the said Paul Abbott, 327 S. Bloodworth St., and Capital Amusement Company and H. E. Laing, late of the County of Wake, on the 8th day of May, 1940, did unlawfully and willfully own, keep and possess a certain slot machine and device upon which the taxes levied by the State of North Carolina, County of Wake, had not been paid and upon which the licenses was not prominently displayed, as required by law, against the form of the statute in such case made and provided and against the peace and dignity of the State. W. Y. Bickett, Solicitor.

No. 2771—State *v.* Abbott, 327 S. Bloodworth Street and Capital Amusement Co.—Indictment Various cases. Pros. Witnesses: Officer Clarkson, x Officer Maddrey. Those marked x sworn by the undersigned Foreman, and examined before the Grand Jury, and this bill found a True Bill. R. C. deRossett, Foreman Grand Jury."

The aforesaid bill of indictment was put in an envelope by the clerk of the Superior Court of Wake County, marked in words and figures as follows, to wit: "No. 2771—Criminal Docket. July Term, 1940. State *v.* Paul Abbott, Capital Amusement Co., H. E. Laing. Presentment—State's Witnesses: W. H. Clarkson, W. G. Maddrey."

And the said clerk entered this case upon the official dockets prepared by him for the presiding judge, solicitor and himself, as follows: "No. 2771—Criminal Docket, July Term, 1940. Offense: Illegal possession of Gambling Device. Officer Clarkson, W. G. Maddrey. State *v.* Paul Abbott, Capital Amusement Company, H. E. Laing."

In this case Paul Abbott and H. E. Laing, defendants, were called for trial by the solicitor and both defendants, the said Paul Abbott and H. E. Laing, in pursuance of the terms of their bonds, appeared in open court, the said H. E. Laing being represented by A. A. Aronson, Esq., of the Wake County Bar, and the said H. E. Laing, through and with the consent of his said counsel, the said A. A. Aronson, Esq., entered a plea of guilty in open court to the first count contained in the bill of indictment, charging him with unlawful possession and distribution of slot machines prohibited by law and the said H. E. Laing, through and with the consent of his counsel, A. A. Aronson, waived bill and all irregularities thereto and therein and entered said plea as upon bill found and admitted that the name Capital Amusement Company was his trade name used by him in the slot machine business and that he was engaged in the said slot machine business under the name of "H. E. Laing, trading as Capital Amusement Company," and at no time during said term of court did said H. E. Laing or his counsel object or except to said bill of indictment. A plea of guilty against the defendant H. E. Laing on the first count in the said bill of indictment was accepted by the solicitor for the State. The court heard evidence and thereupon entered the following judgment, to wit:

"Judgment—No. 2771. State *v.* Paul Abbott, Capital Amusement Company, H. E. Laing. Indictment—Illegal Possession of Gambling Devices, to wit: Slot Machines. The defendant, Paul Abbott, pleaded guilty to the first count in the bill of indictment charging him with the illegal and unlawful possession of slot machines, prohibited by law. The defendant, H. E. Laing, pleaded guilty to the first count in the bill of indictment charging him with the unlawful possession and distribution of slot machines prohibited by law. Prayer for judgment continued

for two years as to Paul Abbott upon payment of costs and upon the specific condition that during the next two years the defendant, Paul Abbott, does not have in his possession nor shall in any way be connected with any slot or vending machine nor any other type of machine that violates the 1937 Flanagan Act. If at any time during the next two years the defendant cannot satisfy the presiding judge of this court that he has not violated the conditions upon which prayer for judgment is continued *capias* will issue at term and the presiding judge shall take such steps as he deems proper according to law. It appearing to the court that the defendant, H. E. Laing, at this term of court has pleaded guilty to the first count in the bill of indictment in 24 cases charging him with the illegal possession, ownership, and distribution of slot machines prohibited by law and it further appearing to the court that ten years ago he paid the cost for violation of the slot machine law in the Recorder's Court of New Hanover County and he has been in the slot machine business off and on for five years or more, the judgment of the court is: That the defendant, H. E. Laing, be confined to the common jail of Wake County for a term of 8 months to be assigned to work the public roads under the direction of the State Highway and Public Works Commission. It is ordered by the court that the sentence in 2771 run concurrently with the road sentence in case 2749.

"To the judgment and sentence, the defendant H. E. Laing excepted, assigned error and appealed to the Supreme Court. Further notice waived. Defendant given statutory time in which to file case on appeal. State given statutory time to file exception or countercase. Appeal bond set at $100.00. Appearance bond set at $3,000.00.

"Counsel for the defendant and the Solicitor for the State having disagreed as to the Statement of case on appeal, the court, after notice to counsel for defendant and the Solicitor and in their presence in the Courtroom at Raleigh, N. C., settled the above as the case on appeal in this action, and the above constitutes the statement of case on appeal in this action. This October 11, 1940. R. Hunt Parker, Judge Superior Court, Presiding."

Defendant excepted and assigned error as follows: "(1) That the court erred in pronouncing judgment on an invalid and insufficient indictment. (2) That the first count in the bill of indictment does not constitute a criminal offense upon which a valid judgment could be entered under the laws of the State of North Carolina. Aaron Goldberg, W. Brantley Womble, for defendant."

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

Aaron Goldberg and W. Brantley Womble for defendant, H. E. Laing.

CLARKSON, J. Was judgment rendered contrary to law in the court below on an invalid and insufficient indictment? We think not.

Did the first count in the bill of indictment constitute a criminal offense under the laws of North Carolina, upon which a valid judgment could be rendered? We think so.

In *S. v. Warren,* 113 N. C., 683, it was held: "Where a defendant pleads guilty, his appeal from a judgment thereon cannot call into question the facts charged, nor the regularity and correctness of the proceedings, but brings up for review only the question whether the facts charged and admitted by the plea, constitute an offense under the laws and Constitution." At p. 684, it is said: "The appeal could only bring up for review the question whether the facts charged, and of which the defendant admitted himself to have been guilty, constitute an offense punishable under the laws and Constitution. Wharton Cr. Pr. & Pl., 9th Ed., sec. 413." *S. v. McKnight,* 210 N. C., 57; *S. v. Cox,* 216 N. C., 424 (425).

Defendant contends that there was error in the judgment in the court below, and this contention is presented by his appeal from the judgment to this Court. This brings the record here for our consideration. *Dixon v. Osborne,* 201 N. C., 489 (495); 8 R. C. L., sec. 85.

In 22 C. J. S., p. 657, speaking to the subject, we find: "A plea of guilty, in general, waives all defenses other than that the indictment, or information charges no offense."

The defendant Laing, having waived bill and all irregularities therein, and having pleaded guilty, as upon bill found, to the unlawful possession and distribution of slot machines prohibited by law, the question of the sufficiency of the bill of indictment shown in the record is not necessarily presented by the appeal, but we think the bill properly charged a criminal offense under the statutes now in force, and that defendant's plea of guilty rendered him amenable to the sentence pronounced thereon by the court.

Chapter 196, Public Laws 1937 (N. C. Code, 1939 [Michie], secs. 4437 [t], 4437 [r], and 4437 [v]). The title is "An Act to Prohibit the Manufacture, Sale, Possession and Use of Slot Machines, Gambling Apparatus and Devices." Section 1. "That it shall be unlawful to manufacture, own, store, keep, possess, sell, rent, lease, let on shares, lend or give away, transport, or expose for sale or lease, or to offer to sell, rent, lease, let on shares, lend or give away, or to permit the operation of, or for any person to permit to be placed, maintained, used or kept in any room, space or building owned, leased or occupied by him or under his management or control, any slot machine or device." Sec. 3. *"That any machine, apparatus or device is a slot machine or device within the provisions of this Act if it is one that is adapted, or may be readily con-*

verted into one that is adapted, for use in such a way that, as a result of the insertion of any piece of money or coin or other object, such machine or device is caused to operate or may be operated in such manner that the user may receive or become entitled to receive any piece of money, credit, allowance, or thing of value, or any check, slug, token, or memorandum, whether of value or otherwise, or which may be exchanged for any money, credit allowance, or anything of value, or which may be given in trade, *or the user may secure additional chances or rights to use such machine, apparatus or device;* or in the playing of which *the operator or user has a chance to make varying scores or tallies upon the outcome of which wagers might be made,* irrespective of whether it may, apart from any element of chance or unpredictable outcome of such operation, also sell, deliver or present some merchandise, indication or weight, entertainment or other thing of value. This definition is intended to embrace all slot machines and similar devices except slot machines in which is kept any article to be purchased by depositing any coin or thing of value, and for which may be had any article of merchandise which makes the same return or returns of equal value each and every time it is operated, or any machine wherein may be seen any pictures or heard any music by depositing therein any coin or thing of value, or any slot weighing machine or any machine for making stencils by the use of contrivances operated by depositing in the machine any coin or thing of value, or any lock operated by slot wherein money or thing of value is to be deposited, where such slot machines make the same returns of equal value each and every time the same is operated and does not at any time it is operated offer the user or operator any additional money, credit, allowance, or thing of value, or check, slug, token or memorandum, whether of value or otherwise, which may be exchanged for money credit, allowance or thing of value or which may be given in trade or by which the user may secure additional chances or rights to use such machine, apparatus, or device, or in the playing of which the operator does not have a chance to make varying scores or tallies." Sec. 5. "That an article or apparatus maintained or kept in violation of this Act is a public nuisance." (Italics ours.)

This Act set forth above has been held constitutional in *Calcutt v. McGeachy,* 213 N. C., 1. In that case, at pp. 5-6, we find the following: "The above definition manifests the intention of the Legislature to distinguish the *bona fide* merchandise vending machines, picture machines, music machines and machines of like character from well recognized types of gambling slot machines. The line of distinction is illustrated in the judgment below, wherein type 12 is separated from those types in which there is an element of chance in some form even though such element be only that of making varying scores or tallies on which wages may be made." The bill of indictment in the present action charges an

offense under sec. 3, *supra,* and is drawn in conformity to the wording of the statute.

In *S. v. George,* 93 N. C., 567 (570), *Ashe, J.,* for the Court, said: "The indictment strictly follows the words of the statute, and that is laid down in all the authorities as the true and safe rule. It is true there are some few exceptions, but we do not think they embrace this case." *S. v. Leeper,* 146 N. C., 655; *S. v. Puckett,* 211 N. C., 66 (73).

The bill of indictment above set forth follows the language of an Act declared constitutional and prohibits the ownership or distribution of any slot machine that is adapted for use in such a way that as a result of the insertion of any piece of money or coin or other object the machine may be operated in such a manner that *"the user may secure additional chances or rights to use such machine, apparatus or device."*

The defendant contends that it was the legislative intent to repeal the portion of the 1937 Slot Machine Act, under which defendant was indicted and judgment pronounced, by the Revenue Act of 1939. We cannot so hold.

The Revenue Act—Public Laws 1939, chapter 158, sec. 130, subsecs. 1, 2 and 3, reads as follows: "(1) It shall be unlawful, unless licensed as hereinafter provided, for any person, firm or corporation to own, operate or maintain in any place of business or other place for the purpose of being operated for gain or profit any machine or device operated upon the coin-in-the-slot principle or operated otherwise in which is kept any article to be purchased or any machine wherein may be seen any picture or heard any music or slot weighing machine or any machine for the making of stencils or any slot lock or any machine or device for the playing of games or amusement of the players thereof, when a uniform price shall be fixed for the operation of said device by the insertion of a coin in the slot or otherwise, pursuant to which operation the player or user thereof may not make varying scores or tallies or when such operation thereof may or may not result in some combinations of symbols shown or indicated thereon. *Provided, such varying scores and tallies or combination of symbols do not cause such machine or device to vend automatically any slug, premium, prize, coupon, reward, refund or rebate, or other thing of value, which might be used in the further operation of such device, or for which no cash value is received.* Provided further, this section shall not apply to slot telephones, slot luggage or parcel lockers or stamp machines. (2) Any person, firm or corporation who engages in the business of leasing, renting, letting on shares, selling or who engages in the business of placing on location, within this State, any of the above types of machines, or devices shall before engaging in such operation, first apply for and obtain from the Commissioner of Revenue what shall be known

as an annual operator's occupational license, for the privilege of engaging in the said business and shall pay therefor an annual license tax of one thousand dollars ($1,000). The license tax herein provided shall cover an annual privilege tax as provided by law and shall be payable on or before the first day of June of each year. Provided, the above annual operator's occupational license tax shall not apply to any person, firm, or corporation engaged in the business of operating any machine that vends any article of merchandise, music machines, weighing machines, and stencil making machines, but same shall apply to persons engaged in the business of operating all types of amusement machines. (3) In addition to the above license tax every person, firm or corporation operating any of the above mentioned machines or devices shall apply for and obtain from the Commissioner of Revenue what shall be termed a State-wide license for each machine operated and shall pay therefor the following annual tax," etc. (Italics ours.)

Part subsec. 5, is as follows: "It is the intention of this section to license and permit the operation of only legal machines as defined in subsection one of this section *and not the intention to license or legalize any gambling machine or device, or any other machine in connection with the operation of which there is given or allowed any premium, prize, coupon, reward, refund or rebate.*"

It will be noted that the Act of 1937 is a Public Act, known as the Flanagan Act, and is a separate and distinct Act prohibiting "the manufacture, sale, possession and use of slot machines, gambling apparatus and devices." The modification of 1939 is a revenue Act.

In *McCormick v. Proctor,* 217 N. C., 23 (26), it is held: "Chapter 158, Public Laws 1939, expressly prohibits certain types of slot machines and permits other types of slot machines as lawful."

We think the proviso in the above section leaves intact the Flanagan Act, under which defendant is indicted. The express language of this proviso admits of no interpretation except that the type of machine described in the first count of the bill of indictment is the type of machine that is still prohibited by the Flanagan Act, chapter 196, of the Public Laws of 1937, and that it was definitely not the intention of the Legislature to modify the section of the 1937 Act here under consideration. The language of the proviso specifically states that no machine is made lawful, and excludes a machine from being licensed, on which varying scores and tallies or combination of symbols cause the machine to vend automatically any slug, premium, prize, coupon, reward or rebate, or other things of value, *which might be used in the further operation of such device,* or for which no cash value is received. The additional chances or rights to use such machine which may be secured on the machine admittedly owned and operated by the defendant, very

clearly constitutes a "premium or prize or reward" entitling the player to further operation of the device. The use of the word "vend" is the equivalent of the word "give" or any similar word which would mean to provide the player with additional plays, or free plays upon making certain scores.

The Revenue Act itself provides for its construction in accord with the above by the language found in subsection (5) of section 130 (ch. 158, Laws 1939), *supra:* "It is the intention of this section to license and permit the operation *of only legal machines* as defined in subsection one of this section *and not the intention to license or legalize any gambling machine or device, or any other machine in connection with the operation of which there is given or allowed any premium, prize, coupon, reward, refund or rebate.*" The words above quoted and underscored, "given or allowed," provide the legislative interpretation of the word "vend" employed in the proviso of subsection (1), and eliminate any question which might otherwise exist as to the construction to be placed on the word "vend." Thus the Legislature itself has taken the precaution to dispel any doubt as to its intention that any slot machine which may be operated so as to give or allow free games, is still considered illegal, and that portion of the 1937 Act which so declares is still in full force and effect. This being true, the facts alleged in count one of the bill of indictment do constitute a criminal offense, because the operation and ownership of the type of machine therein described is within the purview of the 1937 Act which still prevails.

In *Hinkle v. Scott,* 211 N. C., 680 (682), it is said: "The payment of State and county license tax on slot machines would not justify the operation of those machines which come within the definition of unlawful devices set forth in the statutes."

It is a vain thing for the defendant to argue that machines which are gambling devices, in and of themselves, are made legal by the Revenue Act of 1939. Again, it is submitted that such intention is expressly disclaimed by the Act itself, in subsection (5) of section 130, which provides that "It is . . . not the intention to license or legalize any gambling machine or device . . ." Lest it be attempted to distinguish these cases because the slot machines therein considered emitted token or checks, whereas it does not appear that the one in the instant case did, it should be pointed out that these decisions hold that the thing played for and received is actually the right to operate the machine an additional time or times, and not the token which represents that value. We think the position here taken is borne out by authorities in other jurisdictions. *Painter v. State,* 163 Tenn., 627, anno, in 81 Am. Law Rep., p. 173 (174); *Gaither v. Cate,* 156 Md., 254, 144 A., 239, 244; *Rankin v. Mills Novelty Co.,* 182 Ark., 561, 32 S. W. (2d), 161; *State*

ex rel. v. Marvin (Iowa), 233 N. W., 486; *Harvie v. Heise,* 150 S. C., 277, 148 S. E., 66, 68; *State v. Mint Vending Machine Co.,* 85 N. H., 22, 154 A., 224, 228; *Green v. Hart* (D. C.), 41 F. (2d), 855, 856."

In 24 Amer. Jurisprudence, sec. 35, p. 422, is the following: "In general, however, a slot machine which, in return for a coin deposited therein, dispenses merchandise of the value of such coin, accompanied at occasional and uncertain intervals by a varying amount of money, trade checks, or coupons, or more broadly, one which provides an element of chance, is a gambling device. . . . According to the generally prevailing opinion, where the return to the player is thus dependent on an element of chance, a slot machine is a gambling device, even though the player is assured of his money's worth of some commodity, and, hence, cannot lose. Also, according to the great weight of authority a slot machine is not rendered innocuous by the fact that it indicates in advance of each deposit exactly what it will dispense, since it is considered that in such instances, the player gambles not on the immediate return for the coin he deposits, but on the hope or chance that the indicator will show a profit on his next play. . . . Furthermore, a machine which returns merchandise of the value of the coin played therein, and, in addition, a chance of receiving a varying amount of checks which may be used to play the machine for amusement only is a gambling device, the right to continue the operation of the machine for amusement being a thing of value within statutes directed against gaming."

In *S. v. Humphries,* 210 N. C., 406, construing slot machine acts, at p. 410, it is said: "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."

We think the construction here given is the logic of the situation. The statute under which the defendant wishes to call to his aid and to repeal the Flanagan Act, declared constitutional by this Court, is a revenue provision in the Revenue Act. The General Assembly in this Revenue Act declares its intention in no vague or uncertain language, that the intention is to license and permit the operation of *only legal machines* as defined in the section, *"and not the intention to license or legalize any gambling machine or device."* When this language was used in the Revenue Act, the Flanagan Act was on the statute books unrepealed and declared constitutional by this Court. The defendant is convicted of its violation. If the drafters of the Revenue Act, which passed the General Assembly, wanted to repeal the Flanagan Act, why was it not done by clear language? The presumption is that it did not intend to do so. There has long been recognized a difference between

"games" of skill and chance. The former, like ten-pins, bowling, archery, "shooting for turkey," and other similar trials of skill, are lawful. The State long ago outlawed gambling by every species of games of chance, and, particularly, has passed comprehensive laws prohibiting the operation or possession of slot machines adaptable for that purpose. These statutes have been upheld by this Court as within the police power of the State. *S. v. Humphries, supra; Calcutt v. McGeachy,* 213 N. C., 1.

We conclude that the General Assembly did not intend to license unlawful slot machines and make them the subject of revenue.

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

Affirmed.

STACY, C. J., concurring in result; On the hearing, the defendant H. E. Laing, through counsel, pursuant to the provisions of C. S., 4610, waived bill and entered plea of guilty, as upon bill found, charging him with "unlawful possession and distribution of slot machines prohibited by law." To what extent, therefore, the 1937 Flanagan Act has been modified by subsequent legislation is not necessarily presented on the instant record. Nor is it desirable that we here enter upon a discussion of the subject. Certainly there is no presumption as to what the General Assembly intended to do about it. *Cf. S. v. Dixon,* 215 N. C., 161, 1 S. E. (2d), 521. The question more properly arises in two appeals by J. N. Finch, Nos. 442 and 443 on our docket, where no waivers appear, but the defendant entered pleas of guilty on first count in bills as charged. Suffice it here to say the law forbids the possession, use, or operation of certain slot machines, *Calcutt v. McGeachy,* 213 N. C., 1, 195 S. E., 49, and permits the possession, use and operation of others, under license, *McCormick v. Proctor,* 217 N. C., 23, 6 S. E. (2d), 870. The defendant waived bill and pleaded guilty to such unlawful possession and distribution of slot machines as is prohibited by law. This renders the present appeal feckless.

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

STATE v. WM. M. BROWN, CAPITAL AMUSEMENT COMPANY AND H. E. LAING.

(Filed 20 November, 1940.)

APPEAL by defendant H. E. Laing from *Parker, J.,* at September Criminal Term, 1940, of WAKE. Affirmed.

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

Aaron Goldberg and W. Brantley Womble for defendant.

CLARKSON, J. This case is governed by the opinion of *S. v. Abbott, ante,* 470.

For the reasons given in that opinion, the judgment of the court below in this case is

Affirmed.

STATE v. P. M. ROGERS, CAPITAL AMUSEMENT COMPANY AND H. E. LAING.

(Filed 20 November, 1940.)

APPEAL by defendant H. E. Laing from *Parker, J.,* at September Criminal Term, 1940, of WAKE. Affirmed.

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

Aaron Goldberg and W. Brantley Womble for defendant.

CLARKSON, J. This case is governed by the opinion of *S. v. Abbott, ante,* 470.

For the reasons given in that opinion, the judgment of the court below in this case is

Affirmed.

STATE v. M. N. MOSELEY, CAPITAL AMUSEMENT COMPANY AND H. E. LAING.

(Filed 20 November, 1940.)

APPEAL by defendant H. E. Laing from *Parker, J.,* at September Criminal Term, 1940, of WAKE. Affirmed.

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

Aaron Goldberg and W. Brantley Womble for defendant.

CLARKSON, J. This case is governed by the opinion of *S. v. Abbott, ante,* 470.

For the reasons given in that opinion, the judgment of the court below in this case is

Affirmed.

STATE v. O. J. MILLS, VENDING MACHINE COMPANY AND J. N. FINCH.

(Filed 20 November, 1940.)

APPEAL by defendant J. N. Finch from *Parker, J.,* at September Criminal Term, 1940, of WAKE. Affirmed.

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

W. Brantley Womble for defendant.

CLARKSON, J. This case is governed by the opinion of *S. v. Abbott, ante,* 470.

For the reasons given in that opinion, the judgment of the court below in this case is

Affirmed.

STACY, C. J., and BARNHILL and WINBORNE, JJ., concur in result.

STATE v. AL DAVIS, VENDING MACHINE COMPANY AND J. N. FINCH.

(Filed 20 November, 1940.)

APPEAL by defendant J. N. Finch from *Parker, J.,* at September Criminal Term, 1940, of WAKE. Affirmed.

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

W. Brantley Womble for defendant.

CLARKSON, J. This case is governed by the opinion of *S. v. Abbott, ante,* 470.

For the reasons given in that opinion, the judgment of the court below in this case is

Affirmed.

STACY, C. J., and BARNHILL and WINBORNE, JJ., concur in result.

CLARENCE R. DEAL (CHILD, DEVISEE AND HEIR AT LAW OF C. J. DEAL, DECEASED) AND WIFE, CARLOTTA R. DEAL; JAMES F. DEAL (CHILD, DEVISEE AND HEIR AT LAW OF C. J. DEAL, AND BROTHER OF CLARENCE R. DEAL) AND WIFE, NENA WHITE DEAL; ARTHUR L. DEAL (CHILD, HEIR AT LAW AND DEVISEE OF C. J. DEAL, AND BROTHER OF CLARENCE R. DEAL) AND WIFE, HATTIE DEAL; MABEL F. (DEAL) AULL (CHILD, HEIR AT LAW AND DEVISEE OF C. J. DEAL, AND SISTER OF CLARENCE R. DEAL) AND HUSBAND, W. B. AULL, v. THE WACHOVIA BANK & TRUST COMPANY, EXECUTOR OF THE WILL OF C. J. DEAL, DECEASED, AND THE WACHOVIA BANK & TRUST COMPANY, TRUSTEE OF THE ESTATE OF C. J. DEAL, DECEASED, UNDER HIS WILL; AND JAMES F. DEAL, JR., AND WIFE, VADA DEAL; ELIZABETH DEAL McKNIGHT, AND HUSBAND, J. G. McKNIGHT, CHILDREN OF JAMES F. DEAL, AND WIFE, KATE PETERSON DEAL, AND CONTINGENT REMAINDERMEN OR REVERSIONERS OR EXPECTANTS UNDER THE WILL OF C. J. DEAL; AND SARAH AULL SMITH AND HUSBAND, KLINE H. SMITH; EILEEN AULL COVINGTON AND HUSBAND, HOWARD E. COVINGTON; MARGARET AULL LESEMANN, AND HUSBAND, T. BALLARD LESEMANN; MABEL AULL (UNMARRIED); HELEN AULL (UNMARRIED); ROWENA AULL (UNMARRIED); WILLIAM D. AULL (UNMARRIED) AND ARTHUR H. AULL (UNMARRIED), CHILDREN OF MABEL DEAL AULL AND HUSBAND, W. B. AULL, AND CONTINGENT REMAINDERMEN, REVERSIONERS OR EXPECTANTS UNDER THE WILL OF C. J. DEAL; AND MARY DEAL BOST AND HUSBAND, IRA BOST; HUGH L. DEAL AND WIFE, LILLIE MAE DEAL; MABEL DEAL (UNMARRIED); CARL DEAL AND WIFE, ANNIE GRAHAM DEAL, CHILDREN OF ARTHUR L. DEAL AND WIFE, HATTIE DEAL, AND CONTINGENT REMAINDERMEN OR REVERSIONERS OR EXPECTANTS UNDER THE WILL OF C. J. DEAL, DECEASED; AND THE FOLLOWING AS CHILDREN, HEIRS AT LAW OF SILAS A. DEAL, DECEASED, HE BEING A CHILD, HEIR AT LAW, DEVISEE AND LEGATEE UNDER THE WILL OF C. J. DEAL, AND THEY BEING CONTINGENT REMAINDERMEN, REVERSIONERS OR EXPECTANTS RELATIVE TO THE DEVISE, ETC., TO CLARENCE R. DEAL, SAID CHILDREN OF SILAS A. DEAL BEING AS FOLLOWS: ROY DEAL (UNMARRIED); WALTER DEAL AND WIFE, MARGARET DEAL; LOUISE DEAL MONROE AND HUSBAND, JAMES MONROE, AND ARNOLD DEAL (UNMARRIED) AND GEORGE R. UZZELL, GUARDIAN AD LITEM OF WILLIAM D. AULL AND ARTHUR H. AULL; AND C. P. BARRINGER, GUARDIAN AD LITEM OF ALL UNBORN ISSUE OF CLARENCE R. DEAL, JAMES F. DEAL, ARTHUR L. DEAL, MABEL DEAL AULL AND CLAUDE F. DEAL, WHO IN THE FUTURE MIGHT QUALIFY AS HEIRS AT LAW, CHILDREN OR NEXT OF KIN, EITHER AS REMAINDERMEN, REVERSIONERS OR EXPECTANTS UNDER THE WILL OF C. J. DEAL, DECEASED, AND AS CHILDREN OR HEIRS AT LAW OF CLARENCE R. DEAL, JAMES F. DEAL, ARTHUR L. DEAL, MABEL DEAL AULL, CLAUDE F. DEAL AND SILAS A. DEAL, WHO WERE NAMED AS DEVISEES AND LEGATEES AND CHILDREN OF C. J. DEAL IN HIS WILL, AND ARTHUR L. DEAL, ADMINISTRATOR OF CLAUDE F. DEAL, THE SAID CLAUDE F. DEAL HAVING BEEN JUDICIALLY DECLARED DEAD, AND WITHOUT ISSUE, ACCORDING TO A DECREE OF COURT FILED IN THE CLERK'S OFFICE OF ROWAN COUNTY.

(Filed 20 November, 1940.)

1. Trusts § 8c—

The legal and equitable titles are merged in the beneficiary of a passive trust; but as to active trusts the title vests and remains in the trustee for the purposes of the trust.

2. Same—Trust held an active trust and legal and equitable titles do not merge in beneficiary.

A devise and bequest of property to a trustee with direction that the income therefrom be paid to a named beneficiary for life, and at his death to his children, share and share alike, with further provision that the share of each child should be paid him in fee upon his majority and that if the first taker should die without children him surviving the property should revert to the estate, *is held* to create an active trust requiring the trustee to hold the property and pay over the income and finally distribute the *corpus* of the estate in accordance with the terms of the trust, and the legal and equitable titles do not merge in the first taker.

3. Executor and Administrator § 24—Family settlement doctrine held inapplicable in this case.

The will in question created an active trust with clear and explicit direction that the income from the property should be paid the first beneficiary for life and at his death to his children until they reached their majority, and that then the *corpus* of the estate should be paid them, with contingent limitation over for reversion to the estate in the event the first beneficiary should die without issue him surviving. Living children of the testator relinquished their contingent interest and agreed that the first beneficiary should take the property in fee and that the trust should be terminated. Minor contingent beneficiaries received no consideration for the purported settlement and did not join in the request for the relief sought. *Held:* The family settlement doctrine is not applicable.

4. Death § 1—

Where a person is absent for a period of seven years without being heard from by those who would naturally be expected to hear from him if he were alive, he will be presumed dead at the end of the seven years, but the presumption is rebuttable.

5. Same—

The presumption of death after seven years absence raises no presumption that the absent person died without children him surviving.

6. Infants § 15—

A guardian *ad litem* has no authority, without valid consideration, to relinquish to the immediate beneficiary of the estate the contingent interest of infant defendants in the estate, notwithstanding that their parents having a more immediate contingent interest in the estate, had assigned and conveyed such interest to the immediate beneficiary.

7. Trusts § 11—Release signed by contingent beneficiaries cannot destroy active trust, and judgment that trustee should continue to hold the property for the purposes of the trust, is upheld.

Testator devised the property in question to a trustee with direction that the income therefrom be paid to one of his sons for life, and at his son's death to his son's children, share and share alike, until each should reach his majority when each should be paid his share of the *corpus* of the estate in fee, with further provision that in the event the first bene-

ficiary died without issue him surviving, the property should go back to the estate. One of the testator's children was declared legally dead upon the presumption arising from seven years absence, but his children, if any, were not made parties. Other children of the testator assigned, transferred and conveyed to the first beneficiary their contingent interest, and the guardian of the minor children of one of testator's children relinquished by answer his ward's interest, and joined with him in his action to have the trust terminated and the *corpus* paid to him. The minor contingent beneficiaries and those not *in esse* were represented by guardian *ad litem*, and the guardian *ad litem* filed answer admitting the allegations of the complaint and asking that the court enter such judgment as might be proper. Upon failure of the other defendants, except the trustee, to file answer, judgment was entered against all defendants except the trustee decreeing that they were forever estopped from claiming any interest in the estate. *Held:* The releases signed by the children of testator and the guardian of the children of the deceased child cannot have the effect of destroying the trust, and judgment of the lower court in favor of the trustee that the trust should not be terminated but that the trustee should continue to hold the property for the purposes of the trust, is upheld.

APPEAL by plaintiffs from *Phillips, J.*, at May Term, 1940, of ROWAN.

Civil action instituted by and on behalf of Clarence R. Deal for the termination of testamentary trust for his benefit for life, created under the will of C. J. Deal, deceased.

The controversy centers around these provisions of the will of C. J. Deal: The Wachovia Bank & Trust Company is appointed "as executor" thereof, and "as trustee of certain parts of my estate as hereinafter set forth." Then after making certain bequests and devises, the testator devised and bequeathed "all the remainder of my property, real, personal or mixed," to the Wachovia Bank & Trust Company, as trustee, upon designated trusts, pertinent portions of item three of which reads: "3. At the death of my wife, to distribute all my property, real and personal, . . . as follows: . . . Of the residue, which shall be divided into six equal parts: . . . One-sixth to be held in trust upon the following conditions: All income to be paid to my son, Clarence R., during the term of his natural life, and at his death, if he leaves children alive and surviving him, the income to be paid to them, share and share alike, until each reaches the age of 21 years. As each reaches the age of 21 years, its part shall be paid to it in fee simple. If either dies before reaching the age of 21 years, its share shall go to the others. If none reaches the age of 21 years, said one-sixth shall revert to my estate. If my son, Clarence R., dies, leaving no children alive and surviving him, said one-sixth shall revert to my estate and be divided among my other children hereinbefore mentioned, or their heirs or representatives, as herein provided."

A like provision in almost identical verbiage is made for the benefit of his son, Claude F. Deal.

The will was duly admitted to probate in Rowan County. The Wachovia Bank & Trust Company qualified as executor thereof and afterwards duly administered the estate and duly filed its final account, and then qualified as trustee as provided in said will with regard to the trusts for the benefit of Clarence R. Deal and Claude F. Deal, respectively, as above set forth.

C. J. Deal left surviving him, his wife, Sarah J. Deal, who is now dead, and the following children: Arthur L. Deal, James F. Deal, Mabel Deal Aull, Silas A. Deal, Claude F. Deal, and Clarence R. Deal.

Arthur L. Deal, James F. Deal and Mabel Deal Aull are married and each has children. Silas A. Deal died intestate leaving children.

In 1923, Claude F. Deal, who was then married but had no children, with his wife left the city of Charlotte, and the State of North Carolina, where they resided, and has not "been heard of since the said date," and, by order of the clerk of the Superior Court of Rowan County, dated 7 December, 1936, has been declared to be civilly dead, and Arthur L. Deal was appointed administrator of the estate of Claude F. Deal.

Clarence R. Deal, who is married but has no children, joined by his wife, and Arthur L. Deal and wife, James F. Deal and wife, and Mabel Deal Aull and her husband, children, devisees, and heirs at law of C. J. Deal, deceased, instituted this action against the Wachovia Bank & Trust Company, as executor and trustee under the will of C. J. Deal, deceased, and against all of the present living children of Arthur L. Deal, James F. Deal, Mabel Deal Aull and Silas A. Deal, deceased, and against the unborn children, if any, of Arthur L. Deal, James F. Deal, Mabel Deal Aull, Claude F. Deal and Clarence R. Deal, and against Arthur L. Deal, as administrator of the estate of Claude F. Deal, for these purposes: 1. To remove and set aside the trust provided under the will of C. J. Deal for the benefit of Clarence R. Deal, as above set forth, upon the ground that it is "void, naked and passive" and to require the Wachovia Bank & Trust Company, trustee, to deliver to him, divested of any trust, all property received by it under the will of C. J. Deal for his benefit. 2. In view of the fact that his brothers and sister, who have joined as plaintiffs in this action, have assigned, transferred and conveyed to him all of their right, title and interest in and to the property held by the defendant, Wachovia Bank & Trust Company, as trustee, are "no longer interested, and the alleged or purported contingency, so far as they are concerned, is merged into the rights and title of the said Clarence R. Deal," to have a judgment entered declaring that their children "have no right, title or interest in and to" the said property, and, further, that the children of Silas A. Deal, deceased, who are defendants, be precluded and estopped from claiming any interest in and to same and, further, that "all unborn issue who might be in existence at the

time of the death of the said Clarence R. Deal, and who are at this time not *in esse,*" be likewise precluded and estopped. 3. To declare the agreement, by which the brothers and sister of Clarence R. Deal, who have joined as plaintiff in this action, assigned, transferred and conveyed to him all of their right, title and interest in and to the property so held by said trustee, "a family settlement" by which Clarence R. Deal be adjudged the owner of said property "in fee, freed of any trust," and of "any and all interests, apparent, contingent or otherwise, that they now have, or might have, and that their action, as parents of their respective children, be binding and conclusive upon said children, and estop them from ever raising any question, even though the said Clarence R. Deal should die without issue surviving him."

James F. Deal and his wife, Arthur L. Deal and his wife, and Mabel Deal Aull and her husband have executed a release in which they conveyed to Clarence R. Deal "all of their right, title and interest in and to the property devised to Wachovia Bank & Trust Company, as trustee for the beneficial interest of Clarence R. Deal," and in which they ask to be joined as parties plaintiff in the present action.

Summons and complaint have been duly served personally upon named defendants, who are residents of the State of North Carolina, and "upon affidavit and order of court, summons and process were served on all nonresident defendants named in this action, by publication, as prescribed by law."

While the defendant, Wachovia Bank & Trust Company, trustee, in answer filed admits the provisions of the will, it denies the material allegations of the complaint upon which plaintiffs rely for the relief sought.

The children of Silas A. Deal, deceased, filed answer, setting up claim to a contingent interest in the trust fund in accordance with the provisions of item three of the will of C. J. Deal.

Upon no other answers being filed, the clerk of Superior Court entered judgment by default against all named defendants who had not answered; and appointed George R. Uzzell as guardian *ad litem* of two named minor defendants; and also appointed C. P. Barringer as guardian *ad litem* for "any and all unborn issue of the plaintiffs, Clarence R. Deal, James F. Deal, Arthur L. Deal and Mabel Deal Aull, and also any unborn issue of any of the non-answering defendants."

Thereupon, the cause was transferred to the civil issue docket of Superior Court for trial upon the issues raised by the answers filed.

Afterward the children of Silas A. Deal, deceased, as above named, through their attorneys of record withdrew their answer, and together with the respective spouses of such as were married, executed a release similar to that executed by Arthur L. Deal and others as above stated,

in which they conveyed to Clarence R. Deal "any and all rights, claims and demands" of them "by reason of any trust or rights as heirs contingent, expectant or by way of remaindermen, or reversioners to the same effect as if no such trust had ever been provided for or mentioned in the aforesaid will of C. J. Deal," and formally authorized withdrawal of their answer, as well as releasing any and all claim against the Wachovia Bank & Trust Company as trustee.

George R. Uzzell, as guardian *ad litem* of named minor defendants, filed an answer, admitting all of the allegations of the complaint, basing the admissions "upon the information furnished to and obtained by said guardian *ad litem;* and further because of the remote interest of said minors, and because of the fact that both parents of said minors whose interests are not as remote as theirs, have joined in an application requesting that the relief prayed for in the complaint be granted to the plaintiffs," and "joins in the prayers of the plaintiffs, and asks that the relief in said complaint be granted."

C. P. Barringer, appointed guardian *ad litem* of unborn issue as aforesaid, filed answer as such, admitting all the allegations of the complaint, and requesting "the court to pass upon the matters and things alleged and render such judgment as is proper and correct according to the pleading and evidence in this case."

Thereafter, at the November Term, 1939, of Superior Court of Rowan County, upon motion of plaintiffs, Gwyn, J., presiding, entered judgment "against the defendants, and each of them, except the Wachovia Bank & Trust Company, trustee, and in favor of the plaintiffs, and especially the plaintiff Clarence R. Deal, as prayed for in the complaint, establishing his rights, so far as these defendants are concerned, and that said defendants, and each of them, and their issue, born or unborn, children or heirs at law, present, future, or contingent, are henceforth and forever estopped to assert or claim any right or interest in and to the real or personal property willed to and devised to the Wachovia Bank & Trust Company, trustee, for the use and benefit of Clarence R. Deal, under the will of the said C. J. Deal, deceased"—and

"2. That this judgment shall not estop or prevent the said Wachovia Bank & Trust Company, trustee, from further asserting its rights, as set out in its answer, at some subsequent term of court."

The defendant, Wachovia Bank & Trust Company, as executor and trustee under the will of C. J. Deal, excepts in so far as said judgment operates as a bar or estoppel against it.

When the case came on for hearing at the May Term, 1940, the plaintiffs and the answering defendant, the Wachovia Bank & Trust Company, as trustee, waived a jury trial and agreed for the court to find the facts and declare the law, based upon the records, proceedings, plead-

ings and admissions of the different parties. The court finds facts substantially as hereinabove set forth. And, further, that while the said judgment of Gwyn, J., entered at the November Term, 1939, of Rowan Superior Court, "estops Arthur L. Deal, James F. Deal, Mabel Deal Aull, and the children of Silas A. Deal from claiming any right, title and interest in or to the share devised in trust to Wachovia Bank & Trust Company for the beneficial interest of Clarence R. Deal," "the court is of the opinion and concludes as a matter of law that Clarence R. Deal is not entitled to have the trust removed, revoked or declared inoperative, or to order Wachovia Bank & Trust Company, as trustee, to turn over to him the property it has in its hands, which was devised to Wachovia Bank & Trust Company for his use and benefit so long as he shall live, and thereafter to his issue, if any, and that if he should die without issue that this share, or property, should go to his brothers and sister, or their issue, and that as a matter of law, the court holds that the trust should not be terminated and declared at an end."

From judgment denying to plaintiffs, particularly Clarence R. Deal, the right "to have the trust terminated and declared at an end, and the property held by the Wachovia Bank & Trust Company turned over to him as prayed for in the complaint," the plaintiffs appeal to the Supreme Court and assign error.

R. Lee Wright for plaintiffs, appellants.
Stahle Linn for defendant, appellee.

WINBORNE, J. The challenge of appellants to the judgment below is untenable.

The trust in question is active, and not passive. In cases of passive trusts the legal and equitable titles are merged into the beneficiary and the beneficial use is converted into legal ownership. But this is not true as to active trusts. *Fisher v. Fisher, ante,* 42, 6 S. E. (2d), 812, and cases cited.

If a special duty be imposed upon the trustee, such, for example, as the collection and application of the income or the rents and profits of the estate, the trust is active, because the trustee must have the legal title in order to perform his duties. *Webb v. Borden,* 145 N. C., 188, 58 S. E., 1083; *Cole v. Bank,* 186 N. C., 514, 120 S. E., 54; *Heyer v. Bulluck,* 210 N. C., 321, 186 S. E., 356; *Fisher v. Fisher, supra,* and numerous other cases.

The factual situation in *Cole v. Bank, supra,* is not unlike that here. *Adams, J.,* speaking for the Court there, said that "the general rule is that a gift of the income of property is to be regarded as a gift of the property itself only when no limitation of time is attached; but where

a testator directs that the interest on a sum of money be paid to a designated beneficiary annually during his natural life, and that after his death the principal should be distributed among other legatees, the legacy is construed, not as a gift to the first taker of the *corpus* of the fund, but only of the income for the intermediate period." Then, with regard to an agreement signed by legatees to give their interest in the fund to the immediate beneficiary, the Court held that under the circumstances the agreement could not destroy the trust and deprive the bank of its right to hold and disburse the fund in controversy as provided in the will.

Applying these principles to the present case, the income is to be paid to Clarence R. Deal "during the term of his natural life, and at his death," to others. Contingent remainders are created and the trustee is, by operation of law, required to hold the property and pay over the income as directed, and finally to account for the *corpus*. The releases signed by James F. Deal and wife, Arthur L. Deal and wife, Mabel Deal Aull and husband, and the children of Silas A. Deal, deceased, cannot destroy the trust nor deprive the trustee of its right to hold the property and execute the trust nor relieve the trustee of liability entirely.

While it is stipulated in the release that it is intended as a family settlement agreement, we are of opinion and hold that the family settlement doctrine is inapplicable to the present factual situation. See *Reynolds v. Reynolds,* 208 N. C., 578, 182 S. E., 341; *Bohannon v. Trotman,* 214 N. C., 706, 200 S. E., 852.

Furthermore, it is pertinent to note that neither Claude F. Deal, if living, nor his children, if any, though unknown, are parties to this action. In this connection, while the principle of law that "the absence of a person from his domicile, without being heard from by those who would be expected to hear from him, if living, raises a presumption of his death, that is, that he is dead at the end of seven years," *Beard v. Sovereign Lodge,* 184 N. C., 154, 113 S. E., 661; *University v. Harrison,* 90 N. C., 387; *Steele v. Ins. Co.,* 196 N. C., 408, 145 S. E., 787, "the presumption of his death, arising from seven years absence under the rule, is presumption of fact which may be rebutted." *Chamblee v. Bank,* 211 N. C., 48, 188 S. E., 632, and cases there cited.

It may also be noted that, though Claude F. Deal be declared to be civilly dead, and if he be in fact dead, it does not necessarily follow that he died without leaving issue surviving him. In fact, the decree of the clerk of Superior Court of Rowan County merely declares him to be civilly dead, and does not attempt to make any adjudication on the question as to whether he is actually dead, or as to whether he left surviving issue.

Moreover, in order to sustain the judgment below it is not required

that we pass upon the question of the extent to which the judgment entered by Gwyn, J., at the November Term, 1939, is *res judicata.* Nevertheless, it has been said that the Court has no higher duty than the protection of infant defendants, and that there can be no trust more sacred than that of a guardian. The object of the appointment of a guardian *ad litem* is to protect the interest of the infant defendants. It is the duty of a guardian *ad litem* to file an answer and to protect their interests. *Latta v. Trustees,* 213 N. C., 462, 196 S. E., 862; *Graham v. Floyd,* 214 N. C., 77, 197 S. E., 873.

A guardian *ad litem* has no authority, without valid consideration, to relinquish rights of the infant defendants whom he represents.

As applied to the present case, even though the parents of the named infants and unborn issue have assigned, transferred and conveyed to Clarence R. Deal, the immediate *cestui que trust,* all of their contingent right, title, interest and estate in and to property in the trust in question, and even though the interest of such infants and unborn issue be remote, their guardians *ad litem,* in the absence of valid consideration therefor, are without authority to relinquish those rights to the immediate beneficiary of the trust estate.

In *Latta v. Trustees, supra, Barnhill, J.,* said: "In all suits or legal proceedings of whatever nature, in which the personal or property rights of a minor are involved, the protective powers of a court of chancery may be invoked whenever it becomes necessary to fully protect such rights. When necessary, the Court will go so far as to take notice *ex mero motu* that the rights of infants are endangered and will take such action as will properly protect them." And, further, quoting from 10 R. C. L., 340, it is there stated: "Equity has full and complete jurisdiction over the persons and property of infants and all other persons laboring under legal disabilities. . . . The jurisdiction in all these cases is plenary and potent to reach and afford relief in every case where it may be necessary to preserve their estates and protect their interests."

The judgment below is

Affirmed.

STATE v. NOAH CURETON.

(Filed 20 November, 1940.)

1. Homicide § 30—

A general motion to nonsuit does not properly present on appeal defendant's contention that the evidence is insufficient on the charge of first degree murder, but defendant having been convicted of the capital felony, the contention is nevertheless considered.

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

Evidence tending to show that about an hour after a dispute between defendant and deceased, arising out of a gambling game, the parties met at another place to continue the game, that when defendant arrived the deceased walked away, that defendant broke away from a witness who was holding him, caught up with deceased, slapped him down, shot him, and while deceased was pleading for his life, turned him around and shot him in the back of the head, inflicting fatal injury, that defendant then returned to his home, came back out, walked up to where deceased was lying in the street and struck him and then ordered the crowd to disperse, *is held* amply sufficient to be submitted to the jury on the charge of first degree murder.

3. Criminal Law § 53e—

Where the State has a number of witnesses and only defendant testifies for the defense, the fact that the court necessarily consumes more time in outlining the evidence for the State than that of defendant does not support defendant's contention that the court expressed an opinion upon the facts by laying undue emphasis on the contentions of the State.

4. Criminal Law § 78e—

An exception to the charge on the ground that it failed to state in a plain and concise manner the evidence in the case and declare and explain the law arising thereon, is a broadside exception and does not properly present for review any contention of error in the charge.

5. Criminal Law § 5a—

Every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes until the contrary is proven to the satisfaction of the jury.

6. Homicide § 10—

Defendant's contention that he was too intoxicated to be capable of premeditation and deliberation is an affirmative defense akin to the plea of insanity, and the burden is upon defendant to prove intoxication to such a degree as to render him unable to think out and plan beforehand what he intends to do.

7. Same: Criminal Law § 5b—

Although intoxication is an affirmative defense, no special plea is required.

8. Homicide §§ 10, 27h—In the absence of evidence of intoxication to degree precluding premeditation and deliberation, court is not required to charge jury upon defense.

The evidence tended to show that defendant had been drinking, and defendant himself testified that he was "pretty full," and that he and deceased had been drinking together. There was no evidence that defendant's mental processes were deranged by intoxication, but, on the contrary, defendant's own evidence was to the effect that he knew all about the fatal encounter and had attempted to reason and restrain the deceased, whom defendant contended was disorderly. *Held:* There was no evidence

of intoxication to a degree precluding premeditation and deliberation so as to constitute the defense a part of the law of the case, and the failure of the court to instruct the jury thereon was not error, certainly in the absence of a prayer for special instructions.

9. Homicide § 30—

Where, upon the trial, defendant does not rely upon the defense of intoxication precluding premeditation and deliberation, he may not assert such defense for the first time upon appeal.

APPEAL by defendant from *Clement, J.,* at July Term, 1940, of MECKLENBURG. No error.

Criminal prosecution upon bill of indictment charging the defendant with the murder of one John William Henniken, *alias* John Williams.

The jury returned a verdict of guilty of murder in the first degree. From judgment of death by asphyxiation pronounced thereon the defendant appealed.

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

B. S. Whiting for defendant, appellant.

BARNHILL, J. The defendant assigns as error the refusal of the court to dismiss, on his motion of nonsuit, the first degree murder charge. The record does not sustain this assignment. Only a general motion of nonsuit was entered. However, as this is a capital case we have considered defendant's assignment as if supported by the record.

Briefly stated, the evidence favorable to the State tends to show that on 23 June, 1940, the defendant, the deceased and others, had been engaged in a game of skin. The deceased took a card out of the deck which, as we understand, is a serious breach of the ethics of that game. The defendant objected. In a few minutes the defendant left and went home. In a short while he came back and the deceased apologized. The game broke up and in about an hour the parties again gathered at another place to continue the game. When the defendant came up to the place of the second game he stated, "I have been mistreated." At that time he had a gun that he shot twice on the street. The deceased walked away and a witness tried to hold the defendant. When the deceased was about 125 feet away the defendant broke away from the witness, followed the deceased, caught up with him and slapped him down. He then pulled him up and said to him, "You done me wrong" and shot him. Deceased said, "Oh, Lordy Noah, you done shot me, what you shoot me for? Don't shoot me no more. I ain't done nothing to you." To this the defendant replied, "You done me wrong." He then turned the deceased around and shot him through the head, re-

turned to the shoe shine stand and said, "Who don't like it cause he lay up there?" He then returned to his home, came back out, walked up to the deceased as he lay in the street and struck the deceased, after which he threw up his hands and said to the others, "Bottle up and go, everybody got to bottle up and go." This evidence is amply sufficient to be submitted to a jury on the charge of murder in the first degree.

Defendant's second assignment of error is directed to the alleged failure of the court to comply with the provisions of C. S., 564, in that: (1) In giving the charge the court laid undue emphasis on the contentions of the State, thereby expressing an opinion that facts favorable to the State were fully and sufficiently proven, and (2) that in giving his charge the court failed to state in a plain and correct manner the evidence in the case and declare and explain the law arising thereon.

First: The court reviewed in detail the evidence of the several witnesses for the State and that of the defendant in his own behalf. It then outlined, in behalf of the State and of the defendant, the pertinent contentions arising thereon. As there were a number of witnesses for the State and only the defendant testified in his behalf the court naturally consumed more time in outlining the evidence for the State than it gave to the evidence of the defendant. But, we find nothing in the charge to support the contention that the court acted otherwise than in a fair and impartial manner, giving the defendant the consideration to which he was entitled.

Second: This feature of defendant's assignment of error is a broadside exception and for that reason might well be ignored. But the defendant in his brief undertakes to point out wherein the charge is defective in this respect. He contends that the court failed to explain and apply the principle of law that when one commits a murder when so drunk as to be incapable of forming a deliberate and premeditated design to kill, he would not be guilty of murder in the first degree, but only of murder in the second degree or a lesser degree of homicide.

Every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes until the contrary is proven to the satisfaction of the jury. *S. v. Bracy,* 215 N. C., 248, 1 S. E. (2d), 891. No inference of the absence of deliberation and premeditation arises as a matter of law from intoxication; and mere intoxication cannot serve as an excuse for the offender. The influence of intoxication upon the question of existence of premeditation depends upon its degree and its effect upon the mind and passion. For it to constitute a defense it must appear that defendant was not able, by reason of drunkenness, to think out beforehand what he intended to do and to weigh it and understand the nature and consequence of his act.

"All the authorities agree that to make such defense available the evidence must show that at the time of the killing the prisoner's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated purpose to kill. As the doctrine is one that is dangerous in its application, it is allowed only in very clear cases." *S. v. Shelton,* 164 N. C., 513, 79 S. E., 883; *S. v. Murphy,* 157 N. C., 614, 72 S. E., 1075; *S. v. English,* 164 N. C., 497, 80 S. E., 72; *S. v. Foster,* 172 N. C., 960, 90 S. E., 785; *S. v. Ross,* 193 N. C., 25, 136 S. E., 193; *S. v. McManus,* 217 N. C., 445; *S. v. Alston,* 210 N. C., 258, 186 S. E., 354.

The defendant in relying on this defense contends that for the time being his reason was overthrown and his mental processes anesthetized. Thus, intoxication is an affirmative defense akin to the plea of insanity and, as every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crime until the contrary is proven, the burden of this defense is upon the defendant. *S. v. Payne,* 86 N. C., 609; *S. v. Brittain,* 89 N. C., 481; *S. v. Terry,* 173 N. C., 761, 92 S. E., 154, and cases there cited; *S. v. Jones,* 191 N. C., 753, 133 S. E., 81.

While intoxication is an affirmative defense no special plea is required. However, to avail the defendant and require the court to explain and apply the law in respect thereto, there must be some evidence tending to show that the defendant's mental processes were so overcome by the excessive use of liquor or other intoxicants that he had temporarily, at least, lost the capacity to think and plan. As to this, he is not relegated to his own testimony. It is sufficient if the testimony of any witness tends to establish the fact. But it must be made to appear affirmatively in some manner that this defense is relied upon to rebut the presumption of sanity before the doctrine becomes a part of the law of the case which the judge must explain and apply to the evidence.

This is the rule this Court has consistently followed. *S. v. Foster, supra; S. v. English, supra; S. v. Murphy, supra; S. v. Shelton, supra; S. v. Kale,* 124 N. C., 816; *S. v. Hammonds,* 216 N. C., 67; *S. v. Bracy, supra; S. v. McManus, supra.* Thus it was in the *Ross case, supra,* that a new trial was granted because the defendant tendered evidence tending to show that at the time of the homicide he had been drinking "quite a bit" and that when he was under the influence of ardent spirits "He lost his memory entirely," which was excluded by the court.

Keeping these principles in mind and testing this case by them, we do not think there was sufficient evidence of intoxication to make them applicable. Certainly, in the absence of a prayer, the evidence is not such as would require the court to charge the jury under these principles of law. Nor was it error for it to fail so to do. It is true that

witnesses for the State testified that the defendant had been drinking some and that at the time he was endeavoring to follow the deceased he told the witness who was holding him to turn him aloose he was drunk, and that the defendant testified, "I was pretty full," and that he and the deceased had been drinking together. But, the record is devoid of any suggestion that defendant's mental processes were deranged. On the contrary, he affirmatively asserts that the deceased was the one who was disorderly; that he had the capacity to and did reason with him in an effort to prevail upon him to desist in his disorderliness and go home; that he undertook to take the pistol away from the deceased (who he says had it); and in so doing it was accidentally discharged, causing the death of the deceased. Likewise, it appears that prior to the trial he made two contradictory statements concerning the occurrence, on each occasion claiming to know all about what took place. It is apparent, therefore, that this defense was not relied upon in the court below. It may not be asserted for the first time here.

In the trial below we find

No error.

GEORGE H. BALENTINE ET AL. v. E. B. GILL ET AL.

(Filed 20 November, 1940.)

1. Judgments § 17b—

The right to recover will be determined in accordance with the theory of the complaint.

2. Frauds, Statute of, § 5—

A promise is an original promise not coming within the statute of frauds if the extension of credit is made to the promisor or if the contract is made for the benefit of the promisor; but if the contract is made with a third person and the promise constitutes a separate and independent contract under which the promisor agrees to pay upon default of the primary debtor, the promise is a collateral agreement and comes within the statute. C. S., 987.

3. Same—Complaint held to allege collateral promise to answer for debt or default of another.

The complaint alleged that plaintiff reconditioned certain gin machinery on the property under a contract with defendant tenant who had an option to purchase the gin from the defendant landlord, and that the landlord promised to pay for the work if plaintiffs were unable to collect from the tenant-optionee. *Held:* In regard to the liability of the landlord, the complaint alleges a promise to answer for the debt or default of another within the provision of the statute of frauds, C. S., 987, nor does an allegation that the contract was made at the instance and request of

the landlord aid plaintiffs in the absence of allegations that the contract was made for the landlord's benefit or that the extension of credit was made to the landlord.

4. Frauds, Statute of, § 7—

Where the defense of the statute of frauds is properly presented, only written evidence of the agreement is competent, and parol evidence that the extension of credit was made to the promisor is incompetent.

5. Frauds, Statute of, § 6—

A defendant may invoke the defense of the statute of frauds either by denying the promise or setting up another and different contract, and objecting to the evidence, without pleading the statute, or he may admit the contract and specifically plead the statute.

APPEAL by defendant E. B. Gill from *Williams, J.*, at May Term, 1940, of WAKE.

Civil action to recover balance due for work done and materials furnished.

On 19 April, 1938, E. B. Gill leased a cotton gin and ice plant in the town of Zebulon to P. C. Warren with option to buy on or before 31 December, 1938. It is alleged in the original complaint that in the spring of 1938, at the instance of the defendant Gill, the plaintiffs communicated with his tenant and entered into a contract with him to rebuild and recondition the two Diesel engines located on the property; that the plaintiffs, "acting under said agreement with P. C. Warren," rebuilt and reconditioned the engines at a cost of $1,757.00; that Warren has paid only about one-third of plaintiffs' claim and they here seek to recover the balance due.

The defendant Gill interposed a demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action against him or to support a lien against his property. (The lien has not been pursued.)

Whereupon, an amended complaint was filed in which the plaintiffs "reiterated the allegations of their original complaint," and further allege:

1. That E. B. Gill advised the plaintiffs to make the contract with Warren and to collect from him if possible, and "that if the cost of the work did not exceed $2,000 he would pay any amount which plaintiffs were unable to collect from the lessee."

2. That in accordance with the request of E. B. Gill the plaintiffs "entered into an agreement with P. C. Warren" for the reconditioning of the machinery, etc.

The defendant Gill filed answer in which he denied the allegations of the amended complaint and pleaded the statute of frauds, C. S., 987.

Motion for judgment on the pleadings was denied, and, over objection,

the plaintiffs were allowed to offer evidence tending to show that their extension of credit was to Gill and not to Warren.

The jury returned verdict that the defendant Gill is indebted to the plaintiffs in the sum of $1,078.41. From judgment thereon, the defendant Gill appeals, assigning errors.

Jones & Brassfield for plaintiffs, appellees.
A. R. House and J. G. Mills for defendant Gill, appellant.

STACY, C. J. It appears from a perusal of the pleadings that the plaintiffs are here seeking to hold the defendant Gill on his alleged oral agreement to answer the debt, default or miscarriage of his tenant-optionee and codefendant Warren. Gill denies the alleged agreement and pleads the statute of frauds. C. S., 987. In this state of the record, it is difficult to see how the plaintiffs can get along as against the defendant Gill. *Henry v. Hilliard,* 155 N. C., 372, 71 S. E., 439, 49 L. R. A. (N. S.), 1; *Gulley v. Macy,* 84 N. C., 434; McIntosh on Procedure, 486.

Recovery is to be had, if allowed at all, on the theory of the complaint, and not otherwise. *Barron v. Cain,* 216 N. C., 282, 4 S. E. (2d), 618; *Talley v. Quarries Co.,* 174 N. C., 445, 93 S. E., 995. Here, the plaintiffs have declared on a direct contract with Warren and a collateral contract with Gill. The two are separate and distinct. The one is not within the statute of frauds; the other is. *Dozier v. Wood,* 208 N. C., 414, 181 S. E., 336; *Taylor v. Lee,* 187 N. C., 393, 121 S. E., 659. Neither Warren nor Gill is a party to the other's agreement. Indeed, Gill's agreement was not known to Warren. Judgment is demanded on both contracts. The contract with Gill comes within that section of the statute of frauds which provides that no action shall be brought on any special promise to answer the debt, default or miscarriage of another, unless the agreement, or some memorandum or note thereof, shall be in writing and signed by the party charged therewith or some other person thereunto by him lawfully authorized. C. S., 987; *Novelty Co. v. Andrews,* 188 N. C., 59, 123 S. E., 314.

So far as Gill is concerned, the action is to recover on his alleged collateral agreement, which is required to be in writing to withstand a plea of the statute of frauds or to insure recovery against such plea. *Gennett v. Lyerly,* 207 N. C., 201, 176 S. E., 275; *Newbern v. Fisher,* 198 N. C., 385, 151 S. E., 875; *Whitehurst v. Padgett,* 157 N. C., 424, 73 S. E., 240; *Peele v. Powell,* 156 N. C., 553, 73 S. E., 234; *Sheppard v. Newton,* 139 N. C., 533, 52 S. E., 143; *Garrett-Williams Co. v. Hamill,* 131 N. C., 57, 42 S. E., 448.

The plaintiffs insist that their agreement with Gill is not within the statute of frauds, and for this they rely upon the decisions in *Brown v. Benton,* 209 N. C., 285, 183 S. E., 292; *Garren v. Youngblood,* 207 N. C., 86, 176 S. E., 252; *Whitehurst v. Padgett, supra; Dale v. Lumber Co.,* 152 N. C., 651, 68 S. E., 134; *Whitehurst v. Hyman,* 90 N. C., 487; *Mason v. Wilson,* 84 N. C., 51; *Threadgill v. McLendon,* 76 N. C., 24. In each of these cases, however, the declaration was not on a superadded or collateral agreement, as here, but on an original promise.

The declaration in the instant case is more nearly like the example put by Mr. Clark in his work on Contracts, 67: "If, for instance, two persons come into a store and one buys and the other, to gain him credit, promises the seller, 'If he does not pay you, I will,' this is a collateral undertaking and must be in writing; but if he says, 'Let him have the goods and I will pay,' or 'I will see you paid,' and credit is given to him alone, he is himself the buyer, and the undertaking is original." To like effect are our own decisions. *Haun v. Burrell,* 119 N. C., 544, 26 S. E., 111; *Rowland v. Barnes,* 81 N. C., 239; *Scott v. Bryan,* 73 N. C., 582.

It all comes to this: Whose debt is it? How was the credit extended? It is alleged in the complaint that the contract was made with Warren and that Gill agreed to pay if Warren defaulted, and to make good his default. Thus, it is the theory of the complaint that Gill promised to answer for the debt, default or miscarriage of Warren. To prove such promise some competent writing must be shown. None appears.

It is true there is also allegation that the contract was made with Warren at the instance of Gill and at his request. But it is not alleged, invocative of the "main purpose doctrine," that it was made for Gill's benefit or upon an extension of credit to him. *Coxe v. Dillard,* 197 N. C., 344, 68 S. E., 134; *Ford v. Moore,* 175 N. C., 260, 95 S. E., 485; *Handle Co. v. Plumbing Co.,* 171 N. C., 495, 88 S. E., 514; *Emerson v. Slater,* 63 U. S., 28; *Davis v. Patrick,* 141 U. S., 749; 2 Williston on Contracts, sec. 470; 13 N. C. L., 263.

On the other hand, the defendant asserts the main purpose of the repairs was to enable Warren to operate the gin and ice plant, which he did, albeit it does not appear that he later exercised the option to buy.

It follows, therefore, that the case was erroneously submitted to the jury as to Gill's liability on the evidence offered by the plaintiffs. "A contract which the law required to be in writing can be proved only by the writing itself, not as the *best,* but as the *only admissible evidence of its existence.*" *Morrison v. Baker,* 81 N. C., 76; *Bonham v. Craig,* 80 N. C., 224; *Gulley v. Macy, supra; Kluttz v. Allison,* 214 N. C., 379, 199 S. E., 395.

Had the defendant admitted the agreement as alleged by the plaintiffs and not pleaded the statute of frauds, quite a different situation would have arisen. *Henry v. Hilliard, supra.* The rule is, however, that where the plaintiff declares on a verbal promise, unenforceable under the statute of frauds, and the defendant either denies that he made the promise or sets up another and different contract, or admits the promise and invokes the protection of the statute by special plea or answer, testimony offered to prove the promise is incompetent and should be excluded. *Winders v. Hill,* 144 N. C., 614, 57 S. E., 456; *Holler v. Richards,* 102 N. C., 545, 9 S. E., 460; *Jordan v. Furnace Co.,* 126 N. C., 143, 35 S. E., 247; *Browning v. Berry,* 107 N. C., 231, 12 S. E., 195. "The party to be charged may simply deny the contract alleged, or deny it and set up a different contract, and avail himself of the statute, without pleading it, by objecting to the evidence; or he may admit the contract and plead the statute; and in either case the contract cannot be enforced"—*Allen, J.,* in *Henry v. Hilliard, supra.*

On the record as presented, the plaintiffs are not entitled to judgment against the defendant Gill.

Reversed.

CHOZEN CONFECTIONS, INC., v. W. H. JOHNSON, E. V. NEAL, LYNN McIVER AND T. N. HOLMES.

(Filed 20 November, 1940.)

1. Judgments § 10—

In an action to recover for goods sold under consignment upon allegations that the purchaser failed to properly account and that he was guilty of fraudulent misappropriation, plaintiff is not entitled to judgment by default final upon failure of answer, but only to judgment by default and inquiry. C. S., 595, 596.

2. Same: Indemnity § 4—

The liability of indemnitors cannot exceed that of the principal, and therefore where plaintiff is entitled only to judgment by default and inquiry against the principal, judgment by default final against the indemnitors is irregular.

3. Judgments § 22e—Holding, as a matter of law, that movant had failed to show meritorious defense is reviewable.

Judgment by default was entered against the principal and the sureties on his indemnity contract for goods sold the principal upon consignment. Subsequent to the judgment the principal filed answer alleging that plaintiff had refused to accept merchandise returned and had failed to give credit therefor as required by the contract, and appealing surety moved to set aside the judgment. The principal's verified answer was ordered stricken out, but was preserved in the record by defendants' exception

and was considered by the court in passing upon the motion to set aside. *Held:* The defenses of the principal are available to the sureties, and the court's denial of the motion to set aside, upon his holding, as a matter of law, that movant had failed to show a meritorious defense, is error.

4. Indemnity § 4—

All the defenses of the principal are available to the sureties on his indemnity bond.

5. Judgments § 11—

Where, in an action for fraud, judgment by default final is rendered against a defendant upon whom no service of summons had been had, it would seem that the defendant should be permitted to enter voluntary appearance thereafter and file answer denying the matters alleged against him.

APPEAL by defendants Johnson and McIver from *Grady, J.,* at Chambers, August, 1940. From MECKLENBURG. Reversed.

Action to recover upon an account for goods sold and delivered. Plaintiff entered into contract with defendant Johnson whereby the latter agreed to sell merchandise manufactured by plaintiff, and to account for same under a consignment agreement, and the defendants McIver, Neal and Holmes executed obligation to indemnify and save harmless the plaintiff for any loss sustained on account of merchandise delivered to Johnson under the contract.

Thereafter plaintiff instituted this action against Johnson as principal, and McIver, Neal and Holmes as sureties, to recover for goods delivered to Johnson under the contract and not accounted for, alleging fraudulent misapplication on the part of Johnson. Johnson had left the State and was not served with summons. The other defendants were duly served. No answer was filed by any of the defendants, and thereupon judgment by default final for the sum of $367.83 was rendered by the clerk against defendants McIver, Neal and Holmes, on 8 January, 1940.

On 16 April, 1940, answer of defendant Johnson was filed in the office of the clerk, and at same time motion to set aside the judgment by default final was made by defendant McIver. At the hearing by the clerk the answer of defendant Johnson was ordered stricken from the record and the motion of defendant McIver was denied.

Upon exception and appeal to the Superior Court, the orders of the clerk were affirmed, the judge holding that the answer was not filed by leave of the court or by consent, and that the motion of defendant McIver to set aside the judgment of the clerk failed to show a meritorious defense. Defendants Johnson and McIver appealed to this Court.

A. M. Jenkins and Jno. H. Small, Jr., for plaintiff.

K. R. Hoyle for defendants.

DEVIN, J. It is apparent that the judgment by default final was improvidently entered. It was irregular. Under the allegations of the complaint, plaintiff was entitled only to a judgment by default and inquiry. C. S., 595, 596; *Byerly v. Acceptance Corp.,* 196 N. C., 256, 145 S. E., 236; *Supply Co. v. Plumbing Co.,* 195 N. C., 629, 143 S. E., 248; *Jeffries v. Aaron,* 120 N. C., 167, 26 S. E., 696. Nor could the liability of the sureties on the indemnity obligation exceed that of the principal. *S. v. Guarantee Co.,* 207 N. C., 725, 178 S. E., 550.

However, upon the motion to set aside the judgment on the ground of irregularity, it was incumbent upon the defendants to show a meritorious defense. *Cayton v. Clark,* 212 N. C., 374, 193 S. E., 404; *Supply Co. v. Plumbing Co.,* 195 N. C., 629, *supra.* But this, we think, was shown by the answer of defendant Johnson. True, this was ordered stricken out by the clerk, but it was preserved in the record by defendant's exception and was considered by the court below. By this verified answer, defendants offered to show as a defense that the plaintiff breached its contract with defendant Johnson, and refused to receive back large amounts of merchandise and give defendants credit therefor, which under the contract it was obligated to do, and that defendants were not indebted. All the defenses of defendant Johnson, the principal, were available to the other defendants sureties. *Bank v. Loven,* 172 N. C., 666, 90 S. E., 948. It may be noted that the ruling of the court below in declining to set aside the judgment by default final was based upon the holding that there was a failure to show a meritorious defense. *Tickle v. Hobgood,* 212 N. C., 762, 194 S. E., 461.

We think the court erred in denying the motion to set aside the judgment by default final under the circumstances disclosed by the record. It would seem also that defendant Johnson, against whom suit had been instituted for fraud, and upon whom no service of summons had been had, should be permitted to enter voluntary appearance and file answer in denial of the matters alleged against him. *Dodd v. Reese,* 128 A. L. R., 574. This appears to have been the view of plaintiff's counsel when he wrote defendants' counsel, "The plaintiff does not contest the right of Mr. Johnson to file his answer in the matter."

We conclude that the judge below erred in his ruling on the motion, and that the judgment must be reversed. This disposition of the appeal renders unnecessary the consideration of defendants' motion in this Court based upon newly discovered evidence.

Judgment reversed.

MRS. JOSIE M. SMITHWICK v. JAMES E. SMITHWICK.

(Filed 20 November, 1940.)

1. Contempt of Court § 2b: Divorce § 14—Court must find facts supporting its conclusion that disobedience of court order was willful.

In contempt proceedings for willful failure to comply with an order of court, it is required that the court find facts supporting the conclusion of willfulness, and findings of fact that defendant had been ordered to pay, under the provisions of C. S., 1667, a certain sum monthly for the necessary subsistence of his wife and child, and that defendant had failed to comply with the order, without findings as to the property possessed by defendant or his earning capacity, will not support a judgment attaching defendant for contempt.

2. Same—

The mere fact that a defendant ordered to pay a certain sum monthly for the necessary subsistence of his wife and child has a right to move at any time for modification of the order does not support the conclusion that defendant's failure to comply with the order is willful.

APPEAL by the defendant from *Sink, J.*, at June Term, 1940, of MECKLENBURG.

Helms & Mulliss for plaintiff, appellee.
E. S. Peel and H. S. Ward for defendant, appellant.

SCHENCK, J. This is an appeal by the defendant from a judgment attaching him for contempt and ordering his imprisonment for failure to comply with an order directing him to pay a sum certain for the necessary subsistence of the plaintiff, his wife, and of their child, entered under the provisions of C. S., 1667.

The record discloses that the plaintiff and defendant were married in 1934, that their child was born in 1935, that he abandoned her in 1936; that in 1938, Armstrong, J., upon motion of the plaintiff, after notice to the defendant, entered an order that the defendant pay to the plaintiff the sum of $50.00 per month for the necessary subsistence of herself and child, and that the defendant complied with said order until November, 1939, and since that time has paid only the sum of $25.00 per month to the plaintiff; and that in May, 1940, upon motion of plaintiff, Sink, J., ordered the defendant to appear and show cause, if any he had, why he should not be attached for contempt for failure to comply with the order of Armstrong, J., and the defendant in obedience to the last mentioned order appeared and filed reply admitting his failure to comply with said order, but alleging that "his failure to pay was not willful but

was and is due to the fact that he is without funds to pay the same and that it is impossible for him to pay."

Meanwhile, that is subsequent to the order of Armstrong, J., and prior to the judgment of Sink, J., herein appealed from, the defendant obtained in Martin County a judgment of divorce from the plaintiff which contained the following clause: "It is further ordered, adjudged and decreed by and with the consent of all the parties hereto that this judgment or decree shall in nowise affect the judgment rendered in a civil action instituted in the Superior Court of Mecklenburg County, North Carolina, entitled 'Josie M. Smithwick *v.* James E. Smithwick,' and this action and judgment shall in nowise affect the findings and the order entered in said cause, nor the rights of the parties as determined in said cause."

This cause came on for hearing at the June Term, 1940, of Mecklenburg before Sink, J., upon the motion by the plaintiff for an order attaching the defendant for contempt in failing to comply with the order of Armstrong, J., and the reply thereto filed by the defendant. It appears from the record that the court considered the affidavits and evidence of the plaintiff in her application for an order before Armstrong, J., in 1938, and affidavits of the defendant made in 1940, which latter affidavits tended to show that the defendant was without funds and unable to earn sufficient funds to meet the requirements of the order of Armstrong, J. The court found that the defendant had failed to comply with the order of Armstrong, J., and that such failure was willful and contemptuous, and adjudged that the defendant be committed to prison until he had complied with said order, or was otherwise discharged by law. To this judgment the defendant preserved exception and appealed.

We are of the opinion that the exception preserved by the defendant is well taken, and, therefore, must be sustained.

The only facts found by the court are that the order directing the payment of funds for subsistence of the plaintiff and her child was made, and that the defendant has failed to comply therewith, from which the court concludes that such failure was willful and contemptuous. The two facts found do not support the conclusion made. Since the defendant in his reply alleges that his noncompliance was due to his being without funds and his inability to obtain funds, it became necessary before concluding that such noncompliance was willful and contemptuous for the court to find the facts upon which such conclusion was founded, such as the funds of which the defendant was possessed and his earning capacity, *Vaughan v. Vaughan,* 213 N. C., 189. The mere right of the defendant, as stated in the judgment, to move at any time to have the order directing the payment modified does not sustain the conclusion that his failure to comply was willful and contemptuous.

"In contempt proceedings the facts upon which the contempt is based must be found and filed, especially the facts concerning the purpose and object of the contemnor, and the judgment must be founded on these findings." *In re Hege,* 205 N. C., 625; *West v. West,* 199 N. C., 12.

There is no finding of fact by the court as to what property the defendant possesses or as to what his earning capacity is, nor is there any finding of fact from which it can be concluded that the defendant was able financially to comply with the order of Armstrong, J., and willfully refused so to do—the record is wanting in sufficiency to support a judgment for contempt or "willful disobedience" of the court order as is requisite under C. S., 978 (4). *Berry v. Berry,* 215 N. C., 339.

Error and remanded.

STATE v. CARL WYONT.

(Filed 20 November, 1940.)

1. **Rape § 1—**

Evidence that the prosecutrix at the time alleged was an innocent, virtuous woman, under sixteen years of age, and that the defendant is the father of her illegitimate child, which was born shortly after she arrived at the age of sixteen, *is held* sufficient to be submitted to the jury in a prosecution under C. S., 4209.

2. **Same: Criminal Law § 53e—Charge that evidence relating to essential element of crime should satisfy the jury beyond a reasonable doubt, interjected in stating defendant's contentions, held for error as expression of opinion.**

In this prosecution under C. S., 4209, the court, in summarizing the contentions of defendant, charged that defendant insisted that the jury should not find beyond a reasonable doubt that the prosecutrix was under sixteen years of age, "whereas the Biblical records and the testimony of her father and mother should satisfy you beyond a reasonable doubt that she is under sixteen years of age." *Held:* The instruction constitutes an expression of opinion on an essential element of the crime charged, prohibited by C. S., 564, and the error is not mitigated by construing the charge as a whole, nor may it be upheld as charging that the jury should find that the prosecutrix was under sixteen years of age if they believed the uncontradicted testimony.

3. **Criminal Law § 53g—**

A statement of contentions, based on evidence which had not been introduced and concerning which defendant had no opportunity to cross-examine the witnesses, will be held for error notwithstanding the absence of objection at the time.

APPEAL by defendant from *Sink, J.,* at June Criminal Term, 1940, of GASTON. New trial.

Criminal prosecution upon bill of indictment under C. S., 4209, Vol. III.

The evidence offered by the State tended to show that the prosecutrix, at the time alleged, was an innocent, virtuous woman under 16 years of age and that the defendant is the father of her illegitimate child, which was born shortly after she arrived at the age of 16.

There was a verdict of guilty. From judgment pronounced thereon the defendant appealed.

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

Ernest R. Warren for defendant, appellant.

BARNHILL, J. There is no merit in the defendant's exception to the refusal of the court to dismiss the prosecution as of nonsuit. The evidence was sufficient to be submitted to a jury.

The court below in its charge, in summarizing the contentions of the defendant, said in part: "He challenges the question of her age and insists that you should not find beyond a reasonable doubt that she is under 16 years of age; that on the contrary that she is over that; (whereas the Biblical records and the testimony of her mother and father should satisfy you beyond a reasonable doubt that she is under 16 years of age); he insists that she is over 16." The clause in parentheses is the subject matter of one of defendant's exceptive assignments of error. This exception must be sustained.

The statement of the court to which exception is entered constitutes an inadvertent but unequivocal expression of opinion by the court that an essential element of the crime charged had been fully and sufficiently proven. This is in clear violation of the terms of C. S., 564. *S. v. Hart,* 186 N. C., 582, 120 S. E., 345; *S. v. Kline,* 190 N. C., 177, 129 S. E., 417; *S. v. Mitchell,* 193 N. C., 796, 138 S. E., 166; *Carruthers v. R. R.,* 215 N. C., 675, 2 S. E. (2d), 878. The charge, when considered as a whole, fails to mitigate this error. Nor can it be considered, as contended by the State, as an instruction upon uncontradicted testimony that if the jury finds the facts to be as the testimony tends to show it should find that prosecutrix was under sixteen at the time alleged.

But the State insists that this clause, when considered contextually, constitutes nothing more than a statement of a contention by the State. Even so, it is prejudicial. The record fails to disclose that any birth record entered in a family Bible was identified and offered in evidence. Thus the charge, in part, is based on evidence which had not been introduced and concerning which the defendant was afforded no opportunity to cross-examine the witnesses. By this action of the court evidence material to the issue was placed before the jury without opportunity

to answer it or in any way to meet it. This constitutes prejudicial error. *S. v. Love,* 187 N. C., 32, 121 S. E., 20; *Smith v. Hosiery Mill,* 212 N. C., 661, 194 S. E., 83.

Speaking to the subject in the *Love case, supra,* the Court said: "True, this feature of the charge was prefaced by the statement that it is the contention of the State, and we have numerous decisions to the effect, that if the court, in stating the contentions, commit an error, it is too late to except to it after verdict—but while the deduction from the facts was given as a contention of the State, the putting of the fact before the jury as sworn testimony where it had been excluded was the act of the judge and of a highly prejudicial kind and none of the decisions referred to go to the extent of disallowing an exception under such circumstances. Suppose the counsel for the prisoner had excepted and on discussion the judge had withdrawn the evidence referred to, this would only have served to emphasize the error and strengthen the lodgment it had necessarily made on the minds of the jury. Like an expression of an opinion by the court on the merits of the case, the harmful impression could not well be effaced and in our opinion should not be taken as waived because not presently excepted to. See *S. v. Cook,* 162 N. C., 586, and cases cited."

In justice to the court below it is well to note that the appeal is presented on an agreed case on appeal. The trial judge has had no opportunity to review it. However, we are not permitted to indulge in assumptions as to what might have occurred, but are bound by and must decide the questions presented upon the record as it comes here.

The indicated error in the charge entitles the defendant to a New trial.

ADDIE DOUGLAS OGBURN v. STERCHI BROTHERS STORES, INC.

(Filed 20 November, 1940.)

1. Costs § 1b—

A typewritten statement, purporting to have been signed by plaintiff, to the effect that plaintiff was unable to comply with C. S., 493, which statement is followed by an unsigned, unsealed and unauthenticated jurat is not an affidavit, and will not support an order allowing plaintiff to prosecute the action as a pauper, C. S., 494, but the deficiency does not necessarily require the dismissal of the action, since the court may give plaintiff a reasonable time to supply the deficiency.

2. Bill of Discovery § 1—

An order for the examination of an adverse party is improvidently granted plaintiff after complaint has been filed and before answer, since in

such case the relief is not sought to obtain information to frame the complaint, and until answer is filed and issues joined, the application is premature for the purpose of obtaining evidence for the trial. C. S., 900, 901.

3. Appeal and Error §§ 37b, 38—

Since the burden of showing error is on appellant, when the record fails to show to the contrary, it will be presumed that appellant's motion for a bill of particulars was denied by the court in the exercise of its discretion, and not as a matter of law, which discretionary ruling is not ordinarily reviewable.

APPEAL by defendant from *Sink, J.*, at May Term, 1940, of MECKLENBURG.

This is an action to recover damages for the wrongful taking and withholding of certain personal property of the plaintiff by the defendant.

No counsel for plaintiff, appellee.
E. A. Hilker and Alvin A. London for defendant, appellant.

SCHENCK, J. The defendant's first assignment of error is "That the court erred in overruling the defendant's motion to dismiss on account of failure to post bond or comply with section 493, *et seq.*, of the Consolidated Statutes of North Carolina."

The record discloses that the plaintiff did not give an undertaking, did not make a deposit in lieu thereof, and did not file written authority from the judge or clerk authorizing plaintiff to sue as a pauper, as by C. S., 493, required. The record further discloses that the plaintiff did not make affidavit that she was unable to comply with the preceding section as by C. S., 494, required.

The record contains a typewritten statement, which purports to have been signed by the plaintiff, to the effect that she is unable to comply with the requirements of C. S., 493, which statement is followed by an unsigned, unsealed and unauthenticated jurat. This does not constitute an affidavit as required by C. S., 494. An affidavit is "A written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before an officer having authority to administer such oath." Black's Law Dictionary (2d Ed.), p. 46.

The clerk allowed the defendant's motion to dismiss the action for the reason that the plaintiff had not complied with the requirements of C. S., 493 or 494, but upon appeal the judge reversed the action of the clerk and disallowed the defendant's motion to dismiss. In this we are of the opinion, and so hold, there was error.

The order allowing the plaintiff to sue as a pauper is reversed, and the case is remanded to be proceeded in according to law. The judge of the Superior Court need not necessarily dismiss the plaintiff's action

by reason of there being no authentication of her attempted affidavit. He may, if he shall think proper, continue the cause until she has had reasonable time to supply the defect by swearing to her affidavit before an officer duly authorized to take and certify the same. *Miazza v. Calloway,* 74 N. C., 31.

The defendant's second assignment of error is "That the court erred in overruling the defendant's motion to strike out the subpœna and the commission granted, appointing J. H. McLain commissioner (to examine the credit manager of the defendant)." We are of the opinion, and so hold, that this assignment is well taken.

It appears from the record that the complaint has been filed and that the answer has not been filed. The purpose of the statutes, C. S., 900 and 901, allowing an examination of an adverse party, in so far as they relate to the plaintiffs, is twofold: first, to procure information in framing the complaint, and second, to procure evidence for trial. Since the complaint has been filed the order granting the commission to examine the adverse party was not obtained for the first purpose, and since the answer has not been filed it is obvious that the application for the order for the second purpose is premature, since no issues have yet been joined. *Pender v. Mallett,* 123 N. C., 57. "This proceeding (for examination of adverse party) may be permitted to the plaintiffs to procure information to frame complaint, *Holt v. Warehouse Co.,* 116 N. C., 480; or after answer is filed the plaintiff may cause the defendant to be examined to procure evidence, *Helms v. Green,* 105 N. C., 251; *Vann v. Lawrence,* 111 N. C., 32." *Jones v. Guano Co.,* 180 N. C., 319.

The defendant's third assignment of error is "That the court erred in overruling the defendant's motion for a Bill of Particulars." This assignment cannot be sustained, since it does not appear from the record whether the ruling of the court was made in its discretion or as a matter of law, and, the burden of showing error being upon the appellant, it is presumed that such ruling was correctly made, that is in the discretion of the court. "An application for a bill of particulars under C. S., 534, . . . is addressed to the sound discretion of the trial court, and his ruling thereon, made in the exercise of such discretion, is not reviewable on appeal, except perhaps in extreme cases." *Tickle v. Hobgood,* 212 N. C., 762, and cases there cited.

Error and remanded.

CITY OF GASTONIA v. JOHN DAVID GLENN.

(Filed 20 November, 1940.)

1. Eminent Domain § 14—

This proceeding was instituted by a municipality to condemn an easement over respondent's land for a sewer line, C. S., 2791, 2792, 1705, *et seq.* The petition described defendant's tract of land over which the easement was sought but did not describe the property sought to be condemned. *Held:* Defendant's demurrer to the petition for insufficiency of the description should have been sustained. C. S., 1716.

2. Pleading § 23—

Where it is determined on appeal that respondent's demurrer to the petition in condemnation proceedings should have been sustained, petitioner may apply to the court below for leave to amend the petition if so advised. C. S., 515.

APPEAL by respondent from *Clement, J.,* at July Term, 1940, of GASTON.

Special proceeding under C. S., 2791-2792 and 1705, *et seq.,* to condemn right of way, privilege, or easement, over respondent's land for extension of municipal sewer line.

It is set out in the petition that the city of Gastonia, in order to meet the necessity of extending its sewerage system, "has constructed and is constructing a sewer pipe line across the lands of the defendant . . . described as follows: Beginning at a point in the center of the Gastonia-Dallas Highway . . . containing 25¼ acres"; that petitioner and respondent have failed to agree upon the compensation that should be paid for such right of way because of the excessive demand of the respondent, and that respondent has denied to petitioner the right to construct the line across his lands.

Demurrer interposed on the ground that the petition contains no description of the property sought to be condemned and fails to show the location of the line by map, profile, or otherwise.

Demurrer overruled, and respondent appeals.

Ernest R. Warren for petitioner, appellee.
J. L. Hamme for respondent, appellant.

STACY, C. J. It is provided by C. S., 1716, that in condemnation, the petition, when filed by the condemnor, "must contain a description of the real estate which the corporation seeks to acquire." This we apprehend means a description of the property sought to be acquired and not merely a description of the entire tract over which the right of way,

privilege, or easement is to run. The right of way is to be located before it can be taken. It must be fixed and not fugitive. See *Johnston County v. Stewart,* 217 N. C., 334, 7 S. E. (2d), 708. In other words, to paraphrase a certain parody, "the recipe for taking property in condemnation begins by saying 'first locate the property.'" Such is the statutory requirement in condemning a right of way for a railroad. C. S., 3471; *S. v. Wells,* 142 N. C., 590, 55 S. E., 210.

In the present state of the record, we are constrained to reverse the ruling on the demurrer for insufficient description of the property sought to be condemned, with the observation that petitioner may apply to the court below, under C. S., 515, for leave to amend the petition, if so advised. This might have been done in the first instance under 3 C. S., 513. *Petty v. Lemons,* 217 N. C., 492.

Reversed.

STATE v. J. N. FINCH AND P. W. COOPER.

(Filed 20 November, 1940.)

Indictment § 10: Criminal Law § 56—

Where the name of one of defendants does not appear in the indictment, it is fatally defective as to him, notwithstanding that his name appears on the envelope in which his indictment was placed, and that his name was placed on the dockets prepared for the judge, solicitor and the clerk, and that he was fully informed of the charge against him, and his motion in arrest of judgment, made in the Supreme Court upon appeal, will be allowed.

APPEAL by defendant Finch from *Parker, J.,* at September Term, 1940, of WAKE.

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

W. Brantley Womble for defendant, appellant.

SCHENCK, J. The defendant Finch, along with one P. W. Cooper, by and with the consent of his counsel, pleaded guilty to the first count in a two-count bill of indictment charging (1) a violation of section 1, chapter 196, Public Laws 1937 (N. C. Code of 1939 [Michie], 4437 [r]), by owning and possessing a certain slot machine for the purpose of operation in a building under his control upon which the operator or user thereof had a chance to make various scores upon the outcome of which wagers might be made, and (2) of keeping and possessing a cer-

tain slot machine upon which the tax levied by the State had not been paid and upon which license was not properly exhibited as required by section 130, chapter 158, Public Laws 1939 (N. C. Code of 1939 [Michie], 7880 [61]). The court pronounced judgment that the defendant Finch be imprisoned for a term of 12 months, and from said judgment the defendant Finch appealed.

An examination of the bill of indictment reveals the fact that the name of the appellant Finch does not appear therein, and of the record that there was no waiver of a bill of indictment by him as provided by C. S., 4610. It is true the envelope in which the indictment was placed contained the name of the appellant, and that his name was placed on the dockets prepared for the judge, the solicitor and the clerk, along with the names of P. W. Cooper and the Vending Machine Company, and that the appellant was fully informed of the charge against him.

The appellant assigns as error the pronouncing of judgment upon him, and in this Court moves in arrest of judgment. We are of the opinion, and so hold, that the motion should be allowed.

"The *indictment* must show on its face that it has been found by competent authority, in accordance with the requirements of law, and that a *particular person mentioned therein* has done within the jurisdiction of the indictors such and such specific acts, at a specific time, which acts so done constitute what the court can see, as a question of law, to be a crime." *S. v. Phelps,* 65 N. C., 450.

". . . where *no name* at all appears in the bill or in the *only* count on which a conviction is had, it is held in this jurisdiction that such a charge is fatally defective, and the judgment must be arrested. *S. v. Anderson Phelps,* 65 N. C., 450. And this course should be taken though the question is presented for the first time in the Supreme Court on appeal. *S. v. Lumber Co.,* 109 N. C., 860; *S. v. Caldwell,* 112 N. C., 854; *S. v. Goings,* 98 N. C., 766." *S. v. McCollum,* 181 N. C., 584.

This will be certified that the judgment pronounced against the appellant Finch be arrested.

Reversed.

STATE v. J. N. FINCH AND CHARLIE POOLE.

(Filed 20 November, 1940.)

APPEAL by defendant Finch from *Parker, J.,* at September Term, 1940, of WAKE.

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

W. Brantley Womble for defendant, appellant.

SCHENCK, J. In this case a motion in arrest of judgment is lodged by the appellant Finch. The record and facts are identical with those in another case against the appellant in which decision was this day rendered, except the codefendant is one Charlie Poole instead of P. W. Cooper.

For the reasons set forth in the former, it will be certified that the judgment pronounced against the appellant Finch be arrested.

Reversed.

STATE v. MRS. J. E. HENDERSON.

(Filed 20 November, 1940.)

1. Intoxicating Liquor § 8c—

In this prosecution for illegal possession of intoxicating liquor, the admission of testimony that defendant's tavern was a public place where people went to dance and eat *is held* not to constitute prejudicial error.

2. Criminal Law § 81c—

An excerpt from a portion of the judge's statement of the State's contentions will not be held for prejudicial error when it is apparent that considering the charge contextually, defendant was not prejudiced thereby.

APPEAL by defendant from *Sink, J.*, at April Term, 1940, of GASTON. No error.

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

Ernest R. Warren and P. C. Froneberger for defendant.

DEVIN, J. The defendant was charged in the bill with the possession of intoxicating liquor for the purpose of sale and with unlawful possession of intoxicating liquor under the statute. The State's evidence tended to show that defendant operated a tavern or road-house known as "Ma's Tavern"; that the sheriff and his deputies, upon a search of the premises, found 58 pints of whiskey concealed in a trap; that the defendant, who was not present at the time of the search, stated afterwards that "selling a little liquor was the worst thing she ever did." The defendant offered no evidence. There was general verdict of guilty.

The defendant assigns as error the ruling of the trial judge in permitting a witness to testify that defendant's tavern was a public place where people went to dance and eat. This does not afford sufficient ground upon which to predicate prejudicial error.

The defendant's exception to the judge's charge cannot be sustained. The excerpt therefrom, to which exception was noted, was contained in the recitation of the State's contentions, and, considered contextually, was insufficient to justify serious complaint. All other exceptions were abandoned. There was evidence sufficient to support the verdict, and in the trial we find

No error.

MRS. LOLA M. RAYBURN v. JOSEPH P. RAYBURN.

(Filed 20 November, 1940.)

1. Judgments § 5—

In an action to have an agreement between the parties made a judgment of the court in accordance with the provisions of the agreement, defendant's demurrer is properly overruled.

2. Judgments § 11—

The action of the court in overruling defendant's demurrer and at the same time rendering judgment for plaintiff as prayed for in the complaint is error, since defendant has ten days after the demurrer is sustained or, if an appeal is taken, ten days after the certificate of the Supreme Court is received, in which to file answer. C. S., 515.

APPEAL by defendant from *Grady, Emergency Judge,* at May Term, 1940, of MECKLENBURG.

Plaintiff instituted action to cause an agreement between the parties to be made the judgment of the court, in accord with the provisions of the contract. Defendant demurred. Demurrer overruled, and at the same time judgment was rendered for plaintiff as prayed for in the complaint. Defendant appealed.

Henderson & Henderson for plaintiff, appellee.
J. F. Flowers for defendant, appellant.

DEVIN, J. The able judge who heard this cause below properly overruled the demurrer, but was in error in rendering judgment for the plaintiff without allowing defendant the statutory period within which to answer.

The applicable procedural statute, C. S., 515, contains this provision: "If the demurrer is overruled, the answer shall be filed within ten days

after receipt of the judgment, if there is no appeal, or within ten days after receipt of certificate of the Supreme Court, if there is an appeal." *Law v. Cleveland,* 213 N. C., 289, 195 S. E., 809; *Cody v. Hovey,* 217 N. C., 407; *Adams v. Cleve, ante,* 302.

The prescribed period for answering not having expired, judgment for want of answer was improperly entered and should be stricken out, and an opportunity afforded defendant to answer, if he so desires.

The cause is remanded for such further proceeding in accord with the statute as the parties may elect.

Error and remanded.

JAMES A. BECHTLER, ADMINISTRATOR OF THE ESTATE OF CYNTHIA BECHTLER, v. B. MARVIN BRACKEN AND GIBSON ICE CREAM COMPANY.

(Filed 27 November, 1940.)

1. Trial § 22b—

Upon motion to nonsuit, all the evidence tending to support plaintiff's cause of action is to be considered in the light most favorable to plaintiff, and he is entitled to the benefit of every reasonable intendment thereon and every reasonable inference therefrom. C. S., 567.

2. Negligence § 5—

It is not required that the negligence of defendant be the sole proximate cause of the injury in order to hold defendant liable therefor, it being sufficient if defendant's negligence is one of the proximate causes.

3. Same—Negligence is proximate cause if it creates situation of peril from which injury of nature produced could have been reasonably anticipated.

It is not required that the negligent act of defendant itself inflict the injury, it being sufficient if defendant is guilty of an act of negligence which places a third party in a position of peril so that under the circumstances injury of the nature produced could have been reasonably anticipated, and if defendant's negligence produces the injury in a natural and unbroken sequence, defendant is not exculpated from liability for the injury even though the third party thus placed in a position of peril is also guilty of negligence constituting one of the proximate causes of the injury.

4. Automobiles § 13—

The failure of the driver of a motor vehicle to give the signal required by statute before stopping or turning on the highway, when the movement of his vehicle may affect other vehicles on the highway, is negligence *per se,* and when the proximate cause of injury, is actionable.

5. Automobiles § 18d—Whether defendant was guilty of negligence constituting a proximate cause of injury held question for jury under the evidence.

The evidence tended to show that plaintiff's intestate was riding as a guest in a vehicle traveling south, that the driver approached a bridge along a straight, unobstructed highway at about 35 miles per hour, that as the driver entered upon the bridge, which was about 150 feet long, the highway was free of traffic except for a truck followed by several cars traveling north about 150 feet south of the bridge, that just as the driver had traversed the bridge, the truck suddenly stopped three or four feet before reaching the bridge, and that the driver of the car immediately behind the truck thereupon pulled out to his left to pass the truck, and struck the car in which intestate was riding. The evidence also tended to show that the car in which intestate was riding was being driven on its right side of the highway, and that at the time of the collision its right wheels were on the dirt shoulders, and that the left wheels of the other car were over the center on the left side of the highway. There was also evidence that the truck was not equipped with a rear-view mirror as required by statute, Michie's Code, 2621 (275), and that the driver of the truck failed to give the statutory signal of his intention to stop. Michie's Code, 2621 (301). *Held:* Whether the driver of the truck was guilty of negligence constituting one of the proximate causes of the accident is a question for the jury under the evidence, and an instruction that his negligence, if any, was insulated by the negligence of the driver of the other car is erroneous.

6. Negligence § 5—

Negligence is a proximate cause of injury if it produces the injury in continuous sequence and the injury would not have occurred except for the negligent act, and if injury or harm could have been reasonably anticipated as a natural and probable result.

APPEAL by plaintiff from *Grady, Emergency Judge,* at Extra 13 May, 1940, Civil Term, of MECKLENBURG. New trial.

This is an action brought by the plaintiff, administrator of the estate of Cynthia Bechtler, against the defendants as joint tort-feasors for killing his child, the intestate, a young girl about four years of age. The defendants denied negligence.

C. M. Sloop, witness for plaintiff, testified, in part: "I live at 132 Bruns Avenue and have lived in Charlotte about 22 years. On September 2, 1939, Mr. James Bechtler and I were working for Southeastern Magnesia and Asbestos Company. On September 2, 1939, I was driving my automobile from Durham to Charlotte when we had a wreck seven miles south of Lexington on the way to Salisbury. The wreck occurred about 3:30 in the afternoon. In my automobile were Horace Shue, sitting on the front seat with me, and Mr. and Mrs. Bechtler and their daughter, Cynthia Bechtler, sitting in the back seat. The highway runs in a general north and south direction. I was going south towards Charlotte. The wreck occurred just south of the bridge. North of the

bridge the road is straight for approximately 900 to 1,000 feet with a slight down-grade to the bridge; the bridge is approximately 150 feet long; south of the bridge there is about a 400-foot straightway, then a curve to the left or east, going south; on the south the grade up from the bridge is a little steeper than on the north. The highway is a hard surface of tar and gravel construction, approximately 18 feet wide with shoulders on each side from 5 to 6 feet wide. The width of the bridge is the same as the hard surface, 18 feet. As I approached the bridge from the north I saw the truck of Gibson Ice Cream Company on the south side moving in a north direction coming toward me. There were some few cars behind it; I did not pay particular attention to just how many. I entered the bridge at approximately 30 to 35 miles an hour. There was no traffic ahead of me on my side of the road nor was there any vehicle between me and the truck on its side. As I entered the bridge on the north end the truck was about 150 feet from the southern end. As I left the southern end of the bridge the truck was within 4 or 5 feet of the bridge on my left or its right side. The truck was approximately 80 inches wide, from 12 to 15 feet long and about 7 feet high. The body of the truck was of solid construction, the cab was just like an ordinary truck cab inside the edge of the body. The driver sat in the cab and just back of his head was the cab part of the truck. I do not know whether there was glass in the back of the cab or not, but he couldn't see through it; it was an ice cream refrigeration truck. I passed a part of the truck; it was stopped or practically stopped, I did not see which. I did not see the driver give any signal indicating that he was going to stop prior to the time I got to the position where the truck was. The front of my automobile was about 4 feet past the rear of the truck at the time it was struck. At the time my automobile was struck every part of my automobile was to my right of the center of the highway. My right front wheel was off the pavement on the right-hand dirt shoulder. Just before I got to the back of the truck, Mr. Bracken's car came right over toward my car, and I tried to miss him. Just as the Bracken car came out from behind the truck I cut to the right to try to keep him from running into me, and he struck the left front wheel and did most of the damage to the door and the rear part of my car, and that threw me over the embankment. When the collision occurred the part of my car nearest the center line was a good 2½ to 3 feet right of the center and the left front wheel of the Bracken car was over to the left of his center of the road at least 2½ to 3 feet. On my right immediately adjoining the road on the west side was an embankment. When the Bracken car ran into my car and my car was thrown down this embankment. After I got out of my car I came back up on the highway. The Bracken car was still right where the two cars hit, over on

my center of the road about 3 feet; he had not moved it. It was a 6- or 7-foot embankment, but my car did not turn over. It was a coach with one door on each side. The left door was damaged to the extent that it would not stay closed, and flopped around. Cynthia Bechtler, who was with her parents in the rear seat of the car, was thrown out of the car when it went down the embankment and the door sprang open. I was the first one to get to the child. It was within 3 or 4 feet of the car on the left side of the car lying on some rock on the ground. I picked the child up and handed her to her father and told him to take her to the hospital. I think she was dead. . . . There were some few cars behind the truck, but I naturally noticed the truck, it being the bigger. When the front of my car was approximately 4 feet behind the truck the Bracken car came out from behind the truck onto my side of the road and hit my car. It happened so quick I did not pay any attention to whether he skidded or not and I did not hear any brakes. I couldn't judge his speed, but I imagine a very slow rate of speed. The Bracken car did not stop in its tracks but struck the front of my car, plowed into the side of it, and did most of the damage to the back of the car. He never got upon the bridge. I did not see the driver of the truck make any signal. There is a slight grade on each side of the bridge. The pavement was dry, of asphalt construction. . . . I had very little opportunity to put on my brakes. It was so sudden out from behind the truck, right in my face, and brakes were useless."

J. L. Evans, witness for plaintiff, testified, in part: "(Mr. Robinson: Now, if your Honor please, we want to introduce some declarations or statements made by Mr. Bracken. We concede that it would not be competent against the Ice Cream Company.—The Court: No, it would not be competent against the other defendant.) I talked to Mr. Bracken. He said he passed the ice cream truck about 3 miles down the highway, then came up the highway about 2 miles and the truck passed him, this being about a mile from the bridge where the wreck happened. Mr. Bracken said that he followed behind the truck for the last mile; that the truck got to the bridge and stopped in front of him; that he was too close to the truck, and rather than hit the back of the truck that he, Bracken, pulled out to the left to take a chance to pass."

Mrs. B. Marvin Bracken, witness for plaintiff, testified, in part: "I live at 616 North Church Street, Charlotte, and I am the wife of Marvin Bracken, one of the defendants. On September 2, 1939, I was in the automobile with my husband setting on his right on the front seat. We were proceeding north. I first observed the ice cream truck when it passed our car about 2 miles south of North Potts Creek. We trailed the truck for that distance to the bridge, and I was conscious of it in front of me part of the way. I do not recall any vehicle between us and

the truck. There is a curve just before you reach the bridge. We made this curve, and I was conscious that the ice cream truck was a little distance ahead of us. It was a white truck. When we were about 25 feet from the south of the bridge the truck stopped. I saw it stop. It stopped suddenly, very quickly, I was sitting on the right and did not see any signal. . . . When Mr. Bracken jerked our car out we were about 30 to 35 feet back of the truck. The truck stopped quick but I did not see it skid down the road a piece. I did not see him applying his brakes. When I saw the truck stopped we were about 30 or 35 feet behind it. When my husband put on the brakes we kept going, but our speed was less. We did not pass the back end of the truck but came to a stop with our left front axle resting on the ground about a foot across the center line."

James A. Bechtler, plaintiff, administrator, testified, in part: "I was in the automobile driven by Mr. Sloop on September 2, 1939. Mr. Sloop, Mr. Shue and I were working on the new American Tobacco Company building in Durham and were returning to Charlotte for Labor Day. I was sitting on the right-hand side of the rear seat with my wife and baby girl, who was 4 years and 2 months old. As we were driving south and left the south end of the bridge the ice cream truck was about 3 to 5 feet from the south end. It had stopped or was practically stopped. I did not see the driver of the truck put his hand out the side of the truck or give any other signal that he was going to stop. The collision between the left front wheels of the two cars occurred about 4 feet back of the truck. The end of the truck was about the center of our car. At the time of the collision the Sloop car was as far to the right as we could get. The left front side of the Sloop car was struck by Bracken's left front side. To the right of our car at the south end of the bridge was a shoulder and then a slope between 5 and 8 feet high. Mr. Sloop picked up my baby; I got out on the right side of the car and did not see where she was lying. I went around the car and said 'Give her to me.' I thought she was living but she wasn't breathing, it was just the blood gushing out of her nose. She had never been sick a day in her life except for whooping cough. She was extra bright and was my only child."

On the trial in the court below, the defendant Bracken introduced evidence which we do not now consider, as he was granted a new trial. The defendant Gibson Ice Cream Company introduced no evidence.

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

"1. Was the plaintiff's intestate injured and killed by the negligence of the defendant B. Marvin Bracken, as alleged in the complaint? Ans.: 'Yes.'

"2. Was the plaintiff's intestate injured and killed by the negligence of the defendant Gibson Ice Cream Company, as alleged in the complaint? Ans.: 'No.'

"3. What damage, if any, is the plaintiff entitled to recover? Ans.: '$5,000.00.'"

Upon the coming in of the verdict, plaintiff moved to set aside the verdict upon the second issue. The motion was denied, and the plaintiff excepted. Upon the coming in of the verdict, the defendant B. Marvin Bracken moved to set aside the verdict upon the first and third issues. The court having denied the plaintiff's motion as to the second issue, the plaintiff conceded that there was an error in the charge as to the measure of damages and consequently agreed that the answer to the third issue might be set aside; the plaintiff being of the opinion that it would be unfair to the defendant Bracken to set aside the verdict as to damages and leave standing the verdict on the first issue, conceded that the answer to the first issue might be also set aside. The answers to the first and third issues were thereupon by consent of the plaintiff set aside.

The judgment is as follows: "This cause coming on to be heard before his Honor, Henry A. Grady, and a jury, at the Extra May 13th Civil Term, 1940, and the jury having answered the issues as appear in the Record, and the answer to the first and third issues having been set aside, as appears in the record: Now, therefore, it is hereby Considered, Ordered and Adjudged that the plaintiff recover nothing of the defendant Gibson Ice Cream Company, Inc., and the cause is retained for trial as to the defendant B. Marvin Bracken. This the 5th day of May, 1940. Henry A. Grady, Judge Presiding."

To the signing of the foregoing judgment in favor of defendant Gibson Ice Cream Company, the plaintiff excepted, assigned error and appealed to the Supreme Court.

John H. Small, Jr., F. M. Redd, and John M. Robinson for plaintiff.
J. Laurence Jones for defendant Gibson Ice Cream Company.

CLARKSON, J. The defendant B. Marvin Bracken is out of the picture. He does not appeal, as he was granted a new trial in the court below.

The plaintiff excepted and assigned error to the following portion of the charge of the court below: "Whether or not the driver of the truck was guilty of a violation of the law of the State, to my mind, makes no difference in this case; and so I am not going to discuss with you whether or not he did violate the law in stopping the truck at the point indicated by the witness, because, gentlemen, the stopping of the truck had nothing to do with the collision. In other words, if it hadn't been for the inter-

vention of Mr. Bracken, in coming in as he did, the truck itself would not have struck the oncoming car driven by Mr. Sloop and would not have caused any injury to the child. The fact that the operator of the truck was guilty of negligence, . . . if he was guilty at all, it is what we call 'insulated' negligence, 'harmless' negligence—it did no harm to anybody; and the sole proximate cause of the injury so far as the defendants are concerned was the negligent conduct of the defendant Bracken. I am, therefore, directing you gentlemen to answer the second issue 'No.' (Again reading the second issue): 'Was the plaintiff's intestate injured and killed by the negligence of the defendant Gibson Ice Cream Company, as alleged in the complaint?' I direct you to answer that 'No,' because the burden is upon the plaintiff to satisfy you, by the greater weight of the evidence, that the driver of the truck was guilty of some act of negligence which was at least one of the proximate causes of the little girl's death; and the plaintiff has not done so, as I understand the law; and, therefore, it is your duty to answer that issue 'No.'"

It appears from the record that the only question for this Court to determine is whether, on the evidence of plaintiff, the matter should have been left to the jury as to the negligence of the defendant Gibson Ice Cream Company. We think so. The often repeated rule is that the evidence which makes for plaintiff's claim, or tends to support his cause of action, is to be taken in its most favorable light for the plaintiff, and he is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom.

The defendants were sued as joint tort-feasors. In 5 Amer. Jurisprudence, part sec. 345, at pp. 687-8, it is written: "The rule that where two or more tort-feasors by concurrent acts of negligence which, though disconnected, in combination inflict an injury, all are jointly liable. . . . But the parties may be sued jointly, although the degree of care which each owed the person injured was different. They may be sued jointly notwithstanding there may exist a difference in the degree of liability or the *quantum* of evidence necessary to establish such liability. So, too, the fact that one was wanton and reckless and the other simply manifested want of ordinary caution does not prevent joint liability."

In *Harton v. Telephone Co.*, 141 N. C., 455 (461), it is said: "There may be more than one proximate cause of an injury, and it is well established that when a claimant is himself free from blame and a defendant sued is responsible for one such cause of injury to plaintiff, the action will be sustained though there may be other proximate causes concurring and contributing to the injury. In 21 Am. & Eng. Enc. (2 Ed), 495, it is said: 'To show that other causes concurred in producing or contributing to the result complained of is no defense to an action

of negligence. There is indeed no rule better settled in this present connection than that the defendant's negligence, in order to render him liable, need not be the sole cause of plaintiff's injuries.' Again, on p. 496, it is said: 'When two efficient proximate causes contribute to an injury, if defendant's negligent act brought about one of such causes, he is liable.' " The above is approved in *Harvell v. Lumber Co.*, 154 N. C., 262, and quoted with approval in *Wood v. Public-Service Corp.*, 174 N. C., 697 (699-700). *White v. Realty Co.*, 182 N. C., 536 (537-8); *York v. York*, 212 N. C., 695 (703).

In *Lewis v. Hunter*, 212 N. C., 504 (507), we find: "The contention of the appellant that the negligence of the defendant Spear insulated any negligence on his part, and was the sole proximate cause of the intestate's death cannot be sustained, since the evidence tends to show that the death of the intestate was the result of the joint and concurrent negligence of the defendants Hunter and Spear. *West v. Baking Co.*, 208 N. C., 526, and cases there cited."

C. M. Sloop was the driver of the car in which the child was killed. She was on the back seat with her father and mother. Sloop's testimony was to the effect that he was driving about 30 to 35 miles an hour when he crossed the bridge, no traffic ahead of him, and he was on his side of the road. When his car was struck by that driven by defendant Bracken "every part of my automobile was on the right of the center of the highway."

Mrs. Bracken testified, in part: "There is a curve just before you reach the bridge. We made this curve, and I was conscious that the ice cream truck was a little distance ahead of us. It was a white truck. When we were about 35 feet from the south edge of the bridge the truck stopped. I saw it stop. It stopped suddenly, very quickly. I was sitting on the right and did not see any signal. . . . When I saw the truck stopped we were about 30 to 35 feet behind it."

James A. Bechtler testified, in part: "As we were driving south and left the south end of the bridge the ice cream truck was about 3 to 5 feet from the south end. It had stopped or was practically stopped. I did not see the driver of the truck put his hand out the side of the truck or give any other signal that he was going to stop. . . . At the time of the collision the Sloop car was as far to the right as we could get. The left front side of the Sloop car was struck by Bracken's left front side."

We are only considering the negligence as to the defendant Gibson Ice Cream Company. It is contended by plaintiff that, on the evidence, the defendant Gibson Ice Cream Company, through its driver and agent, violated the following rules of the road: (1) N. C. Code, 1939 (Michie), sec. 2621 (287)—Reckless Driving; (2) sec. 2621 (275)—Mirrors—"No

person shall drive a motor vehicle on a highway which motor vehicle is so constructed or loaded as to prevent the driver from obtaining a view of the highway to the rear by looking backward from the driver's position, unless such vehicle is equipped with a mirror so located as to reflect to the driver a view of the highway for a distance of at least two hundred feet to the rear of such vehicle, of a type to be approved by the commissioner." (3) Sec. 2621 (301)—Signals on starting, stopping or turning—"(a) The driver of any vehicle upon a highway before starting, stopping or turning from a direct line shall first see that such movement can be made in safety, and if any pedestrian may be affected by such movement shall give a clearly audible signal by sounding the horn, and whenever the operation of any other vehicle may be affected by such movement, shall give a signal as required in this section, plainly visible to the driver of such other vehicle, of the intention to make such movement. (b) The signal herein required shall be given by means of the hand and arm in the manner herein specified, 'or by any approved mechanical electrical signal device, except that when a vehicle is so constructed or loaded as to prevent the hand and arm signal from being visible, both to the front and rear, the signal shall be given by a device of a type which has been approved by the department.' Whenever the signal is given the driver shall indicate his intention to start, stop, or turn by extending the hand and arm from and beyond the left side of the vehicle as hereinafter set forth. Left turn—hand and arm horizontal, forefinger pointing. Right turn—hand and arm pointed upward. Stop—hand and arm pointed downward. All signals to be given from left side of vehicle during last fifty feet traveled." One driving an automobile upon a public highway is required by provision of this section to give specific signals before stopping or turning thereon, and the failure of one so driving to give the signal required by statute is negligence, and when the proximate cause of injury, damages may be recovered therefor by the one injured. *Murphy v. Coach Co.*, 200 N. C., 92, 93; *Stovall v. Ragland*, 211 N. C., 536, 539; *Smith v. Coach Co.*, 214 N. C., 314; *Mason v. Johnston*, 215 N. C., 95; *Newbern v. Leary*, 215 N. C., 134.

In *Holland v. Strader*, 216 N. C., 436, *Devin, J.*, for the Court, said: "Evidence that defendant stopped his car suddenly without giving the warning signal required by statute, and that the car in which plaintiff was riding as a guest, traveling on the highway in the same direction behind defendant's car, collided with the rear of defendant's car, causing the injury in suit, is held sufficient to be submitted to the jury on the issue of defendant's negligence, notwithstanding defendant's evidence that the cars were in a long line of traffic going to a football game and that the negligence of the driver of the car in which plaintiff was riding in failing to keep a proper lookout and control over the car, and in fol-

lowing too closely behind defendant's car, was the sole proximate cause of the injury, the conflicting contentions raising a question of fact for the determination of the jury." At p. 438, it is said: "According to the uniform decisions of this Court, the violation of a statute imposing a rule of conduct in the operation of a motor vehicle and enacted in the interest of safety has been held to constitute negligence *per se,* but before the person claiming damages for injury sustained can be permitted to recover he must show a causal connection between the injury received and the disregard of the statutory mandate. This has been the established rule in North Carolina," citing authorities.

In *DeLaney v. Henderson-Gilmer Co.,* 192 N. C., 647 (650-1), it is said: "In *Lea v. Utilities Co.,* 175 N. C., at p. 463, the Court said: 'In order to establish actionable negligence, the plaintiff is required to show by the greater weight of the testimony, 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, proper care being that degree of care which a prudent man should use under like circumstances and charged with a like duty; 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 could not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under the facts as they existed. *Ramsbottom v. R. R.,* 138 N. C., 41.' In *Hudson v. R. R.,* 176 N. C., 488 (492), *Allen, J.,* confirming the above rule, says: 'To which we adhere, with the modification contained in *Drum v. Miller,* 135 N. C., 204, and many other cases, that it is not required that the particular injury should be foreseen, and is sufficient if it could be reasonably anticipated that injury or harm might follow the wrongful act.' *Hall v. Rinehart & Dennis Co.,* 192 N. C., 706; *Boswell v. Hosiery Mills,* 191 N. C., 549; *Moore v. Iron Works,* 183 N. C., 438."

We are here dealing with the negligence of the defendant Gibson Ice Cream Company. If the stopping of the truck by the driver of Gibson Ice Cream Company was negligent and it caused defendant Bracken to run into the Sloop car, it was for the jury to say whether it was a contributing cause to plaintiff's intestate's death. We are not analyzing the contentions as to Bracken also being a joint tort-feasor, as the question of his liability is not here on appeal. Sloop was the driver of the car. We see no evidence of any control of the car driven by Bechtler, but he and his wife and child were guests.

In *Albritton v. Hill,* 190 N. C., 429 (430), we find: "This and other evidence, which we need not set out in detail, . . . tended to show a breach of more than one statute. A breach of either is negligence *per se;* the causal relation between the alleged negligence and the injury,

being, of course, a question for the jury. . . . (citing authorities). In reference to concurrent negligence we have held that where two proximate causes contribute to an injury, the defendant is liable if his negligent act brought about one of such causes. . . . (citing authorities). We have also held that negligence on the part of the driver of a car will not ordinarily be imputed to another occupant unless such other occupant is the owner of the car or has some kind of control over the driver." *Gold v. Kiker,* 216 N. C., 511 (517).

We think there was error in the charge of the court below and there was sufficient evidence to be submitted to the jury as to the negligence of defendant Gibson Ice Cream Company. For the reasons given, there must be a

New trial.

E. K. CATHEY v. SOUTHEASTERN CONSTRUCTION COMPANY.

(Filed 27 November, 1940.)

1. Pleadings § 20—

A demurrer challenges the sufficiency of the pleading, taking as true the facts alleged and the relevant inferences of fact deducible therefrom, but the demurrer does not admit inferences or conclusions of law.

2. Master and Servant § 12—Contractor furnishing scaffold for subcontractor may be held liable by employee of subcontractor for injuries resulting from defect existing by reason of negligence.

This action was instituted against the main contractor for the construction of a dwelling by an employee of a roofing contractor who had subcontracted the roofing for the dwelling. The complaint alleged that as a result of a course of dealing between the parties the contractor permitted the subcontractor to use the scaffold erected by the main contractor, that on the construction in question the contractor erected the scaffold and permitted the employees of the subcontractor to use the same in performance of the subcontract, that while plaintiff was on the scaffold in the performance of his work the scaffold fell, resulting in serious injury, and that defendant contractor was guilty of negligence proximately causing the injury in building the scaffold out of defective material, and in removing a support from the scaffold without warning to the employees of the subcontractor. *Held:* While the fact that plaintiff's employer was an independent contractor would ordinarily relieve defendant of liability for injuries to a third person caused by the subcontractor's negligence, such relationship does not relieve defendant of liability for its own negligence, and upon the factual situation alleged in the complaint the defendant was under duty to exercise due care to provide the employees of the subcontractor a reasonably safe scaffold, and therefore defendant's demurrer to the complaint should have been overruled.

3. Master and Servant § 49—

An employee of the subcontractor is not precluded by the Workmen's Compensation Act from maintaining an action at common law against the

main contractor for injuries resulting from alleged negligence on the part of the main contractor, since the action is not against plaintiff's employer but against a third person.

APPEAL by plaintiff from *Johnston, Special Judge,* at 14 October, 1940, Extra Regular Civil Term, of MECKLENBURG. Reversed.

The allegations in the complaint, in part, are as follows:

"3. That on and prior to December 28, 1939, the defendant was engaged as general contractor in the erection of a residence known as the Evans residence at Laurinburg, North Carolina.

"4. That under the contract between the owner of said residence and said Southeastern Construction Company, the Southeastern Construction Company was obligated to cover said residence with a slate roof of a particular kind, as set out in the contract between said parties.

"5. That the defendant sublet the contract for furnishing and installing the slate roof on said residence to Glasgow-Allison Company, a corporation.

"6. That the plaintiff, at the time of the injury hereinafter referred to, was employed by Glasgow-Allison Company to assist in installing the slate roof on the said residence as hereinbefore referred to.

"7. That prior to the letting of the subcontract for the furnishing and installation of the slate roof on said residence hereinbefore referred to, there had been a long course of dealing between Southeastern Construction Company and Glasgow-Allison Company involving similar subcontracts, and it was understood between said parties, pursuant to the course of dealing between them, that the necessary scaffolds to be used in the installation of the roof on said dwelling would be furnished by the defendant, Southeastern Construction Company.

"8. That the defendant, Southeastern Construction Company, did cause to be erected a scaffold, or scaffolds, along the walls of the residence hereinbefore referred to and slightly below the edge of the roof of said residence.

"9. That the defendant, Southeastern Construction Company, furnished to Glasgow-Allison Company, the employer of the plaintiff, the necessary scaffolds to be used in connection with the installation of the roof on said residence.

"10. That the Southeastern Construction Company, through its foreman or superintendent, gave Glasgow-Allison Company and its employees permission to use the scaffold hereinafter referred to.

"11. That Glasgow-Allison Company and its employees, including the plaintiff, used the scaffolds erected by the defendant in connection with the construction of the residence hereinbefore referred to with the knowledge of the Southeastern Construction Company, and had so used them for some time prior to the injuries hereinafter referred to.

"12. On the 25th day of December, 1939, while the plaintiff and two other employees of Glasgow-Allison Company were standing upon one of the scaffolds furnished and erected by Southeastern Construction Company, said scaffold fell to the ground.

"13. That the fall of said scaffold to the ground and the injuries resulting to the plaintiff therefrom, as hereinafter alleged, were proximately caused by the negligence of the defendant, in that:

"(a) The defendant furnished to Glasgow-Allison Company, to be used by its employees, including the plaintiff, a defective scaffold.

"(b) The defendant negligently constructed said scaffold from defective material causing it to break and give way and causing the scaffold to fall, and, in particular, furnished and used in said scaffold timbers as supports for the floor of said scaffold which were doughty and decayed and had large knots running entirely through said pieces of timber, and said timbers were of insufficient strength to support the weight which might reasonably be expected to be upon said scaffold.

"(c) The defendant, its agents, servants and employees, negligently failed to properly inspect the timbers used in the erection of said scaffold, and failed to properly inspect said scaffold both before and after its completion.

"(d) The defendant, through its servants, agents and employees, negligently removed a support from said scaffold without warning the plaintiff thereof when the defendant knew that the plaintiff and his co-employees of Glasgow-Allison Company were using said scaffold for the purpose of standing on the same while they placed the slabs of slate upon the roof of said residence and fastened them thereto.

"(e) The defendant undertook to furnish a scaffold for the use of the plaintiff and other employees of Glasgow-Allison Company and failed to exercise due care to furnish a scaffold which was reasonably safe for the purpose for which it was to be used.

"(f) The defendant invited and permitted the plaintiff and other employees of Glasgow-Allison Company to use said scaffold and failed to exercise reasonable care to see that the said scaffold was reasonably safe for said purpose, but, on the contrary, furnished a scaffold which was built at least in part of weak and defective material.

"(g) The defendant negligently and carelessly failed to exercise due care to keep and maintain said scaffold in a reasonably safe, or proper condition.

"14. That, as a proximate result of the negligence of the defendant, as hereinbefore alleged, the said scaffold, with the plaintiff upon it, fell a distance of approximately twenty feet to the ground causing the plaintiff to sustain compression fractures of two or more of his vertebrae, a severe laceration of the right thumb, together with serious and painful injuries

and bruises on various parts of his body; and severe sprains of his muscles and joints; that, as a result thereof it was necessary for the plaintiff to be treated in a hospital, and to be put in a plaster of paris cast for a period of several weeks, after which he has been compelled to wear a tight-fitting plaster of paris jacket; that he has incurred expenses for hospital and medical treatment; that he is informed and believes that he has permanent injuries to his back, his thumb and his hip joints; that he is unable, on account thereof, to engage in the roofing trade for which he is trained; that his earning capacity has been seriously and permanently impaired; that he has suffered and will continue to suffer intense pain of body and agony of mind; that he will continue to incur medical expenses, and that his injuries are lasting and permanent, and that he has been damaged by the negligence of the defendant," setting forth the amount.

The defendant denied negligence, and in its further answer and defense set up, (1) plea of abatement, the lack of jurisdiction. If defendant was liable the parties were subject to the "N. C. Workmen's Compensation Act"—N. C. Code, 1939 (Michie), ch. 133-A; (2) plea of contributory negligence; (3) assumption of risk; (4) negligence of fellow servant.

The defendant demurred *ore tenus* to the complaint: "(1) That the complaint does not state facts sufficient to constitute a cause of action against the defendant in that it appears from the face of the complaint: (a) The plaintiff at the time mentioned in the complaint was an employee of Glasgow-Allison Company, a corporation; (b) that Glasgow-Allison Company, a corporation, was an independent contractor; (c) that the defendant, Southeastern Construction Company, was the general contractor; (d) that the relationship of master and servant did not exist between the plaintiff and the defendant; (e) that the work in which the plaintiff was engaged at the time mentioned in the complaint was not inherently or intrinsically dangerous; (f) that the defendant owed no duty to the plaintiff, and was guilty of no breach of duty to the plaintiff; (g) that the duty, if any by anybody, to furnish the plaintiff a reasonably safe place in which to work was the duty of his employer, Glasgow-Allison Company, and not the duty of the defendant." The court below sustained the demurrer.

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

Robinson & Jones and H. L. Strickland for plaintiff.
Helms & Mulliss for defendant.

CLARKSON, J. N. C. Code, 1939 (Michie), sec. 511, is as follows: "The defendant may demur to the complaint when it appears upon the face thereof, either that: . . . (6) The complaint does not state facts sufficient to constitute a cause of action."

In *Leonard v. Maxwell, Comr.*, 216 N. C., 89 (91), the well settled rule is: "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," citing authorities.

The question involved: Under the facts and circumstances of this case, did defendant owe to plaintiff any duty—(1) In reference to seeing that the scaffold was of sufficient strength for the intended purpose and not built of defective material, or (2) not to remove a support from the scaffold while employees were at work upon it without warning such employees.

Does the complaint allege facts imposing a duty on the part of the defendant to exercise due care in reference to the plaintiff? We think so.

The allegations of the complaint show that the defendant was engaged in building the "Evans" residence at Laurinburg, N. C. In building the residence the defendant erected a scaffold for the purpose, slightly below the edge of the roof. The defendant employed the Glasgow-Allison Company to install the slate roof and the Glasgow-Allison Company employed plaintiff to aid in the work. Permission was given Glasgow-Allison Company and its employees to use the scaffold. It is alleged, "There had been a long course of dealing between Southeastern Construction Company and Glasgow-Allison Company involving similar sub-contracts, and it was understood between said parties, pursuant to the course of dealing between them, that the necessary scaffolds to be used in the installation of the roof on said dwelling would be furnished by the defendant, Southeastern Construction Company."

The scaffold was used by plaintiff in his work in helping to slate the roof. The scaffold did not belong to the Glasgow-Allison Company, but to the defendant. It was left for the use of workmen who had to use the scaffold to perform the work of slating the roof. The scaffold was used with the knowledge of defendant. The scaffold was erected by defendant and used by plaintiff in his work, was negligently constructed from defective material. The complaint alleges: "In particular, furnished and used in said scaffold timbers as supports for the floor of said scaffold which were doughty and decayed and had large knots running entirely through said pieces of timber and said timbers were of insufficient strength to support the weight which might reasonably be expected to be upon said scaffold." Defendant failed to inspect the scaffold

before and after its completion. The complaint alleges, "The defendant, through its servants, agents and employees, negligently removed a support from said scaffold without warning the plaintiff thereof when the defendant knew that the plaintiff and his co-employees of Glasgow-Allison Company were using said scaffold for the purpose of standing on the same while they placed the slabs of slate upon the roof of said residence and fastened them thereto," and "Undertook to furnish a scaffold for the use of the plaintiff and other employees of Glasgow-Allison Company and failed to exercise due care to furnish a scaffold which was reasonably safe for the purpose for which it was to be used." On 28 December, 1939, while the plaintiff and two other employees of Glasgow-Allison Company were standing upon one of the scaffolds furnished and erected by Southeastern Construction Company, said scaffold fell to the ground. That the fall of said scaffold to the ground and the injuries resulting to the plaintiff therefrom, as alleged in the complaint, were proximately caused by the negligence of the defendant, as before stated.

The complaint in this case, as in *Mack v. Marshall Field & Co.*, 217 N. C., 55, sets forth actionable negligence against defendant—a third person—not against the employer. Therefore, the N. C. Workmen's Compensation Act is not available to defendant.

The defendant owned the scaffold and had not taken it down. No new one was erected by plaintiff's employer for the employees doing the slating. Defendant knowingly permitted plaintiff to use a scaffold made of defective material and of insufficient strength, and removed a support without notice to the employees. Nor did the defendant inspect same. It is alleged that as a proximate result, the scaffold fell with plaintiff and he was permanently injured. We think the complaint alleges a good cause of action against the defendant.

In *Campbell v. Boyd,* 88 N. C., 129, it is held: "A private way was opened by the defendant for his own convenience and a bridge built over a creek which ran across it, and the public used the same with his knowledge and permission; the plaintiff sustained injury caused by the breaking in of the bridge, which the defendant knew to be unsafe, but which was apparently in good condition: *Held,* he was liable to the plaintiff in damages. The duty of reparation and the liability for neglect in such cases, rest upon the defendant, by whose implied invitation the public used the way." At p. 131, it is said: " 'The principle is well settled,' remarks *Appleton, C. J.,* 'that a person injured, without neglect on his part, by a defect or obstruction in a way or passage over which he has been induced to pass for a lawful purpose, by an invitation express or implied, can recover damages for the injury sustained, against the individual so inviting, and being in default for the neglect.' *Tobin v. P. S. and P. R. R.,* 59 Maine, 188. . . . (P. 132) The law does

not tolerate the presence over and along a way, in common use, of structures apparently sound, but in fact ruinous, like man-traps, inviting travelers to needless disaster and injury. The duty of reparation should rest on some one and it can rest on none others but those who built and used the bridges, and impliedly at least invite the public to use them also. For neglect of this duty they must abide the consequences." *Mulholland v. Brownrigg,* 9 N. C., 349; *Batts v. Telephone Co.,* 186 N. C., 120 (121). We think the principle above set forth analogous to the present action. *Thomas v. Lumber Co.,* 153 N. C., 351; *Paderick v. Lumber Co.,* 190 N. C., 308.

In *Greer v. Construction Co.,* 190 N. C., 632 (636), it is written: "In *Paderick v. Lumber Co., ante,* 308, it was held by this Court that an owner who furnishes defective machinery to its independent contractor, whose employee was killed by the operation of such defective machinery, was liable to the administratrix of such employee for damages. In the opinion it is said: 'Under the facts and circumstances of this case, defendant having agreed with L. L. Paderick . . . to furnish the loader, in so far as L. L. Paderick and those in his employ are concerned, in the operation of the loader, the principle of master and servant was applicable.' It was held that the defendant owed to the employee of the independent contractor the duties prescribed by law to be observed by a master to a servant."

It will be noted that the decision in the *Paderick case, supra,* says: "The principle of master and servant was applicable," not that they were master and servant. That principle is set forth in *Clinard v. Electric Co.,* 192 N. C., 736 (741), as follows: "The degree of care required of an employer in protecting his employees from injury, a few variants of this form may be stated: 'It is such care as reasonable and prudent men would use under similar circumstances.' In the words of the Supreme Court of the United States, 'The master is bound to observe all the care which prudence and the exigencies of the situation require, in providing the servant with machinery or other instrumentalities adequately safe for use by the latter.' *Hough v. Texas & P. R. Co.,* 100 U. S., 213, 24 L. Ed., 612. 'Such care as ordinarily prudent persons exercise under the same or similar circumstances.' 'He uses that degree of care "which a man of ordinary prudence would use, having regard for his own safety, if he were supplying them (appliances) for his own personal use." (*Cotton v. North Carolina R. Co.,* 149 N. C., 227; *Marks v. Harriet Cotton Mills,* 135 N. C., 287.)' "

In 27 Amer. Jur., sec. 30, p. 508, we find: "Although one employs an independent contractor to do certain work, and although he thereby escapes liability for the negligence of such contractor, he is nevertheless answerable for his own negligence. In other words, if an injury is

caused by his own negligence, and not by the negligence of the independent contractor, the employment of such contractor is no defense, notwithstanding the injury is occasioned to a person in the employ of such contractor. If the negligence of an employer concurs with the negligence of his independent contractor, and an injury thereby results to a third person, the employer is not absolved from liability because he has employed a contractor. It is obvious that the employer remains liable for the nonperformance of any duties which arise out of the work in question, and which are not devolved upon the contractor. Also, where the employer reserves the right to direct the manner of performance of the contract in any particular, *or where he undertakes to provide any of the instrumentalities, he owes to the contractor and the latter's employees the duty of exercising reasonable care with respect to such matters. Thus, if a contractor agrees to do certain work on a building and the owner imposes on himself the duty of erecting the necessary scaffolding for the work, he will be liable for injuries to a servant of the contractor received on account of negligence in erection of the scaffold. . . . In accordance with the familiar principle that every man who expressly or by implication invites others to come upon his premises assumes to all who accept the invitation the duty to warn them of any danger in coming, which he knows of or ought to know of, and of which they are not aware.*" (Italics ours.)

Coughtry v. Globe Woolen Co., 56 N. Y. Reports, 124, is a similar case. At p. 128 it is said: "At the time of the injury the scaffold belonged to the defendant, had been erected by it, was in its possession and was being used on its premises, with its permission, for the very purpose for which it had been furnished, and by the persons for whose use it had been provided. The only operation which the contract has in the case is to preclude the defendant from setting up that the defective structure was not its own but that of the contractor. Being conceded to be its own structure, furnished by it for use, the duty of due diligence in its construction arose, not merely out of the contract to furnish it, but from the fact that the defendant did actually furnish it for the express purpose of enabling and inducing the men who were to do the work to go upon it. It is evident from the nature and position of the structure that death or great bodily harm to those persons would be the natural and almost inevitable consequence of negligently constructing it of defective material or insufficient strength. It was clearly the duty of the defendant and its agents to avoid that danger by the exercise of proper care. *Thomas v. Winchester*, 2 Seld., 397; *Godley v. Hagerty*, 20 Penn. St. R., 387; *Cook v. The N. Y. Floating Dry Dock Co.*, 1 Hilt., 436. This duty was independent of the obligation created by the contract."

We think the cases cited by defendant distinguishable from the present action. See *Pafford v. Construction Co.*, 217 N. C., 730; *Robey v. Keller,* U. S. Circuit Court, decided 7 October, 1940.

From the allegations of the complaint, taken as true for the purposes of this demurrer, we think it is a matter for the jury to determine and the nonsuit was improperly granted.

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

Reversed.

McDONALD SERVICE COMPANY v. PEOPLE'S NATIONAL BANK OF ROCK HILL, SOUTH CAROLINA.

(Filed 27 November, 1940.)

1. Process § 6d—

A "local" agent of a foreign corporation for the purpose of service of summons under C. S., 483, is an agent residing in this State permanently or temporarily for the purpose of the agency.

2. Same—

An "agent" of a foreign corporation for the purpose of service of summons under C. S., 483, is a person or corporation given power to act in a representative capacity with some discretionary supervision and control over the principal's business committed to his care, and one who may be reasonably expected to notify his principal that process had been served on him.

3. Same—

In the absence of any express authority, the question of whether a person or corporation in this State is the local agent of a foreign corporation for the purpose of service of summons under C. S., 483, depends upon the surrounding facts and the inferences which the Court may properly draw from them.

4. Same—Depository bank held not local agent of foreign bank for the purpose of service of process under C. S., 483.

The facts found by the court below upon the uncontroverted evidence appearing by affidavit and by stipulation of the parties, were to the effect that the bank, chartered by this State, upon which process was served, acted as a depository for the nonresident defendant bank, received money of the defendant for deposit, honored checks of the defendant drawn on it, charged currency to defendant as and when requested, and discounted notes of defendant's customers for defendant. *Held:* The depository bank was engaged in the discharge of the very functions for which it was organized, and it was conducting its own business and not that of the defendant, and the relation existing between the banks was that of creditor and debtor and not that of principal and agent, and therefore the depository bank was not the local agent of the nonresident bank for the purpose of service of summons under C. S., 483. Further, it would seem that the nonresident bank was not doing business in North Carolina, since the business transacted here was the business of the depository bank.

APPEAL by plaintiff from *Johnston, Special Judge,* at October Special Term, 1940, of MECKLENBURG. Affirmed.

Motion, made on special appearance, to vacate purported service of process and to dismiss the action.

The facts found by the court below upon uncontroverted evidence appearing by affidavit and by stipulation of the parties may be summarized as follows:

The defendant, People's National Bank of Rock Hill, South Carolina, is a nonresident corporation with its domicile and place of business in the city of Rock Hill, South Carolina, and the American Trust Company of Charlotte is a banking institution organized under the laws of North Carolina, with its principal place of business in the city of Charlotte, North Carolina. For a period of twenty years the American Trust Company has performed the following services for the defendant: (a) acted as depository; (b) received money of the defendant for deposit; (c) received checks, drafts and acceptances for collection and deposit; (d) honored checks of the defendant drawn on it; (e) charged currency to defendant as and when requested; (f) discounted notes of defendant's customers for defendant.

When items for collection and credit were received, those drawn on other banks within Charlotte were collected through the Charlotte clearing house and those drawn on out-of-town banks were credited and collected either through the Federal Reserve System or through some other bank.

On 1 October, 1940, the date of service of summons, the American Trust Company received from the defendant three cash letters with a number of checks, accompanied by deposit tickets. The amount of these checks was placed to defendant's credit and collected in the usual course. On the same day it received a letter with collection items which were to be collected by the American Trust Company and placed to defendant's credit and which were collected and so credited 2 October. Likewise, on 1 October, it paid a check of defendant in the amount of $90,000 and charged back to defendant two items which had been previously credited to its account. On that date it had on deposit to the credit of defendant an amount in excess of $500,000.00.

One of the cash or collection letters received by the American Trust Company from the People's National Bank on 1 October, 1940—which was typical of others—was in the form as follows: (From) People's National Bank, Rock Hill, S. C., September 30, 1940, (To) American Trust Company, Charlotte, North Carolina. "We enclose for collection and (credit to our account) items as follows (here were listed 228 items for collection aggregating the sum of $10,976.71), John G. Barron, Cashier."

Service was had in this action on 1 October, 1940, by delivering a copy of the summons and verified complaint to C. B. Campbell, who is secretary-treasurer of the American Trust Company, upon the theory that the said bank is a local agent of the defendant within the meaning of C. S., 483.

When the cause came on to be heard by the court below, upon the facts found, the court concluded that the American Trust Company is not a local agent of the defendant within the meaning of C. S., 483, and thereupon entered judgment sustaining the motion of the defendant and invalidating the service of process. Plaintiff excepted and appealed.

Jno. H. Small, Jr., for plaintiff, appellant.

Whitlock, Dockery & Shaw and Lenoir C. Wright for defendant, appellee.

BARNHILL, J. The only question presented on this appeal is this: Is the American Trust Company, on the uncontroverted facts found by the court, a local agent of the defendant, a foreign corporation, upon whom valid service of summons may be had under the provisions of C. S., 483? The court below answered this question in the negative. In this conclusion we concur.

The exact provisions of C. S., 483, as they relate to the service of process upon a foreign corporation, have heretofore been outlined and discussed by this Court in a number of cases. *Cunningham v. Express Co.*, 67 N. C., 425; *Higgs v. Sperry*, 139 N. C., 299; *Tinker v. Rice Motors, Inc.*, 198 N. C., 73, 150 S. E., 701; *Steele v. Telegraph Co.*, 206 N. C., 220, 173 S. E., 583; *Mauney v. Luzier's, Inc.*, 212 N. C., 634, 194 S. E., 323. Further repetition would serve no good purpose.

The term local, as used in the statute, pertains to place and a local agent to receive and collect money *ex vi termini* means an agent residing either permanently or temporarily within the State for the purpose of his agency. *Moore v. Bank*, 92 N. C., 592; *Tinker v. Rice Motors, Inc., supra.* The term as used in C. S., 483, contemplates some control over and discretionary power in respect to the corporate functions of the defendant. A local agent is one who stands in the shoes of the corporation in relation to the particular matters committed to his care. He must be one who derives authority from his principal to act in a representative capacity. *Watson v. Plow Co.*, 193 Pac., 222 (Wash.), and who may be properly termed a representative of the foreign corporation. *St. Clair v. Cox*, 106 U. S., 350, 27 L. Ed., 222. Anno. 113 A. L. R., 41. He must have the power to represent the foreign corporation in the transaction of some part of the business contemplated by its charter, *Booz*

v. Texas & P. R. Co., 250 Ill., 376, 95 N. E., 460; and he must represent the corporation in its business in either a general or limited capacity. *Peterson v. Chicago R. I. & P. R. Co.*, 205 U. S., 364, 51 L. Ed., 841. Thus the question is to be determined from the nature of the business and the extent of the authority given and exercised. *Lumber Co. v. Finance Co.*, 204 N. C., 285, 168 S. E., 219. It is merely a question whether the power to receive service of process can reasonably and fairly be implied from the character of the agency in question. *Conn. Mutual Life Ins. Co. v. Spratley*, 172 U. S., 602, 43 L. Ed., 569; *Board of Trade v. Hammond Elevator Co.*, 198 U. S., 424, 49 L. Ed., 1111.

In the absence of any express authority the question depends upon a review of the surrounding facts and upon the inference which the court might properly draw from them. If it appear that there is a law of the State in respect to the service of process on foreign corporations, and that the character of the agency is such as to render it fair, reasonable and just to imply an authority on the part of the agent to receive service the law will and ought to draw such an inference and to imply such authority, and service under such circumstances and upon an agent of that character will be sufficient. *Conn. Mutual Life Ins. Co. v. Spratley, supra; St. Clair v. Cox, supra.*

Furthermore, the provisions for the service of summons upon agents of nonresident corporations must not encroach upon the principles of natural justice which require notice of a suit to a party before he can be bound by it. They must be reasonable and the service provided for should be only upon such agents as may be properly deemed representatives of the foreign corporation. *St. Clair v. Cox, supra; Whitehurst v. Kerr*, 153 N. C., 76, 68 S. E., 913; *Higgs v. Sperry, supra; Steele v. Telegraph Co., supra.*

A definition of local agent, as used in the statute under consideration, which has been followed and approved by the courts of this and other states, is given by *Hoke, J.*, in *Whitehurst v. Kerr, supra*, as follows: "While there is some apparent conflict of decision in construing these statutes providing for service of process on corporations arising chiefly from the difference in the terms used in the various statutes on the subject, the cases will be found in general agreement on the position that in defining the term agent it is not the descriptive name employed, but the nature of the business and the extent of the authority given and exercised which is determinative, and the word does not properly extend to a subordinate employee without discretion, but must be one regularly employed, having some charge or measure of control over the business entrusted to him, or of some feature of it, and of sufficient character and rank as to afford reasonable assurance that he will communicate to his

company the fact that process has been served upon him. 19 Enc. Pl. & Pr., 665, 676, 677; *Simmons v. Box Co.*, 148 N. C., 344; *Jones v. Ins. Co.*, 88 N. C., 499; *Angerhoefer, Jr., v. Bradstreet Co.*, 22 Fed., 305; *Hill v. St. Louis Ore & Steel Co.*, 90 Mo., 103." See also *Furniture Co. v. Bussell*, 171 N. C., 474, 88 S. E., 484; *Furniture Co. v. Furniture Co.*, 180 N. C., 531, 105 S. E., 176; *Tinker v. Rice Motors, Inc., supra; Mauney v. Luzier's, Inc., supra.*

Applying this definition of local agent, although it appeared that the relationship, in some aspects, was that of principal and agent, it has been held that a caretaker serving without compensation and who has sold and received pay for one or two articles and applied the proceeds in payment of the corporate watchman, *Kelly v. Lefaiver & Co.*, 144 N. C., 4; a foreman of the corporation who acts under orders of a superintendent who is present at the time, *Simmons v. Box Co., supra;* an attorney for a foreign corporation who has claims to collect in this State, *Moore v. Bank, supra;* a bookkeeper of a nonresident defendant who is not clothed with authority generally to make collection who is in this State for the purpose of collecting a particular account, *Tinker v. Rice Motors, Inc., supra;* a representative of a foreign corporation who solicits orders to be filled by the shipment of goods from the home office, *Mauney v. Luzier's, Inc., supra;* and a broker or commission merchant who maintains a local office at his own expense and solicits orders for the sale of goods within the State by a foreign corporation, such orders being subject to approval by the corporation at its office in another State and the goods sold being shipped from the other State directly to the purchasers and the corporation makes all collections through its home office, Anno. 60 A. L. R., 1038, are not local agents upon whom service of process may be had.

And, dealing with a situation similar to but somewhat stronger than the one here presented, it was held in *Bank of America v. Whitney Central National Bank*, 171 U. S., 173, 67 L. Ed., 594, that a bank located in one State does not do business in another merely because it has a correspondent in such other State with which it keeps an active account, and which transacts for it the business usually transacted by a correspondent bank. There *Mr. Justice Brandeis* said: "The Whitney Central had what would popularly be called a large New York business. The transactions were varied, important, and extensive. But it had no place of business in New York. None of its officers or employees was resident there. Nor was this New York business attended to by any one of its officers or employees resident elsewhere. Its regular New York business was transacted for it by its correspondents—the six independent New York banks. They, not the Whitney Central, were doing its busi-

ness in New York. In this respect their relationship is comparable to that of a factor acting for an absent principal. The jurisdiction taken of foreign corporations in the absence of statutory requirement or express consent, does not rest upon a fiction of constructive presence, like *qui facit per alium facit per se.* It flows from the fact that the corporation itself does business in the State or district in such a manner and to such an extent that its actual presence there is established. That the defendant was not in New York, and, hence, was not found within the district, is clear." Certainly, if the correspondent bank, on the facts stated, is conducting its own business and not the business of its customer, in so doing it is not the agent of such customer.

While this Court has held that in certain respects in connection with transactions between one who delivers to a bank negotiable paper for collection and the bank, the relationship is that of principal and agent, this principle is applied purely for the purpose of determining the relative rights and liabilities of the parties in connection with the transaction. Under the facts found by the court the relationship between the American Trust Company and the defendant was that of depository bank and customer—creditor and debtor—and not that of principal and agent. The services rendered by the American Trust Company to the defendant were those of a depository bank. In the various transactions outlined, the American Trust Company was engaged in the discharge of the very functions for which it was organized. It was conducting its business and not the business of the defendant. In no sense can it be said that it was the local agent of the defendant within the meaning of C. S., 483. To so hold would make every bank a local agent for many, if not all, of its corporate depositors, upon which service of process could be had. This would extend the meaning and purpose of the statute far beyond that contemplated by the Legislature.

The correlated question—is the defendant doing business in North Carolina—is presented in the briefs. This question we need not discuss. It is sufficient to say that if the American Trust Company was not the agent of the defendant in respect to the transactions outlined, then it follows as a matter of course that the defendant is not doing business in North Carolina.

The judgment below is

Affirmed.

STATE v. FRANK STARNES.

(Filed 27 November, 1940.)

1. **Criminal Law § 51—**

The evidence tended to show that defendant killed deceased by a violent blow with a hammer. Defendant testified that he did not "hit her hard." *Held:* The action of the solicitor in striking his hand upon a table with some violence and asking the defendant if the blows that defendant struck deceased were like that, *is held* not to have seriously prejudiced defendant and was not such as to call for the exercise by the court of its discretionary power of supervision.

2. **Criminal Law § 53e—Statement that court would strike evidence unless it corroborated witness, and failure to strike it out, held not expression of opinion on weight of evidence.**

The court remarked that it was admitting evidence for the purpose of corroboration and that if the evidence did not corroborate the witness it would strike it out. The evidence was competent and was not stricken. *Held:* The remark of the court taken in connection with the failure to strike is not an expression of opinion by the court that the evidence did corroborate the witness, it being apparent that the court was referring to the function of the evidence rather than its effect, and the contention that it amounted to an expression of opinion on the weight of the evidence is too remote to afford an inference of substantial prejudice.

3. **Same—Instruction that jury should consider proof of relevant facts by the State held error as expression of opinion.**

In this prosecution for homicide, defendant's testimony tended to show a quarrel between him and deceased and an attack made upon him by deceased. The court charged the jury that the jury might consider the entire absence of provocation and *proof* that there was no quarrel between them prior to the killing upon the question of premeditation and deliberation. *Held:* The instruction is susceptible to the construction that the absence of provocation and of any quarrel before the killing had been proved, and the instruction must be held for prejudicial error as an expression of opinion by the court upon the weight of the evidence.

STACY, C. J., dissents.

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

APPEAL by defendant from *Johnston, Special Judge,* at Criminal Term, 24 June, 1940, of MECKLENBURG. New trial.

At the criminal term of Mecklenburg Superior Court referred to, the defendant was tried upon an indictment for the murder of Anna Harris. The jury returned a verdict of murder in the first degree and defendant was sentenced to death by asphyxiation, as provided by law, from which defendant appealed.

The evidence of the State discloses that on 29 May, 1940, one Anna Harris, a colored woman, was found lying in a pool of blood in her

house in Charlotte, where she had been living with the defendant. Shortly before the body was found there, the defendant was seen to get out of a car and go into the house. The State's witness, McCullough (R., p. 3), testified that after defendant went into the house, he heard the deceased and the defendant talking; that he heard the deceased saying "Don't hit me like that." He then heard someone run out of the house.

The evidence discloses that on Sunday prior to the killing on Wednesday, while at the dinner table in company with the deceased and the defendant, the defendant made the remark, "You know one thing, you going to come in one of these days and you going to find your sister dead as hell, lying on the floor." This witness further testified that when he came into the house where the deceased and the defendant were living about 8 o'clock on the night of the killing, the deceased and the defendant were sitting and talking; that this witness left the house and returned about an hour later and found the deceased lying on the floor; that the defendant was not there; that the deceased had apparently been beaten over the head with a hammer; that there was a hole in her head and her brains were knocked out on the floor.

The witness Woodall (R., p. 6), testified that at about 9:15 on the night of the killing the defendant came to his house and said: "Well, I guess you all through seeing me walk around here for awhile. I killed Mac just now." ("Mac" was the name by which he called the deceased.)

The defendant was arrested shortly after the killing by officers McCall, Huneycutt and Yandle. When arrested the defendant made a statement to them to the effect that he and the deceased had an agreement that if she caught him in bed with a Negro woman she was going to kill him, and if he caught her in bed with a Negro man he was going to kill her. He further stated at this time that when he went home on the night of the killing, he found one Nathanial Tillman in bed with the deceased; that she had no clothes on; and after Tillman left the house, which was shortly thereafter, he and the deceased had an argument; that he slapped her while she was in bed; that she jumped up and ran into the front room and that he slapped her again in there, and that she ran through the middle room and as she was going from the middle room to the kitchen, he grabbed a hammer and struck her with it. He told these officers that he did not know how many times he hit her. The officers testified that when they first came to the house, the dead woman was lying with her feet towards the middle room, with her head in the doorway between that room and the kitchen; that there was a large hole in the right side of her head and there were four or five other places where apparently she had been struck with a hammer or some other

sharp instrument. These officers also testified that a blood-stained hammer was found near the body.

The defendant himself went on the witness stand (R., p. 12), and testified that he had been living with the deceased as man and wife for about a year and a half; that they were not married; that on the night of the homicide he came home and found Anna and Nathanial Tillman sitting on the side of the bed in the house; that the deceased had been drinking and they got in an argument about what they were going to have for supper; that the deceased refused to cook him any supper; that she had been drinking wine and that when he complained because she would not cook him something to eat, she attacked him with an ice pick; that he warded off the blows as much as he could; that he backed away from her toward a window where there was a hammer lying; that she kept on striking at him with the ice pick, and that he, in order to protect himself, hit her with the hammer three times. (R., p. 13.) The officers who arrested the defendant and who inspected the scene of the homicide all testified that no ice pick was found on the premises where the killing occurred.

The evidence also discloses that the day before the killing, defendant threatened the life of the deceased. The witness, Annie Harris, sister of the deceased, testified that she went down to her sister's house about 12 o'clock the day before the killing; that the defendant came into the house about 2 o'clock and asked her if she had anything to cook. She told him no, and he then told her, "I know one damn thing, very next time I come in here and you don't have me something to eat cooked, I'm going to kill you." (R., p. 19.)

A witness, Simmons, testified that he examined the deceased and prepared her for the photographer to make pictures of the wounds. "I found six holes. The larger hole seemed to be about the back of the ear and seemed to have severed the common carotid artery at the top and it was a fractured part here and there was two besides this large place and one here and one in the top of the head. We took the hammer and placed it in the wound and the small part went up to the handle . . . the ball part went in up to the handle in there behind the ear."

Upon the question of premeditation and deliberation the court instructed the jury *inter alia* that they might consider an entire absence of provocation and the proof that there was no quarrel just before the killing, to which the defendant objected and excepted.

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

A. A. Tarlton and Brock Barkley for defendant, appellant.

SEAWELL, J. The defendant here relies upon two assignments of error. The first is as to the conduct of the solicitor during the course of cross-examination of defendant with regard to the force of the blow which the defendant admitted he administered on the head of the deceased with a hammer. As to this, the State's witness, Simmons, had testified as above appears.

The defendant having testified substantially that he did not "hit her hard," the solicitor, with some violence, struck his hand upon the table and asked the defendant if the blows defendant had stricken were like that.

We do not think, under the circumstances of this case, that the defendant could have been seriously prejudiced by this act of the solicitor. We are also of the opinion that the incident was not of such a nature as to call for exercise of the discretion which must be accorded to trial judges—to whom is committed the immediate supervision of such matters—in defendant's protection.

The second assignment of error includes suggested violations of the provisions of C. S., 564, forbidding the judge to give any expression upon the weight of evidence.

There is an exception under this head relating to an incident occurring during the course of the trial. The State's witness Huneycutt was asked to repeat what the State's witness Grainger Harris had told him with regard to a threat made by defendant. To this defendant objected and the court admitted the evidence with the statement that it was doing so "purely to corroborate him (Harris) and for no other purpose. If it does not corroborate I will strike it out." Inasmuch as the evidence was not subsequently stricken out, the defendant contends that it was tantamount to a statement by the judge that it did so corroborate Harris. As to this question we think the judge used the word "corroborate" in a purely formal sense—as classifying the evidence, referring to its function rather than its effect. The conclusion that the judge had thus expressed an opinion on the weight of the evidence is too remote to afford an inference of substantial prejudice to the defendant.

However, we are unable to give entire approval to that portion of the charge noted above relating to deliberation and premeditation; that the jury might "consider an entire absence of provocation" and "the proof that there was no quarrel just before the killing."

The testimony of the defendant did disclose such a quarrel and an attack upon him by the deceased. Whether the jury should believe this or not is not our affair; it must be held that they understood the English language in its ordinary use and at least knew the difference between *evidence* and *proof*—a distinction maintained in both the common and the technical acceptation of these terms. Also since the presence of

provocation, when it exists, has a bearing on the question of deliberation favorable to defendant, just as its absence has an unfavorable bearing, the form of the instruction is open to the same objection. It is not taking an impractical view of the situation to say that the jury may have understood the judge to intimate that the absence of provocation and of any quarrel before the killing had been proved. Such an assumption, of course, would be to express an opinion upon the evidence. *S. v. Kline,* 190 N. C., 177, 129 S. E., 417; *Bradley v. R. R.,* 126 N. C., 735, 36 S. E., 181; *Pigford v. R. R.,* 160 N. C., 93, 75 S. E., 860.

In returning this case for a retrial it must be understood that we regard the incident as a casualty which might befall the ablest of judges. However, considering that the crime of which the defendant stands convicted draws the penalty of death, we are unable to relax the standards by which such conviction must be had.

We do not deem it necessary to pass upon other exceptions in the record. The error pointed out entitles the defendant to a new trial, and it is so ordered.

New trial.

STACY, C. J., dissents.

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

JACK EDWARDS, ADMINISTRATOR C. T. A. AND D. B. N. OF IRA J. FRIZZELLE, DECEASED, v. R. H. MCLAWHORN.

(Filed 27 November, 1940.)

1. Executors and Administrators § 2c—Clerk is without jurisdiction to appoint administrator c. t. a., d. b. n., until vacancy has occurred by death, resignation, removal, or discharge of executor.

Since a person to whom letters testamentary have been issued has authority to represent the estate until his death, resignation or until he has been removed or the letters testamentary revoked in accordance with statutory procedure, the appointment by the clerk of an administrator *c. t. a., d. b. n.,* upon petition of the residuary legatee alleging failure of the executor to account to the estate for rents and profits, is void, the clerk being without jurisdiction to make the appointment.

2. Same—

The filing of a "final report" by an executor does not have the effect of removing him from office if in fact the estate has not been fully settled, and therefore the filing of the report does not create a vacancy and does not give the clerk authority to appoint an administrator *c. t. a., d. b. n.*

3. Executors and Administrators § 4—

The procedure to remove an executor or administrator for default or misconduct is by order issued by the clerk to the executor or administrator to show cause, and in such proceeding the respondent must be given notice and an opportunity to be heard, with right of appeal. C. S., 31.

4. Executors and Administrators § 2c—Appointment of administrator c. t. a., d. b. n., before termination of executor's authority to represent estate is void and may be collaterally attacked.

This action was instituted by plaintiff as administrator *c. t. a., d. b. n.*, against the executor for alleged failure of the executor to account to the estate for rents and profits. It appeared that plaintiff's appointment was made before the executor was removed and prior to the termination of the executor's power to represent the estate. *Held:* The clerk was without jurisdiction to appoint plaintiff, and the appointment was void and is subject to collateral attack, and therefore plaintiff's action could have been dismissed by the court *ex mero motu* and the dismissal of the action upon motion of defendant is without error.

5. Courts § 1d—

Whenever the court perceives that it is without jurisdiction in the cause it may dismiss the action *ex mero motu* and therefore, *ex necessitate*, may dismiss same upon motion of defendant.

APPEAL by defendant from *Bone, J.*, at May Term, 1940, of PITT.

Civil action for recovery for rents and profits allegedly had and received for use and benefit of the estate of Ira J. Frizzelle, deceased.

When the action came on for hearing in the trial court and after the reading of the pleadings, "the defendant moved to dismiss the action upon the ground that the appointment of Jack Edwards as administrator *c. t. a.* and *d. b. n.* of Ira J. Frizzelle, deceased, is void, and offered in support of said motion the record."

Pertinent facts appearing of record sufficient for consideration of the question raised are substantially these: Ira J. Frizzelle, of Pitt County, died in 1929, leaving a last will and testament in which he named Herman McLawhorn, who is the defendant herein, R. H. McLawhorn, as executor. The will was duly probated. Herman McLawhorn qualified as executor and letters testamentary were issued to him on 2 March, 1929, and he entered upon the duties of executor, and on 25 October, 1932, filed in the office of clerk of Superior Court of Pitt County what is denominated "Final Report," in which the last item appearing is the "Amount in First National Bank of Ayden, 428.38." The report is sworn to and appears of record in the "Book of Settlements," but, in connection therewith, there is no order of the clerk.

Under the will of Ira J. Frizzelle, his land in Pitt County "known as the Tuten Place" is devised to Herman McLawhorn, in trust for purposes therein set forth.

In July, 1938, Nannie I. Frizzelle, who is described as the only next of kin of the said Ira J. Frizzelle and residuary legatee in his will, filed in Superior Court of Pitt County, before the clerk, a petition in which she alleged in brief the foregoing facts, and further:

"5. That as your petitioner is advised and believes, there is still due and owing the estate of the said Ira J. Frizzelle, which should be recovered for the use and benefit of the residuary legatee, a considerable amount of rents and profits accruing from the Tuten farm from 1931 up to and including the year 1937, and which were wrongfully converted by R. H. McLawhorn, the former executor and trustee as aforesaid, during his possession and retention of the farm;

"6. That in order to properly administer said estate, and to collect the aforesaid assets due and owing said estate, it is necessary for an administrator *c. t. a.* and *d. b. n.* to be appointed to the end that the estate of the said Ira J. Frizzelle may be properly administered."

Further, the petitioner "recommends that Jack Edwards be appointed administrator *c. t. a.* and *d. b. n.* with all the power and authority vested by law in such administrator in such case." Thereafter, on 4 October, 1938, upon application of Jack Edwards, the clerk of Superior Court of Pitt County "ordered and adjudged that Jack Edwards, *c. t. a.*, be appointed administrator of the estate of Ira J. Frizzelle, deceased, upon entering into bond in the sum of $1,000.00 . . ." Upon Jack Edwards taking the oath of administrator the clerk issued to him letters of administration, "*c. t. a., d. b. n.*, of the estate of said deceased."

Thereupon, on 4 October, 1938, Jack Edwards, as administrator *c. t. a.* and *d. b. n.* of Ira J. Frizzelle, deceased, instituted this action against Herman McLawhorn, as R. H. McLawhorn, for the purposes set forth in the petition of Nannie I. Frizzelle as above stated. In the complaint filed he alleges, among other things: "1. That the plaintiff . . . is the duly qualified and acting administrator *c. t. a.* and *d. b. n.* of the late Ira J. Frizzelle, who died domiciled in Pitt County on the.....day of ....., 1929." The defendant, in answer thereto, avers: "That paragraph 1 of the complaint is denied, except in so far as it conforms to the record."

The court below denied the motion, and defendant excepted. Then, after disposing of other questions, and during the progress of the trial, the court being of opinion that the action involves a detailed accounting and is a case for reference, "ordered, adjudged and decreed: 1st. That the defendant's motion to dismiss the action on the ground that the appointment and qualification of the plaintiff as administrator is void, be and the same is hereby denied"; and after ruling upon other matters, ordered a reference.

Defendant appeals therefrom to the Supreme Court and assigns error.

Albion Dunn for plaintiff, appellee.
J. B. James and J. A. Jones for defendant, appellant.

WINBORNE, J. These questions are determinative of this appeal: (1) Has the clerk of the Superior Court jurisdiction to appoint an administrator *c. t. a., d. b. n.,* of an estate, before the executor, who has qualified upon the same estate and entered upon the duties of his office, shall have been removed by order of the clerk, or before letters testamentary issued to him shall have been revoked by order of the clerk? (2) If not, does the filing by the executor of a final report of the administration of the estate have the effect of removing him from office, if in fact the estate has not been fully settled? (3) If not, when, in the trial of an action instituted by a party, as administrator *c. t. a., d. b. n.,* who has been appointed as such before there is an order removing the executor, it is made to so appear to the court, should the court *ex mero motu,* or upon motion of the defendant, dismiss the action without proceeding further with the trial? The first and second questions are properly answered in the negative, and the third in the affirmative.

In this State it is provided by statute that the clerk of the Superior Courts of each county has jurisdiction within his county to take proofs of wills and to grant letters testamentary, letters of administration with will annexed and letters of administration in cases of intestacy, C. S., 1 and 938; to revoke letters testamentary and of administration, C. S., 30, 31, 32, 42, 44, and 938, for reasons therein specified, and of application to remove an executor or administrator in a proper case. *Edwards v. Cobb,* 95 N. C., 5.

The general rule is that, after an executor or administrator is appointed and qualified as such, his authority to represent the estate continues until the estate is fully settled, unless terminated by his death, or resignation, or by his removal in some mode prescribed by statute, or unless the letters be revoked in a manner provided by law.

It is also an established principle of law that to warrant the appointment of an administrator *de bonis non,* or *de bonis non, cum testamento annexo,* the office of administrator or executor must be vacant. Vacancy is a jurisdictional fact, and an appointment of either an administrator *de bonis non,* or an administrator *de bonis non, cum testamento annexo,* when there is no such vacancy is absolutely void, and may be so declared, even in a collateral proceeding. 21 Am. Jur., 813, Executors and Administrators, sec. 774; *Griffith v. Frazier,* 8 Cranch (U. S.), 5, 3 L. Ed., 471; *Kane v. Paul,* 14 Pet. (U. S.), 33, 10 L. Ed., 341; *Hyman v. Gas-*

kins, 27 N. C., 267; *Springs v. Irwin,* 28 N. C., 27; *In re Bowman,* 121 N. C., 373, 28 S. E., 404.

In the *Bowman case, supra,* the holdings of this Court is thus epitomized in the headnote: "Where letters of administration are issued to one person, who qualifies, the power of the clerk in that respect and as to that estate are exhausted, and the subsequent appointment of another person as administrator, before the first appointment is revoked, is void." In the opinion it is said that the clerk "had no power to grant letters upon the estate to any other person under any conditions while the letters issued to Whitaker were unrevoked," citing *Hyman v. Gaskins, supra.* To like effect is *Springs v. Irwin, supra.*

In this State it is provided by statute, C. S., 31, that "If, after any letters have been issued, it appears to the clerk, or if complaint is made to him on affidavit . . . that any person to whom they were issued . . . has been guilty of default or misconduct in the due execution of his office . . . the clerk shall issue an order requiring such person to show cause why the letters should not be revoked. On the return of such order, duly executed, if the objections are found valid, the letters issued to such person must be revoked and superseded, and his authority shall thereupon cease."

The practice in such cases is well stated in *Edwards v. Cobb, supra.* There the Court said that in this and similar cases the proceeding is begun by an order made by the clerk to show cause, notice of which must be served on the party charged or proceeded against, who shall have the right to plead thereto, and, from adverse ruling of the clerk, to appeal to the Superior Court, and then to this Court. See, also, *In re Battle,* 158 N. C., 388, 74 S. E., 23; *In re Gulley,* 186 N. C., 78, 118 S. E., 839.

By the weight of authority the removal or discharge of an executor or administrator is not effected by the approval of his final account without a formal order of discharge. Annotations 8 A. L. R., 175, at p. 185. Indeed, in *Best v. Best,* 161 N. C., 513, 77 S. E., 762, this Court, speaking through *Hoke, J.,* said that neither the power nor the duties of the administrator there had necessarily ceased because a final settlement had been formally made.

In *Johnston v. Schwenck,* Ohio St., 124 N. E., 61, 8 A. L. R., 170, *Nichols, C. J.,* speaking for the Court, said: "It is the universal holding that the authority of an executor or administrator to represent the estate continues until the estate is fully settled, unless he is removed, dies, or resigns, and that the filing of what purports to be a final account does not extinguish the trust. Indeed, in the case of *Weyer v. Watt,* 48 Ohio St., 545, 28 N. E., 670, it was held that an order by the court, directing that the administrator be discharged, made at the time of the filing of a

final account, does not terminate his authority if assets of the estate remain unadministered."

Applying these principles to the factual situation of the case in hand, when the clerk of the Superior Court of Pitt County granted letters testamentary to Herman McLawhorn under the will of Ira J. Frizzelle, deceased, his authority was exhausted, and he had no jurisdiction to issue letters of administration *c. t. a., d. b. n.,* to Jack Edwards or to any other person until a vacancy had occurred by the death or resignation of McLawhorn or until he had been removed for cause by order after notice. Hence, the appointment of Jack Edwards as administrator *c. t. a., d. b. n.,* of Ira J. Frizzelle, deceased, is absolutely void.

We now come to the third question.

Objection to the jurisdiction of a court over the subject matter of an act is fundamental and may be made at any time during the progress of the action. *Henderson County v. Smyth,* 216 N. C., 421, 5 S. E. (2d), 136, and cases cited.

In *Burroughs v. McNeill,* 22 N. C., 297, it is stated: "The instant that the court perceives that it is exercising, or is about to exercise, a forbidden or ungranted power, it ought to stay its action, and, if it does not, such action is, in law, a nullity."

To like effect in *Branch v. Houston,* 44 N. C., 85, *Pearson, J.,* said: "If there be a defect, *e.g.,* a total want of jurisdiction apparent upon the fact of the proceedings, the court will of its own motion 'stay, quash, or dismiss' the suit. This is necessary to prevent the court from being forced into an act of usurpation, and compelled to give a void judgment . . . So, *ex necessitate,* the Court may, on plea, suggestion, motion, or *ex mero motu,* where the defect of jurisdiction is apparent, stop the proceeding. Tidd 516-960."

It is appropriate to say that whether Herman McLawhorn as executor of Ira J. Frizzelle, deceased, has or has not fulfilled the duties of office is not before us. This is a question to be addressed to the clerk of Superior Court if, and when, application may be made for the removal of said executor. But, until there has been a removal in accordance with law, "the law could not tolerate such a condition of things as would ensue if the clerk could appoint subsequent administrators, leaving the letters of former ones unrevoked." *In re Bowman, supra.*

For causes stated, the judgment below is

Reversed.

ALEX WEINSTEIN AND BEN WEINSTEIN, TRADING AS WEINSTEIN HIDE & METAL COMPANY, v. THE CITY OF RALEIGH.

(Filed 27 November, 1940.)

Appeal and Error § 48—Where facts agreed are conflicting, cause will be remanded.

Where, in an action against a municipality upon an agreed statement of facts to recover a license tax paid under protest, the facts agreed are ambiguous and conflicting so that it is not clear whether the right to levy the tax was asserted upon the ground that plaintiff was carrying on the business specified within the city, or whether the city contended it had the right to collect the tax on the business located and carried on outside the city limits but within two miles thereof, the case will be remanded so that the statement of facts may be amended to remove the ambiguity or so that, if the parties fail to reach an agreement, the controverted facts may be submitted to a jury.

BARNHILL, J., dissents.

CLARKSON and DEVIN, JJ., concur in dissent.

APPEAL by plaintiffs from *Williams, J.*, at June Term, 1940, of WAKE. Error and remanded.

Jones & Brassfield and Armistead Jones Maupin for plaintiffs, appellants.

Alfonso Lloyd for defendant, appellee.

SCHENCK, J. This is an action to recover $62.50 paid as a license tax upon a junk dealer, and penalties, which payment was made under protest by the plaintiffs to the defendant, heard upon an agreed statement of facts.

An ordinance of the city of Raleigh reads: "Every person engaged in the buying and/or selling of material commonly known as junk, within the city or within a two-mile radius thereof, shall be deemed a 'junk dealer' within the meaning of section 168 of the State Revenue Act, and shall pay an annual license of $62.50."

Section 168 of the State Revenue Act (sec. 168, ch. 158, Public Laws 1939) reads: "Every person, firm or corporation engaged in the business of buying and/or selling or dealing in what is commonly known as junk, . . . shall . . . obtain . . . a State license, . . . and shall pay for such license an annual tax, according to the following schedule: . . . In cities or towns of 30,000 population or more $125.00. Provided, that if any person, firm or corporation shall engage in the business enumerated in this section within a radius of two miles of the corporate limits of any city or town in this State, he or it shall

pay a tax based on the population of such city or town according to the schedule above set out. Counties, cities and towns may levy a license tax not in excess of one-half of that levied by the State."

The agreed statement of facts contains, *inter alia,* the following:

"2. The plaintiff buys and sells junk in the city of Raleigh, N. C., which city has a population of over 30,000 inhabitants."

"5. The city of Raleigh, under its general police power, maintains and contends that it has a right to levy and collect under its general police power a license or franchise tax upon junk dealers located outside of the corporate limits of its city of Raleigh and within two miles of the corporate limits thereof."

"7. The plaintiff paid the tax under protest to the city tax collector and brings this suit to recover the amount of taxes and penalties paid, contending that the city of Raleigh cannot levy or collect a license or privilege tax upon the business of a junk dealer located outside of and beyond the territorial limits of the city of Raleigh."

The defendant city in its brief states: "It is contended by the defendant in this case that the privilege of buying and selling junk inside the city limits of Raleigh (or other counties, towns, or cities) is the privilege upon which this tax is levied; . . ."

The agreed facts are ambiguous and contradictory. If the facts are as agreed and indicated in 2, to the effect that the plaintiffs buy and sell junk in the city of Raleigh, and it is for this that the license was collected, it might appear that the tax was legally levied under the provisions of the statute and ordinance, as contended in defendant's brief; on the other hand, if the facts are as agreed and indicated in 5 and 7, to the effect that the city of Raleigh "contends" it has a right to collect a license tax upon junk dealers located outside of its corporate limits and within two miles thereof, and the case was tried upon this theory, it might appear that such a license tax was illegal. It does not appear whether the license tax levied and paid under protest was for the privilege of buying and/or selling junk within the corporate limits of the city of Raleigh, or for the privilege of conducting a business of a junk dealer without the city limits but within two miles thereof. The confusion is further indicated in the statement of the question involved in the briefs of the respective parties. The plaintiffs state the question to be "Is the plaintiffs' junk business owned, located and operated outside the city of Raleigh exempt from a license tax levied by the city?"; whereas the defendant states the question to be "Is not plaintiffs' junk business liable to the city of Raleigh for a license tax levied by the city . . . when said establishment is located just outside of the city of Raleigh, but the business is carried on in the city of Raleigh?"

Owing to this confusion the parties will be given an opportunity to amend the agreed statement of facts and remove the ambiguity and contradiction therein and submit the amended statement to the judge of the Superior Court for decision; or if they fail to reach an agreement as to the facts the uncontroverted issues may be submitted to a jury. A precedent for this procedure is found in *Roebuck v. Trustees,* 184 N. C., 611, and *Miller v. Scott,* 185 N. C., 93.

Error and remanded.

BARNHILL, J., dissenting: Sec. 168, ch. 158, Public Laws 1939, authorizes cities and towns of 30,000 population or more to levy a license or privilege tax of $62.50 for the privilege of engaging in the business of buying and/or selling or dealing in what is commonly known as junk within the city. The city of Raleigh, being a city of more than 30,000 population, duly enacted an ordinance levying this tax and collected the same from the plaintiff.

This action was instituted by the plaintiff to recover the taxes thus paid upon the allegation that it was wrongfully collected. The burden rested upon him to show that the collection of the license tax was unauthorized. In attempting to carry this burden he does not challenge the validity either of the statute, ch. 158, Public Laws 1939, or of the ordinance. Nor does he attempt to show that the license tax was levied and collected for the privilege of engaging in business outside the city limits. Therefore, the case involves but one determinative issue of fact: Is the plaintiff buying and selling junk in the city of Raleigh? As to this the plaintiff makes a solemn admission in open court that he "Buys and sells junk in the city of Raleigh, N. C., which city has a population of 30,000 inhabitants." This admission settles the only material issue of fact, demonstrates the validity of the tax and defeats plaintiff's right of recovery; *Hilton v. Harris,* 207 N. C., 465, 177 S. E., 411; *S. v. Bridgers,* 211 N. C., 235, 189 S. E., 869.

Paragraphs 5 and 7 in the paper writing appearing in the record designated "agreed statement of facts" do not contain stipulations of fact. Paragraph 5 constitutes a statement of the contention of the defendant in respect to its right to tax and paragraph 7 constitutes a statement of the contention of the plaintiff. As the city has levied and collected a tax against the plaintiff for engaging in the business of buying and selling junk inside the city limits, and the plaintiff admits that he has been thus engaged, the respective contentions, as to the right of the city to levy and collect a license or privilege tax upon the plaintiff's junk business located outside of and beyond the territorial limits of the city of Raleigh, are immaterial.

They were so considered by the court below, as is made to appear by the judgment entered. The following appears therein: "And the court being of the opinion that the tax levied by the city of Raleigh upon the plaintiff for the privilege of 'buying and/or selling junk' inside said city limits, irrespective of where his place of business may be, is a valid exercise of legislative authority delegated to said city," etc.

Thus it appears that the case was tried in the court below upon the theory that the tax was levied against the plaintiff for the privilege of buying and selling junk in the city of Raleigh. The burden being on the plaintiff, he made no effort to show the contrary.

Such ambiguity as exists is in relation to contentions made as set forth in the agreed statement of facts, and the contradictory positions assumed appear in the statements in the briefs as to the true question presented. This Court is not interested in ambiguous or contradictory contentions which are irrelevant to the facts stipulated and the question of law involved. And the defendant should not be defeated in its right merely because it assumed in the court below an untenable position and made a contention as to its right, in any event, to collect the license tax under circumstances other than those here presented.

The case comes to this: The plaintiff's admission that he is buying and selling junk in the city of Raleigh is an acknowledgment of liability for the license tax and defeats his right of recovery. But the case is remanded for the reason that the parties in the court below by their contentions, raised an immaterial issue as to the right of the city to tax the plaintiff on the theory that his place of business was located outside the corporate limits of the defendant but within two miles thereof and for the reason that in their briefs they are not in accord as to the question presented. The remand is to the end that the parties may make proper contentions and agree upon the question of law to be decided. In this I cannot concur.

The *Roebuck* and *Miller cases* cited in the majority opinion are not in point. In the *Roebuck case* a fact material to the decision of the case did not appear in the record. Here the very fact which authorized the levy of the tax is admitted. In the *Miller case* a supplemental agreement enlarging and extending the facts agreed in the original case was submitted to and considered by the court on rehearing.

As plaintiff has failed to show any right to recover the tax paid and admits facts which sustain the levy and collection thereof, the judgment below should be affirmed.

CLARKSON and DEVIN, JJ., concur in dissent.

W. L. SCALES, JR., v. PANNIE S. SCALES, OCTAVIA SCALES PHILLIPS AND HUSBAND, F. DONALD PHILLIPS, JOHN M. SCALES AND WIFE, RUTH H. SCALES, WILLIAM S. SCALES AND WIFE, LOUISE M. SCALES, MARY LEAK SCALES SEATE AND HUSBAND, CLYDE SEATE, AND FRED W. BYNUM, TRUSTEE FOR H. J. ROLLINS, AND H. J. ROLLINS.

(Filed 27 November, 1940.)

Judgments § 37b—Where one of judgment debtors, jointly and severally liable, discharges judgment under compromise agreement, he is entitled to contribution on basis of amount paid.

Where one of several judgment debtors, jointly and severally liable, discharges the entire judgment under a compromise agreement with the judgment creditor by payment of a fraction of the amount of the judgment, he is entitled to an assignment of the judgment to a trustee for his benefit under C. S., 618, and is entitled to recover from each of his codefendants the proportionate part of such codefendant's liability in the amount of the compromise settlement, he being entitled to contribution on the basis of the amount actually paid for the full discharge of the judgment even though such amount does not equal his proportionate liability on the original amount of the judgment.

APPEAL by plaintiff from *Alley, J.*, at July Civil Term, 1940, of RICHMOND. Affirmed.

This is a special proceeding instituted before the clerk of the Superior Court of Richmond County to sell land for division of the proceeds among the tenants in common and for cancellation of the outstanding judgment against W. L. Scales, Jr., one of the tenants in common, as a cloud upon the title. It was agreed that the land should be sold free and clear from the lien of the judgment and that the share in the proceeds of such sale which belonged to the plaintiff W. L. Scales, Jr., should be held by the clerk of the Superior Court pending the settlement of this case. The judgment referred to as being outstanding against plaintiff W. L. Scales, Jr., was a judgment against H. M. Neal, W. L. Scales, Jr., and H. J. Rollins on two notes which were made by the corporation, H. M. Neal, Inc., and which were endorsed on the back by H. M. Neal, W. L. Scales, Jr., and H. J. Rollins. The judgment was for $3,250.00. It is admitted by the record in the case that H. M. Neal, W. L. Scales, Jr., and H. J. Rollins were primarily and equally liable; therefore, jointly and severally liable on the judgment.

In 1934, H. J. Rollins paid the judgment creditor, the Commissioner of Banks, in full for the judgment—$225.00—and in consideration therefor, the Commissioner of Banks assigned the judgment to Fred W. Bynum, Trustee.

The plaintiff claims that the payment by defendant H. J. Rollins satisfied the judgment as to all of the judgment debtors, asked that the court declare the judgment satisfied, and the clerk of court did so. On appeal to the Superior Court, Judge Alley held that the assignment was valid and ordered that the clerk pay to H. J. Rollins, out of the share of W. L. Scales, Jr., of the proceeds of the sale of the land the sum of $75.00, with interest from 24 September, 1934, at the rate of six per cent per annum.

The judgment of the court below is as follows: "This cause coming on to be heard before Hon. Felix E. Alley, the Judge holding the courts of the 13th Judicial District, at the July, 1940, Civil Term of Richmond Superior Court, on appeal of the defendants, Fred W. Bynum, Trustee for H. J. Rollins, and H. J. Rollins, from a judgment of Hon. W. S. Thomas, Clerk of the Superior Court of Richmond County, rendered on the 27th day of June, 1940, and the Court being of the opinion that the assignment of the judgment in the case entitled 'Gurney P. Hood, Commissioner of Banks, *ex rel.* the Bank of Pee Dee, *v.* H. M. Neal, W. L. Scales, Jr., and H. J. Rollins,' which appears of record in the office of the Clerk of Court of Richmond County, N. C., in Judgment Docket No. 29, at page 160, as set forth in the judgment of Hon. W. S. Thomas, Clerk of the Superior Court of Richmond County, in the above entitled action, is a valid and proper assignment of said judgment to Fred W. Bynum, Trustee; AND it further appearing to the Court that the Clerk of the Court of Richmond County now has in his hands certain funds belonging to the plaintiff, W. L. Scales, Jr., and who is one of the defendants named in the judgment above referred to and that said funds were derived from the sale of real estate in which the said W. L. Scales, Jr., has an interest and it was agreed by the parties hereto that said funds should be held by the Clerk of said Court pending a determination of the rights of said parties to said funds by the Court; AND it further appearing to the Court that the defendant H. J. Rollins paid to the Commissioner of Banks the sum of $225.00 on the 24th day of September, 1934, for said judgment, and at which time he had the same transferred to Fred W. Bynum, Trustee; IT IS, THEREFORE, CONSIDERED, ORDERED AND ADJUDGED that the judgment of Hon. W. S. Thomas, Clerk of the Superior Court of Richmond County, as rendered on the 27th day of June, 1940, and which appears of record in said office, be, and the same is hereby reversed. It is further Ordered and Adjudged that the Clerk of said Court shall pay over to Fred W. Bynum, Trustee, the sum of $75.00 with interest thereon from September 24, 1934, at the rate of 6% per annum, the same being one-third of the amount paid by H. J. Rollins for said judgment and for which the said W. L. Scales, Jr., is liable. It is further Ordered that the plaintiff

pay the costs accrued for this appeal and that the said Fred W. Bynum, Trustee, and H. J. Rollins shall not be liable for any of the costs of this action. By consent of the parties plaintiff and defendants, it was agreed that the court might take the court papers in this action and the briefs of plaintiff and defendants and render its judgment as of the July Civil Term, 1940, of Richmond Superior Court. Felix E. Alley, Judge Presiding."

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

Thomas H. Leath for plaintiff.
George S. Steele, Jr., and Fred W. Bynum for defendants.

CLARKSON, J. On the facts in this case, did the court err in signing the above judgment? We think not.

N. C. Code, 1939 (Michie), sec. 618, in part, is as follows: "In all cases in the courts of this State wherein judgment has been, or may hereafter be, rendered against two or more persons or corporations, who are jointly and severally liable for its payment either as joint obligors or joint tort-feasors, and the same has not been paid by all the judgment debtors by each paying his proportionate part thereof; if one of the judgment debtors shall pay the judgment creditor, either before or after execution has been issued, the amount due on said judgment, and shall, at the time of paying the same, demand that said judgment be transferred to a trustee for his benefit, it shall be the duty of the judgment creditor or his attorney to transfer without recourse such judgment to a trustee for the benefit of the judgment debtor paying the same; and a transfer of such judgment as herein contemplated shall have the effect of preserving the lien of the judgment and of keeping the same in full force as against any judgment debtor who does not pay his proportionate part thereof to the extent of his liability thereunder in law and in equity," etc. *Fowle v. McLean,* 168 N. C., 537; *Hamilton v. R. R.,* 203 N. C., 468; *Hoft v. Mohn,* 215 N. C., 397.

H. M. Neal, W. L. Scales, Jr., and H. J. Rollins were all primarily and equally liable, jointly and severally, on the judgment. H. J. Rollins *paid the judgment* and under the statute, *supra,* it was transferred to Fred W. Bynum, Trustee. Scales is one of the judgment debtors and has paid no part of the judgment. The judgment is a lien on the land. N. C. Code, *supra,* sec. 614. The fact that the judgment was settled for $225.00 does not release Scales' land from the lien of the judgment against him. Sec. 618, *supra.* His liability was joint and several to the creditor and his liability was his proportionate part among the judgment debtors—one-third of the judgment. In equity, it having been

purchased for $225.00, his liability would be at least $75.00—one-third the purchase price of the judgment, there being three judgment debtors.

It is contended by plaintiff that "It is apparent that H. J. Rollins acquired no rights against his codefendant debtors, who were jointly and severally liable with him, by having the judgment assigned to a trustee for his benefit, for the reason that by paying $225.00 for the transfer of the $3,250.00 judgment, he paid neither the entire judgment nor more than his proportionate part thereof, which is a condition precedent to make the assignment sufficient at law to keep the judgment alive and thus enable him to wield it against his co-debtors." We cannot sustain this contention. We do not think it is applicable on the facts of record in this case. Rollins not only paid his proportionate part, but the *entire judgment* of $3,250.00 and the "entire debt" which was reduced to judgment. The judgment against H. M. Neal, W. L. Scales, Jr., and H. J. Rollins is settled by Rollins' paying the $225.00. The assignment to the trustee protects him and preserves the lien against the other judgment debtors. We think this is consonant with law and equity under the statute, *supra,* sec. 618, before cited. *Fowle v. McLean, supra,* p. 543.

In 13 American Jurisprudence, sec. 18, p. 23, is the following: "The basis for ascertainment of the excess paid is not necessarily the amount of the original common obligation; if the claimant has satisfied the entire debt or demand or relieved the whole burden by payment of a less amount, he is entitled to contribution only on the basis of the amount actually paid. In the case of a compromise made by the claimant, the sum recoverable must be ascertained on the basis of the amount paid in compromise, each contractor being entitled to the benefit of the compromise," etc.

The rule that the claimant must have paid more than his pro rata share of the common liability does not render it necessary that he shall have paid more than such share of the original liability, provided the debt to the creditors has been extinguished as against all the obligors. 14 B. R. C., 713; Am. Law Inst. Restatement, Restitution, sec. 82.

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

Affirmed.

STATE v. ARTHUR WILSON.

(Filed 27 November, 1940.)

1. Criminal Law § 54c—Where verdict is not responsive to indictment it is the duty of the court to require jury to redeliberate.

Defendant was charged in the first count with rape and in the second count with having carnal knowledge of a female child over twelve and under sixteen years of age. The solicitor announced he would not ask

for a conviction of the capital offense of rape and the court correctly charged the jury as to the verdicts permissible upon the first count, and that upon the second count they might find defendant guilty or not guilty. The jury returned a verdict of not guilty upon the first count and guilty of assault upon a female upon the second count. The court thereupon instructed the jury again as to the verdicts it might render upon the respective counts, and upon the coming in of the jury the second time, it returned a verdict of guilty of an assault upon a female upon the first count and guilty upon the second count. *Held:* Even conceding that the first verdict of not guilty upon the first count precluded the jury from again considering that charge and rendered ineffective the second verdict of guilty of an assault upon a female, its first verdict upon the second count was not responsive to the indictment and was not a verdict permitted by law, and therefore the court properly instructed it to reconsider its verdict upon the second count, and the verdict finally rendered thereon is consistent with law and was properly accepted by the court. The sentence of the court upon the first count is stricken out in accordance with the majority opinion of the Supreme Court.

2. Criminal Law § 81c—

Where defendant is convicted upon two counts, and is sentenced by the court upon each, the sentences to run concurrently, and the sentence on the second count is the longer, any error in the return of the verdict upon the first count could not prejudice defendant, the conviction and sentence on the second count being without error.

APPEAL by defendant from *Bobbitt, J.,* at August Term, 1940, of YANCEY. Modified and affirmed.

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

Charles Hutchins and Briggs & Atkins for defendant, appellant.

SEAWELL, J. The defendant was tried under a bill of indictment containing two counts, as follows: "The jurors for the State upon their oath present, That Arthur Wilson, late of the County of Yancey, on the 1st day of January, in the year of our Lord one thousand nine hundred and forty, with force and arms, at and in the county aforesaid, in and upon one Chloe Johnson, against the peace of the State, then and there being violently and feloniously did make an assault on her the said Chloe Johnson, then and there violently, forceably, feloniously and against her will did rape, ravish and carnally know her, against the form of the statute in such cases made and provided, and against the peace and dignity of the State.

"The jurors for the State upon their oath further present that Arthur Wilson, being a male person, over the age of 18 years, late of the County of Yancey, on the 1st day of January, 1940, A.D., with force and arms, and in said county aforesaid, did unlawfully, willfully and feloniously

carnally know and abuse one Chloe Johnson, a female child over 12 years, and under 16 years of age, who had never before had sexual intercourse with any person, against the form of the statute in such cases made and provided, and against the peace and dignity of the State."

When the jury was impaneled the solicitor announced that he would not ask for conviction of the capital offense of rape charged in the first count, but of such lesser degree of crime as the evidence might appropriately present. With this announcement the cause went to trial upon the two-count bill.

When the jury returned to the courtroom to render their verdict, the record discloses that the following occurred:

"THE CLERK: Gentlemen, have you agreed on your verdict?

"JUROR: We have.

"THE CLERK: What is your verdict on the first count?

"JUROR: Not Guilty.

"THE CLERK: What is your verdict on the second count?

"JUROR: Guilty of an assault on a female.

"THE COURT: Gentlemen, the Court cannot accept this verdict. It is not rendered in accordance with the instructions the Court has given you. As the Court has heretofore explained to you, as to the first count in the bill of indictment, the jury may return one of three possible verdicts, namely, a verdict of guilty of an assault with intent to commit rape, or a verdict of guilty of an assault on a female, or a verdict of not guilty, and that as to the second count in the bill of indictment, which is the charge that the defendant had sexual intercourse with a female child over 12 years of age and under 16 years of age, who had not previously had sexual intercourse with any person, the jury may return one of two possible verdicts, namely, a verdict of guilty or a verdict of not guilty. You may retire to your jury room and deliberate further as to your verdict.

"After deliberating for 30 minutes or more, the jury returned again to the courtroom, when the following occurred:

"THE CLERK: Gentlemen, have you agreed on your verdict?

"JUROR: We have.

"THE CLERK: What is your verdict as to the first count?

"JUROR: Guilty.

"THE COURT: Guilty of what?

"JUROR: Guilty of an assault on a female.

"THE COURT: Guilty of an assault on a female: So say you all, gentlemen of the jury?

"JURORS: (All twelve jurors spoke or nodded their assent.)

"THE CLERK: What is your verdict as to the second count?

"JUROR: (The juror who had heretofore acted as spokesman hesitated and made some remark, in a low voice, which the Court did not hear.)

"THE COURT: Gentlemen, the second count, as the Court has explained to you, charges the defendant with having had sexual intercourse with a female child over 12 years of age and under 16 years of age, who had not previously had sexual intercourse with any person: Do you find the defendant guilty or not guilty of this charge?

"JUROR: Guilty.

"THE COURT: Guilty: So say you all, gentlemen of the jury?

"JURORS: (All twelve jurors spoke or nodded their assent.)

"THE COURT: Gentlemen, as the Court understands your verdict with reference to the first count, your verdict is that the defendant is guilty of an assault on a female. If that is your verdict as to the first count, raise your right hands.

"JURORS: (All twelve jurors thereupon raised their right hands.)

"THE COURT: Gentlemen, as the Court understands your verdict with reference to the second count, your verdict is that the defendant is guilty, that is, guilty of having sexual intercourse with a female child over 12 years of age and under 16 years who had not previously had sexual intercourse with any person. If that is your verdict as to the second count, raise your right hands.

"JURORS: (All twelve jurors thereupon raised their right hands.)

"THE COURT: Record the verdict, Mr. Clerk."

The jury was then dismissed.

Defendant's first exception is "to all of the foregoing." His second and remaining exception is to the judgment rendered on the verdict, which, upon the first count, sentences him to two years on the public roads, and, on the second count, sentences him to five years in State's Prison. Other exceptions are formal.

Conceding that the jury had finished their deliberations and reached a verdict to the effect that the defendant was not guilty on the first count and had properly delivered the same in open court, and that it was beyond the power of the court to recommit the issue to them, we are of the opinion that no irregularity or defect of procedure attended the rendering of the verdict on the second issue, and that a judgment based thereupon is valid. The jury attempted to return a verdict upon this issue, it is true, but it was not responsive to the indictment, and since it was a verdict they could not in law render, it was the duty of the judge to require that they continue their deliberations until a proper verdict should be reached. His instructions as to the verdict they might render on this count are consistent with the law. The manner of its reception is unobjectionable.

Since the terms of imprisonment assigned under both counts are to run concurrently, and that under the second count, where there is a valid conviction, is the longer, the defendant is not harmed by something which would not add to his punishment. But the majority of the Court feels that so much of the judgment as is based on the verdict on the first count—that is, the sentence of two years—should be stricken out, and it is so ordered. The sentence on the second count—that is, five years in State's Prison—is valid, and will stand. As thus modified, the judgment is

Affirmed.

ANDERSON COTTON MILLS v. ROYAL MANUFACTURING CO. ET AL.

(Filed 27 November, 1940.)

1. **Fraud § 8: Pleadings § 29—Where action is for fraud and not upon contract, negotiations prior to execution of the contract may be competent.**

   This action was instituted to recover for alleged fraud on the part of defendants in purchasing plaintiff's products for the corporate defendant while deceiving plaintiff into believing that the corporate defendant was acting as plaintiff's selling agent. *Held:* The action was not based upon the contract of agency but was in tort for fraud, and plaintiff's allegations relating to preliminary negotiations and representations prior to the execution of the contract of agency constituted a part of the cause alleged, and defendants' motion to strike was properly denied.

2. **Fraud § 8: Corporations § 7—Complaint held sufficient to state cause of action in fraud against officers and agents of corporation.**

   The complaint alleged that the corporate defendant procured a contract of agency to sell plaintiff's products, that in fact, instead of selling the products as it represented itself to be doing, it itself purchased same, and directed plaintiff to ship same to dummy purchasers for the purpose of deceiving plaintiff, that plaintiff was deceived to its damage, and that the individual defendants were officers and agents of the corporation and actually caused and participated in the wrongful acts of the corporation. *Held:* The complaint sufficiently alleges a cause of action in fraud against the individual defendants, since the allegation that the individual defendants caused and participated in the wrongful acts of the corporation sufficiently infers that they participated in the fraudulent intent which may be reasonably inferred from the facts alleged.

3. **Fraud § 8—**

   A complaint which alleges facts from which fraudulent intent may reasonably be inferred, or presumed, or necessarily results, is sufficient as against demurrer, it not being required that the word "fraud" be used in the pleading.

4. Pleadings § 15—

Upon demurrer the complaint will be liberally construed with a view to substantial justice, C. S., 535, and every reasonable intendment and presumption will be given the pleader, and the demurrer overruled unless the pleading is wholly insufficient.

APPEAL by defendants from *Johnston, Special Judge,* at September Special Term, 1940, of MECKLENBURG.

Civil action to recover damages for breach of trust and fraud.

The complaint in substance alleges:

1. That the plaintiff is engaged in the manufacture of cotton goods and a valuable by-product known as "waste."

2. That Ira A. Stone was a stockholder, director, vice-president and manager of the Charlotte office of the corporate defendant from 1928 to the spring of 1936; that W. G. Ackerman was manager of the Charlotte office of the corporate defendant from June, 1936, to the end of January, 1939; that both were connected with the actual conduct and management of the corporate defendant's business, and that they both "actually caused and participated in the wrongful acts" of the corporate defendant hereinafter alleged.

3. That the defendant corporation, through its agents, represented to plaintiff that it was an expert in the marketing and handling of "waste" by virtue of its size, experience, etc., and offered to act as agent of plaintiff in disposing of plaintiff's entire output of waste.

4. That the corporate defendant tendered plaintiff a written contract in 1931, which was not accepted, but was again renewed, through its agents, and accepted and renewed each year from 1933 to 1937.

5. That during the years from 1933 to 1937 the corporate defendant fraudulently represented to the plaintiff that it was selling plaintiff's "waste" to domestic customers and exporters, and retained commissions on said alleged sales (the alleged transactions being set out in detail), when in truth and in fact no such sales were made, the defendant itself being the purchaser, at less than market prices; that shipments were directed to be sent to these "dummy purchasers" in order to deceive the plaintiff, which they did, and that the defendant thus speculated in plaintiff's by-product to its great profit and advantage and to the plaintiff's great loss, etc.

The defendants moved to strike from the complaint all allegations relative to the preliminary negotiations prior to the execution of the contract of agency between plaintiff and defendant. Motion denied; exception.

The individual defendants, Ira A. Stone and W. G. Ackerman, interposed demurrer on the ground that the complaint does not state facts

sufficient to constitute a cause of action against them. Demurrer overruled; exception.

Defendants appeal, assigning errors.

Jones & Burwell for plaintiff, appellee.

Stewart & Moore and Whitlock, Dockery & Shaw for defendants, appellants.

STACY, C. J. As the preliminary representations constitute a part of the alleged fraud, the motion to strike was properly denied. *Trust Co. v. Dunlop,* 214 N. C., 196, 198 S. E., 645; *Hildebrand v. Tel. Co.,* 216 N. C., 235, 4 S. E. (2d), 439. The action is one sounding in tort.

The demurrer of the individual defendants was likewise properly overruled. It is alleged that they were officers and agents of the corporate defendant and "actually caused and participated in the wrongful acts" of their principal, which are specifically set out. This saves the complaint from fatal infirmity as to the individual defendants. *S. v. Trust Co.,* 192 N. C., 246, 134 S. E., 656. McIntosh on Procedure, 455.

The sufficiency of the facts alleged to make out a case of actionable fraud on the part of the corporate defendant is not challenged. *Hill v. Snider,* 217 N. C., 437; *Griggs v. Griggs,* 213 N. C., 624, 197 S. E., 165; *Stone v. Milling Co.,* 192 N. C., 585, 135 S. E., 449. If the individual defendants actually caused and participated in these alleged wrongful acts, it must follow that they also participated in the alleged fraud and deceit. At least, such is the reasonable intendment of the complaint. *Foy v. Stephens,* 168 N. C., 438, 84 S. E., 758. "It is not necessary that the word 'fraud' be used in the pleadings, nor that it be alleged in direct terms, if the facts averred contain all the essential elements of fraud." *Petty v. Ins. Co.,* 210 N. C., 500, 187 S. E., 816.

It will be readily conceded that a characterization of "fraud" without any facts to support it is a mere *brutum fulmen. Dixon v. Green,* 178 N. C., 205, 100 S. E., 262; *Baker v. R. R.,* 205 N. C., 329, 171 S. E., 342; *Andrews v. R. R.,* 200 N. C., 483, 157 S. E., 431. On the other hand, a complaint which alleges facts from which the fraudulent intent may reasonably be inferred, or presumed, or necessarily results, will be upheld as against a demurrer. *Dixon v. Green, supra; Foy v. Stephens, supra; S. v. Bank,* 193 N. C., 524, 137 S. E., 593; 12 R. C. L., 417.

When a case is presented on demurrer, we are required by the statute, C. S., 535, to construe the complaint liberally, "with a view to substantial justice between the parties," and in compliance with this provision we have adopted the rule "that if in any portion of it or to any extent it presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can fairly be gathered from it, the pleading

will stand, however inartificially it may have been drawn or however uncertain, defective and redundant may be its statements, for, contrary to the common-law rule, every reasonable intendment and presumption must be made in favor of the pleader." *Dixon v. Green, supra; Brewer v. Wynne,* 154 N. C., 467, 70 S. E., 947; *Lee v. Thornton,* 171 N. C., 209, 88 S. E., 232; *Renn v. R. R.,* 170 N. C., 128, 86 S. E., 964.

"Upon examination of a pleading to determine its sufficiency as against a demurrer, its allegations will be liberally construed with a view to substantial justice, C. S., 535, and every reasonable intendment and presumption will be given the pleader, and the demurrer overruled unless the pleading is wholly insufficient"—First headnote, *Leach v. Page,* 211 N. C., 622, 191 S. E., 349.

A pleading is not to be overthrown by demurrer unless it be wholly wanting in sufficiency. *Ins. Co. v. McCraw,* 215 N. C., 105, 1 S. E., (2d), 369; *Pearce v. Privette,* 213 N. C., 501, 196 S. E., 843; *Blackmore v. Winders,* 144 N. C., 212, 56 S. E., 874.

Viewing the complaint with that degree of liberality which the law requires, it appears to be good as against the demurrer. *Hartsfield v. Bryan,* 177 N. C., 166, 98 S. E., 379; *Hoke v. Glenn,* 167 N. C., 594, 93 S. E., 807.

Affirmed.

ISLA E. HILL, ADMINISTRATRIX, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 27 November, 1940.)

Master and Servant § 27—Evidence held insufficient to show that experienced switchman's fall from train was caused by negligence on part of railroad.

Plaintiff alleged that her intestate, who was an experienced switchman in defendant's employ, fell or was thrown from the rear of a freight train while it was engaged in switching operations over a bridge. Plaintiff's nonexpert witness testified that the train stopped suddenly when it got over the bridge and that he then heard a splash in the water. Two members of the train crew, as witnesses for plaintiff, testified that there was no sudden or unusual movement of the train. *Held:* Taking plaintiff's evidence in its entirety, it is insufficient to make out a case of actionable negligence against the defendant.

APPEAL by plaintiff from *Frizzelle, J.,* at February Term, 1940, of NEW HANOVER.

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 had been in the employ of the defendant for twenty-seven years. He was an experienced switchman. It is alleged that he fell, or was thrown, from the rear of a freight train while engaged in a switching operation near Wilmington when the train he was on passed over the bridge at Smith Creek.

A 17-year-old Negro boy who was fishing in the creek at the time testified for the plaintiff as follows: "When the engine got over the bridge it stopped all of a sudden. They stopped it is all I know. After the engine got over the bridge the cars stopped all of a sudden, and then I heard a splash in the water."

The body of the deceased was later found in Smith Creek about fifteen feet west of the bridge.

Two members of the train crew were called as witnesses for the plaintiff. They testified as follows:

E. F. Pittman: "There was nothing unusual in the movement of the train that day, no jerking or sudden stopping."

R. L. Allen: "There was no sudden stop or jerk of the train that day to throw an experienced man off the train."

From a judgment of nonsuit at the close of plaintiff's evidence, she appeals, assigning error.

Bullard & Bullard and Rodgers & Rodgers for plaintiff, appellant.
Poisson & Campbell and Alan A. Marshall for defendant, appellee.

PER CURIAM. Taking the plaintiff's evidence in its entirety, we agree with the trial court that it is wanting in sufficiency to make out a case of actionable negligence against the defendant. *Usury v. Watkins,* 152 N. C., 760, 67 S. E., 926. *Cf. Smith v. Bus Co.,* 216 N. C., 22, 3 S. E. (2d), 362.

Affirmed.

HELEN MAY MILLS v. CITY OF CHARLOTTE.

(Filed 27 November, 1940.)

Municipal Corporations § 14—

The complaint alleged that defendant municipality blocked the sidewalk and part of the street with dirt from an excavation and that when plaintiff attempted to walk around same, she stepped into the traveled portion of the street and was struck and injured by a motorist. *Held:* Defendant's demurrer was properly sustained under authority of *Newell v. Darnell,* 209 N. C., 254.

MILLS *v.* CHARLOTTE.

APPEAL by plaintiff from *Phillips, J.,* at April Term, 1940, of MECKLENBURG.

H. Haywood Robbins, G. T. Carswell, and Joe W. Ervin for plaintiff, appellant.

J. M. Scarborough for defendant, appellee.

PER CURIAM. The complaint alleges in effect that the defendant negligently excavated a large hole across and under the sidewalk in the eleven hundred block on the east side of North Tryon Street in the city of Charlotte and negligently threw and left the dirt from the hole in such a manner as to block the sidewalk, the space between the sidewalk and the curb of the street, and about one-third of the vehicular traveled portion of the street, in such a manner as to require a pedestrian going south on said sidewalk to walk out into the portion of the street used for vehicular traffic; and that the plaintiff was walking southward on the east sidewalk of North Tryon Street, and upon reaching the obstruction caused by the excavation and dirt attempted to go around it by walking out into the vehicular traveled portion of the street, and when out in such portion of said street she was run down and injured by an automobile which was also going southward and passing another automobile in said street; and that said negligence of the defendant was the proximate cause of her injury. The defendant demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action against the city for the reason it appeared therefrom that the alleged negligence of the defendant was not the proximate cause of the alleged injury of the plaintiff. The court sustained the demurrer and signed judgment accordingly, from which plaintiff appealed, assigning as error the action of the court.

We are of the opinion, and so hold, that the ruling and judgment of his Honor, upon the authority of *Newell v. Darnell,* 209 N. C., 254, were correct.

Affirmed.

STATE v. FLEET JACK WALL.

(Filed 11 December, 1940.)

1. **Homicide § 25—Evidence of defendant's guilt of murder in the first degree held sufficient for jury.**

The evidence tended to show that defendant discovered circumstances causing him to suspect his wife of being unfaithful, that an argument ensued, that four days later defendant took his wife across a field and into the woods, that shortly thereafter he went to a neighbor's house and told him that he had killed his wife and took the neighbor to the scene where the body of the deceased was found, that upon investigation by officers of the law, defendant stated he killed his wife and that her body was in the woods, that the officers found the body upon which mortal wounds had been inflicted, and that defendant admitted the killing and outlined the circumstances thereof. Defendant testified that he had been drinking several days prior to the homicide and that he did not remember killing his wife or making any statement to the officers. *Held:* The evidence favorable to the State required the submission of the question of defendant's guilt of murder in the first degree to the jury, and defendant's motions to nonsuit were properly overruled.

2. **Criminal Law § 81c—**

Defendant's exception to the exclusion of evidence which is immaterial cannot be sustained.

3. **Same—**

Defendant's exception to the exclusion of testimony which is mere repetition cannot be sustained.

4. **Same—**

Defendant's exception to the exclusion of testimony when the record fails to disclose what the answer of the witness would have been had he been permitted to testify cannot be sustained.

5. **Homicide § 27h—**

The court's charge on defendant's defense of intoxication to an extent precluding premeditation and deliberation, *held* without error.

6. **Homicide §§ 11, 27f—**

Defendant testified that he remembered sending his wife for a jar of whiskey and that the last thing he remembered was seeing her standing with a jar in her hand. Defendant did not contend that she actually committed an assault upon him. *Held:* The evidence does not present the question of self-defense, and does not require the court to charge the jury upon the law in respect thereto.

7. **Criminal Law § 53b—**

In this prosecution for homicide the State relied principally upon direct evidence, and as to the actual homicide relied mainly upon statements made by defendant, and relied upon circumstantial evidence only to a small extent in making out its case against defendant. *Held:* Upon the record it was not the duty of the court to charge upon the law of circumstantial evidence.

STATE *v.* WALL.

APPEAL by defendant from *Clement, J.,* at April Term, 1940, of ANSON. No error.

Criminal prosecution on bill of indictment charging the defendant with the murder of his wife, one Laura Mae Wall.

On Tuesday, 5 March, 1940, which was the Tuesday preceding the homicide on Saturday, 9 March, the defendant went into the woods to find his cow. As he returned home he saw a man going from his house into the woods. He went into the house and found his wife making up a single bed which appeared to have been used and he found other evidence which caused him to conclude that his wife had been unfaithful. He asked her why the bed was torn up, why she was looking so funny and about the other evidence. After some talk, or argument, he told her that the best thing for her to do was to get her clothes and go to her mother until "I get over my mad spell," and gave her the money to go. On Saturday he asked her why she did not go and she replied that she was not going. He said to her, "You are going," and she replied, "I will not." He then asked her to tell who the man was. This she refused to do. He then stated to her, "I am going to make you tell," and took her across the field into the woods. They sat there for some time and talked.

The defendant, about 1 o'clock on Saturday, went to a neighbor's house and told him that he had killed his wife and asked him to go back with him to the scene. They went back and the witness saw the body of the deceased. That night, acting on information, officers went to investigate. They found the defendant, who told them, "I have killed my wife, she is over yonder in the woods." About 12 o'clock that night the officers found the deceased in the woods approximately 700 yards from the defendant's house. Her head was crushed, her neck broken, her legs were cut, and there were other lacerations and wounds upon her body. She was then dead and her body was stiff. There was also evidence that the defendant admitted the killing and outlined the circumstances thereof, stating that he struck her with a "crosstie scorer"; that when they left the house on Saturday he told his wife to tell her children goodbye—she would not see them any more; and that he was under the influence of intoxicants.

The defendant offered evidence tending to show that after he saw a man leave his house on Tuesday he purchased 5 gallons of liquor and was constantly drinking whiskey and rubbing alcohol, and the two mixed, during the remainder of the week; that he remembered going down in the woods with his wife and that while there, sending her for some more whiskey. He testified that the last thing he remembers is that he saw his wife standing near him in the woods with a jar in her hands. He further testified that he was so drunk that he has no recol-

lection of what occurred thereafter, stating, "The last thing I can remember my wife saying was when she got that jar of liquor and she said for me to stop drinking and said if I would stop she would tell me she had something to do with a man in my house; yes sir, that is the last thing I can remember she was standing up with that jar in her hand. No sir, I don't know a thing in the world about killing her. The next thing I remember is when I was lying on the bed about four or five o'clock in my house." He denied any recollection of having made statements to the officers.

There was a verdict of guilty of murder in the first degree. From judgment of death pronounced thereon the defendant appealed.

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

Banks D. Thomas for defendant, appellant.

BARNHILL, J. The defendant assigns as error the failure of the court below to grant his motions for judgment as of nonsuit. These exceptions are without merit. The evidence favorable to the State was such as to require its submission to the jury on the charge of murder in the first degree. It fully sustains the verdict returned by the jury.

A number of other assignments of error are directed to the alleged error of the court in excluding testimony. These assignments cannot be sustained. Some of the evidence the defendant sought to develop was immaterial. Some was mere repetition and objection thereto was sustained on that ground. Furthermore, in each instance, the record fails to disclose what the answer of the witness would have been had he been permitted to testify. *Newbern v. Hinton*, 190 N. C., 108, 129 S. E., 181; *S. v. Brewer*, 202 N. C., 187, 162 S. E., 363.

The court in its charge fully and correctly instructed the jury upon defendant's contention that at the time of the homicide he was so drunk that he was unable to premeditate and deliberate or even to recall anything that occurred at the time. The charge was in strict accord with the law as stated in former opinions of this Court. *S. v. Cureton, ante*, 491, and cases there cited. Defendant's exceptive assignments of error based upon excerpts therefrom cannot be sustained.

Defendant further complains that the court failed to charge the law of self-defense. He bases this contention upon his testimony that the last time he remembered seeing the deceased alive was while they were in the woods where she was later found; and that "she was (then) standing up with a jar in her hand." There is nothing in this evidence which even suggests that the defendant struck the deceased in his own necessary defense. Nor does he contend that the deceased actually committed an

assault upon him. He testified that he sent her for a jar of whiskey and that she went for it. It may be assumed, therefore, that he later saw her with the jar in her hand. That alone is not sufficient to sustain a plea of self-defense or to require the trial judge to charge the jury upon the law in respect thereto.

Nor does this record present a case in which it was the duty of the court to charge upon the law of circumstantial evidence. True, it may be said that to some small extent the State relied upon circumstances in making out its case against the defendant. However, primarily it was a case of direct evidence and as to the actual homicide the State relied principally upon the statements of the defendant to the officers and to others on the day of the homicide and thereafter. *S. v. Shew,* 196 N. C., 386, 145 S. E., 679; *S. v. O'Neal,* 187 N. C., 22, 120 S. E., 817; *S. v. Ellis,* 203 N. C., 836, 167 S. E., 67.

We have examined the defendant's other exceptive assignments of error. None of them contain sufficient merit to require discussion.

In the trial below we find

No error.

D. L. HEWETT v. A. C. MURRAY ET AL.

(Filed 11 December, 1940.)

1. Wills § 16b—Where propounder, seeking to establish destroyed will, fails to prove instrument such as might be probated, nonsuit is proper.

In an action to probate a lost or destroyed will, propounder must show by satisfactory proof that the instrument once existed and was lost or destroyed under circumstances that would defeat an inference of cancellation by testator, and upon failure of proof of an instrument such as could be admitted to probate, there is a failure of proof of the *res*, and therefore a nonsuit is properly entered notwithstanding that the proceeding is *in rem*.

2. Same—In order to establish instrument as destroyed holographic will, propounder must show that instrument was in testator's handwriting.

Propounder's evidence tended to show that the instrument sought to be probated as a will had been destroyed in an accidental fire. Propounder's witness testified that she had seen the instrument, that it was written in ink with the signature of the deceased at the bottom. *Held:* There is failure of proof that the instrument and every part thereof was in the handwriting of deceased, and the evidence is insufficient to establish the alleged holographic will. Whether it is necessary that the handwriting of testator should be proved by three witnesses, *quære.*

3. Same—Propounder failing to establish destroyed will is not entitled to recover from heirs value of property which would have been devised.

In an action to probate a destroyed will, propounder's contention that even in the absence of sufficient evidence to establish the instrument as a

will, he should recover from the heirs at law at least the value of the property which his evidence tended to show deceased intended to bequeath and devise to him, is untenable, first because the remedy is inappropriate to his declaration, and second, because he has sustained no wrong at the hands of the heirs at law who inherit the property upon failure of proof of testamentary disposition.

APPEAL by plaintiff from *Stevens, J.*, at December Term, 1939, of NEW HANOVER. Affirmed.

This is a proceeding to have established and admitted to probate, in solemn form, a lost or destroyed paper writing alleged to be the last will and testament of A. R. Murray, deceased. It was alleged that the purported will was entirely in the handwriting of the testator, and duly signed by him; that it was put in a place with his valuable possessions and was destroyed in a fire which burned the small dwelling occupied by him on the outskirts of Wilmington, North Carolina.

The proceeding is brought by D. L. Hewett, who claims to be a beneficiary under the will. Petitioner's evidence tended to show that Murray lived in a little shack made of scraps, cardboard, tin, and paper, located at the end of Gibson Avenue, in a low, swampy place. His custom was to go from house to house in the morning and gather up garbage. Long prior to his death somebody shot Murray, and Hewett, who was named as beneficiary in the will, nursed him and was looking out for him. Hewett was attentive to Murray and was known to have been very helpful to him on numerous occasions, looking out for him and performing many acts of friendliness.

Murray frequently spoke of Hewett and the attention he had given him and of the fact that he had left him his property in a will; and on occasion exhibited this will to one or more persons, who testified regarding it. One witness, Mrs. Ella Beck, a step-daughter of Murray, stated that the Murray house was about two and one-half blocks from where she lived; that Mr. Murray depended upon Mr. Hewett a great deal. That he had been to Mr. Hewett by day and night numbers of times, and that "when Mr. Murray would go off he would come by and ask Mr. Hewett to look out for him." On the last of October before his death in December, Murray told her that he was going to bring a paper up for her to read. Within the next day or two he brought a paper, saying, "This is my will, you can read it," which the witness did. The witness described the will substantially to the effect that it left Hewett the property of Murray on Gibson Avenue and on the creek, and a half interest in his chickens and an heir's part of the rent of his property "with my brothers and sisters," and the will made D. L. Hewett his executor. The will was written in ink, with the signature of Hewett at the bottom.

Some time in December the little shack where Murray lived was destroyed by fire and Murray was so seriously burned that he died shortly thereafter in the hospital. Before his death, however, he told some attendants where they might find the sum of $35.00 to $38.00 in the chinks of the shack if it had not been burned up, and also that they would find his papers, or papers belonging to himself and Mr. Hewett, in a certain container in a place which he described.

The container described by Murray contained only the ashes of the papers, which had been destroyed by the fire.

Upon the hearing, the petitioner introduced no witness other than Mrs. Beck to testify as to the signature of the will or the handwriting, or of its holographic character. Neither Mrs. Beck nor any other witness testified that the will was wholly in the handwriting of Murray. In a supplemental brief we are assured that if testimony of Mrs. Beck could not be construed as evidence that the entire will was in the handwriting of Murray, that upon a subsequent trial, if permitted, she would so testify; but this is, of course, outside of the record.

Emmett H. Bellamy, Nathan Cole, and Isaac C. Wright for plaintiff, appellant.

Clifton L. Moore and Kellum & Humphrey for defendants, appellees.

SEAWELL, J. The petitioner's counsel insist that there can be no nonsuit in the present case, since they regard it as a proceeding to probate a will in solemn form and, therefore, a proceeding *in rem*. But there cannot be a proceeding *in rem* unless there is first a *res*. Usually the proponent of a purported will is able to offer the paper writing in its physical integrity. If lost or destroyed, he makes profert in a more intangible way, through satisfactory proof that it once existed and was lost or destroyed under circumstances that would defeat an inference of cancellation by the testator.

If we concede that most of the preliminary steps toward the establishment and probate of a destroyed holographic will might be taken with the aid of one witness, as in the case of a will with witnesses—*In re Will of Martha Hedgepeth*, 150 N. C., 245, 63 S. E., 1025—in both cases it is necessary to show that the document was such as might be probated as a will. What difficulties petitioner might further encounter in an attempt to proceed with the probate in solemn form in the absence of the oath of the three witnesses prescribed by statute, that the will is entirely in the handwriting of the testator, we need not now inquire. As we have seen, the evidence does not go so far as to show from even one witness that any part of the purported will was in the handwriting

of Murray, except, possibly, the signature. This is, of course, insufficient.

The petitioner contends that he should at least recover of respondents the value of the estate withheld from him—an estate to which he has not advanced any theory of legal right except through the alleged lost or destroyed will. Such a remedy would, of course, be inappropriate to the declaration or petition, if it had any foundation. The petitioner has sustained no wrong at the hands of those who inherit the property failing testamentary disposition and the proceeding discloses no justiciable complaint against them in connection with such inheritance.

The judgment is

Affirmed.

STATE v. SYLVESTER WOODARD.

(Filed 11 December, 1940.)

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

The evidence considered in the light most favorable to the State tended to show that defendant, a man about 30 years of age, had been associating with deceased, a woman about 25 years of age, that for approximately twelve months prior to the homicide, deceased had been associating with another man and had been attempting to break off relations with defendant, and that defendant had been warning the other man to stop associating with her, that on the day of the homicide, defendant, riding a bicycle, encountered deceased on the street, that he attempted to force her to get on the bicycle with him, that he finally put a pistol against her neck, demanding that she stop hollering and threatening to kill her, that repeatedly when he would get her on the bicycle and start off she would stop the bicycle by sticking her foot in the wheel, that after several stops he shot her, that he shot her again as she was falling, and shot her a third time while she was lying on her back, inflicting fatal wounds, and that at least fifteen minutes elapsed from the time of the encounter until the fatal shooting, and that after the homicide defendant stated that he had killed her because she was trying to break off with him for another man and that he had told her he would kill her rather than let another man have her. *Held:* The evidence tends to show motive for the killing and that it was done with premeditation and deliberation, and is amply sufficient to overrule defendant's motion for judgment as of nonsuit on the capital charge.

APPEAL by defendant from *Carr, J.*, at the August Term, 1940, of WAYNE. No error.

Criminal prosecution on bill of indictment charging the defendant with the murder of one Lillie Townsend.

There was a verdict of guilty of murder in the first degree. From judgment of death pronounced thereon defendant appealed.

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

Hugh Dortch for defendant, appellant.

BARNHILL, J. At the conclusion of the evidence for the State the defendant moved for judgment as of nonsuit on the count and charge of murder in the first degree. This motion was overruled and the defendant excepted. The defendant then rested without offering testimony and renewed his motion, which was again overruled and defendant excepted. These exceptions are the subject matter of the defendant's only assignment of error. A careful perusal of the testimony leads us to the conclusion that this assignment is without merit.

The evidence considered in the light most favorable to the State tends to establish the following facts: (1) The defendant, a man about 30 years of age, had been associating with the deceased, a woman of about 25 years of age, for three or four years. (2) Shortly prior to the homicide deceased had been associating with another man and wanted to "call it quits" with the defendant for the other party, and the defendant had been warning the other man to "stop messing with her." This situation had existed for approximately twelve months. (3) On the morning preceding the homicide defendant saw the deceased on the back of Teet's (the other man) luggage carrier. (4) On the day of the homicide the defendant and the deceased were seen on Center Street in the city of Goldsboro. The defendant was on a bicycle. "The woman was trying to get around the wheel to go towards town and the defendant would not turn her loose. He was sitting on the wheel and she was screaming trying to get her arm loose from his so that she could go towards town. When he had her by the arm and she was screaming, she was saying, 'Don't let him kill me.' He kept trying to get her on the wheel and couldn't and he told her he was going to kill her if she did not. She kept screaming and hollering like she was scared to death, she was only begging for help. When he could not keep her on the wheel he pulled a pistol out of his pocket. He put his arm around her and the pistol against her neck, and told her if she put her foot in the wheel he was going to kill her before he left where she was. He had the barrel of the pistol on her neck, with the barrel against her. He would ask her to quit hollering and was still telling her he was going to kill her, and finally he got her on the wheel and whenever he would start off she would stick her foot in the wheel and stop it. He put her on the cross-bar and would go a short distance before it would stop. Whenever he would

start going along she would kick her foot in the wheel and holler 'Oh my foot, you have killed me,' then the wheel would stop when she had her foot in it. She kept begging him to let her alone as she had to go up town. He would twist her arm to get her on the wheel and she would be half on and half off, and they headed in the opposite direction from town. He finally got her on the wheel and they started off again and went about seventy yards when she stopped the wheel again. Then he told her the next time you stick your foot in the wheel I am going to kill you before we go any further. They stopped again and he pushed her and that is when he shot her the first time. When she left the wheel it looked as though her foot was twisted and she turned with her side to him. He was still on the wheel next to the sidewalk. When first fired she kind of wobbled and fell, it looked to me like she was falling when he shot her again, she fell flat on her back. He shot her the third time when she was on her back. She begged him not to shoot from the beginning. After he shot her the last time he got on his wheel and went up North Center Street . . . it was at least fifteen minutes from the time they were on the corner arguing until he shot her down the street." The deceased died almost immediately. (5) After the homicide the defendant stated, when asked why he did it, that he was worried as he had been going with this girl and she had broke him and wanted to call it quits for another man and if she could not do him any good that she would not have anyone else. He said he told her, "If you are not going to be any good to me you are not going to be to anyone else," and then shot.

This evidence tends to show a motive for the killing and that it was done with premeditation and deliberation. It is sufficient to repel defendant's motion for judgment as of nonsuit and to sustain the verdict of the jury.

We have examined with care the record as a whole and find no merit in the defendant's exceptive assignment of error or in the other exceptions entered at the trial but not brought forward.

No error.

HERBERT C. GRIGGS AND WIFE, COLON B. GRIGGS, v. H. BATTLE GRIGGS AND WIFE, ESSIE S. GRIGGS, AND FRED J. COXE.

(Filed 11 December, 1940.)

1. Reformation of Instruments § 7—Complaint held sufficient to allege cause of action to reform deed for fraud.

The complaint alleged fraud and conspiracy on the part of defendants to defraud plaintiffs, that plaintiffs intended to convey to one of defendants certain property, but that defendants, with intent to deceive, and

by means of fraud and trickery, particularly set out, induced plaintiffs to execute deed describing not only the property intended to be conveyed, but also other valuable property, to plaintiffs' deception and damage. *Held:* The complaint sufficiently alleges a cause of action for correction of the deed by striking therefrom the description of the property alleged to have been fraudulently included therein.

2. Fraud § 9—Complaint held to allege fraud on part of demurring defendant connected with fraudulent conspiracy on part of all defendants.

The complaint alleged that plaintiffs intended to convey certain property for a stipulated price, the price to be paid in cash or secured by registered lien, that defendant purchaser and defendant attorney, by fraud and artifice procured plaintiffs to execute a deed describing not only the property intended to be conveyed but also other valuable property, and that defendant grantees executed four unsecured notes aggregating the purchase price of the property intended to be conveyed, and that defendant attorney wrongfully retained one of the said notes, and that the acts of defendants were a part of a fraudulent scheme and conspiracy to deprive plaintiffs of the purchase price of the property intended to be conveyed. *Held:* The complaint is sufficient to allege a cause of action for fraud against defendant attorney, and to connect him with the general scheme alleged.

3. Pleadings § 16a—Complaint held not demurrable for misjoinder of parties and causes.

The complaint alleged fraud and conspiracy on the part of defendants inducing plaintiffs to sign a deed describing not only the property intended to be conveyed by plaintiffs, but also other valuable property, and that further, pursuant to fraud and conspiracy to deprive plaintiffs of the purchase price of the property intended to be conveyed, which was to be paid in cash or secured by registered lien, defendant grantees executed unsecured notes therefor and defendant attorney wrongfully withheld one of the notes so executed, and prayed for reformation of the deed and for judgment on the notes. *Held:* Defendants' demurrer on the ground of misjoinder of parties and causes of action was properly overruled, since all the matters alleged arose out of the same transaction or transactions connected with the same subject of action. C. S., 507.

4. Pleadings § 20—

In passing upon the sufficiency of a pleading as against demurrer, the facts alleged will be taken as true, but only for the purposes of the demurrer.

APPEAL by defendants from *Clement, J.*, at June Term, 1940, of ANSON. Affirmed.

Defendants' demurrer to the complaint was overruled and defendants appealed.

Barrington T. Hill and Vann & Milliken for plaintiffs, appellees.
J. C. Sedberry for defendants, appellants.

DEVIN, J. The defendants demurred to the complaint on three grounds: (1) That the complaint did not state facts sufficient to con-

stitute a cause of action; (2) that no cause of action was alleged as to defendant Coxe, and that there was a defect of parties defendant; (3) that several causes of action were improperly joined.

Without undertaking to quote the complaint *verbatim,* it may be briefly stated that it contains charges of fraud and conspiracy to defraud on the part of the defendant H. Battle Griggs and the defendant Coxe whereby the plaintiffs were induced to execute a deed to defendant H. Battle Griggs containing description of valuable property not intended to be conveyed; that plaintiffs were by fraud and trickery induced to believe that the deed conveyed only certain lots in Wadesboro of the value of $2,000 (which lots plaintiffs intended to convey for that price), whereas, without their knowledge or consent, the deed so fraudulently caused to be executed included in the description also plaintiffs' interest in certain other properties valued at $15,000, and that this fraudulent scheme was accomplished to plaintiffs' injury by means of artifice and misrepresentations made with intent to deceive. The complaint sets out the manner and means by which this was alleged to have been accomplished.

Plaintiffs further alleged that instead of paying the $2,000 consideration for the conveyance of the two lots intended to be conveyed, or securing same as it had been fraudulently represented would be done, defendant H. Battle Griggs executed four notes of $500.00 each, and that defendant Coxe wrongfully retained one of these $500 notes and refused to deliver it to the plaintiffs, and that the other defendants refused to pay the notes, and that this was all part of a fraudulent scheme and conspiracy to deprive plaintiffs of the property wrongfully included in the conveyance as well as of the price of that intended to be conveyed.

It is apparent that a cause of action for the correction of the deed by striking therefrom the description of the property alleged to have been thus fraudulently included, has been stated, and that the defect and omission in the complaint pointed out in the opinion of this Court in *Griggs v. Griggs,* 213 N. C., 624, 197 S. E., 165, has been supplied by more definite allegations in the present action.

It is also apparent that the allegations of fraud and conspiracy to defraud on the part of defendant Coxe and of the trickery and misrepresentations alleged to have been used by him, together with allegations that, as a part of this fraudulent scheme as alleged, defendant Coxe wrongfully holds one of the $500 notes, are sufficient to bring him within the sphere of action complained of, and to connect him with the general scheme alleged. There was no "defect of parties" occasioned by the inclusion of defendant Coxe as party defendant. *Shuford v. Yarborough,* 197 N. C., 150, 147 S. E., 824.

Nor may the complaint be overthrown on the ground that, in the action for fraud on the part of the defendants in inducing plaintiffs to execute the deed sought to be corrected, there was also a prayer for judgment on the notes executed by H. Battle Griggs. It was alleged that there was a general scheme and conspiracy to obtain plaintiffs' other property and to fraudulently deprive them of the purchase price of the lots intended to be conveyed for cash or upon security. All these matters, according to the allegations of the complaint, arose out of the same transaction or transactions connected with the same subject of action. C. S., 507. The rule is that where the several causes of action set out in the complaint are not entirely distinct and unconnected, and arise out of the same transaction or series of transactions, forming one course of dealing, all tending to a single end, demurrer for misjoinder of parties and causes of action will not lie. *Cotton Mills v. Mfg. Co., ante,* 560; *Daniels v. Duck Island,* 212 N. C., 90, 193 S. E., 7; *Barkley v. Realty Co.,* 211 N. C., 540, 191 S. E., 3; *Leach v. Page,* 211 N. C., 622, 191 S. E., 349; *Trust Co. v. Peirce,* 195 N. C., 717, 143 S. E., 524; *Cotton Mills v. Maslin,* 195 N. C., 12, 141 S. E., 348; *Lee v. Thornton,* 171 N. C., 209, 88 S. E., 232. In the language of *Stacy, C. J.,* in *Trust Co. v. Peirce, supra:* "A connected story is told and a complete picture is painted of a series of transactions, forming one general scheme, and tending to a single end. This saves the pleading from the challenge of the demurrers."

We have considered only the facts alleged by the plaintiffs in their complaint. For the purpose of the demurrer they are deemed admitted. *Ins. Co. v. McCraw,* 215 N. C., 105, 1 S. E. (2d), 369. By answer and proof a different story may be told. But upon these allegations we conclude that the court below properly overruled the demurrer, and that the judgment must be

Affirmed.

STATE v. WOODROW COTTON.

(Filed 11 December, 1940.)

1. Criminal Law § 41h—

While either husband or wife may testify for the other in a criminal action, neither is competent to testify against the other. C. S., 1802.

2. Criminal Law § 47—

Ordinarily, the court may consolidate separate indictments for trial in proper instances, and has discretionary authority to deal with an application for a severance.

3. Same—

Where husband and wife are separately indicted for the same homicide and the prosecutions are consolidated and tried together over their objections, and the wife's testimony, though admitted only as to her, is to the effect that her husband killed deceased and forced her, through fear, to confess and attempt to exculpate him, her testimony is necessarily inculpatory of the husband and impinges C. S., 1802, and his motion for a mistrial and severance at the conclusion of the State's evidence should have been granted.

4. Criminal Law § 81d—

Where a new trial is awarded on one exception, other exceptions relating to matters which may not arise upon another hearing need not be considered.

CLARKSON and SEAWELL, JJ., dissent.

APPEAL by defendant, Woodrow Cotton, from *Williams, J.*, at March Term, 1940, of WAKE.

Criminal prosecution tried upon indictments charging the defendant, Woodrow Cotton, and his wife, Margaret Cotton, with the murder of one Mary Lee Herndon, consolidated and tried together, as both indictments relate to the same homicide.

The record discloses that on 19 February, 1940, Mary Lee Herndon, mother of Margaret Herndon Cotton, was found near her home in Wake County mortally wounded. She had been shot in the left side with a shotgun, and died without being able to tell how the shooting occurred.

At first, Margaret Herndon Cotton confessed to the officers that she killed her mother, and related in detail how it happened. Later, this confession was repudiated. On the stand she testified that her husband coerced her into making the confession, saying "Margaret, take it on yourself, play off crazy and I'll get you out of it. . . . Say you were at the house, at the back door, that you were at the back door looking at me when the gun went off"; that she was afraid of her husband; that she heard the gun fire and heard her mother holler, "Woodrow, you shot me"; that she rubbed off the gun and put her fingerprints on it; that she did what Woodrow told her to do, "because I was scared not to. . . . I didn't know what he might take a notion to do to me"; that she confessed to the coroner, "because Woodrow told me to." The jury was instructed not to consider any of this evidence against the male defendant. The *feme* defendant was cross-examined by counsel for her husband and the solicitor, and thus twice repeated her testimony-in-chief.

The defendant, Woodrow Cotton, also made a confession to the officers in the presence of the solicitor that he killed his mother-in-law, and related how the shooting took place. Later, this confession was repudiated.

On motion of the solicitor, and over objection of the defendants, the

two cases were consolidated and tried together. Objection and exception by Woodrow Cotton.

Motion for severance before selection of jury; overruled and exception. Motion for mistrial and severance at the conclusion of the State's evidence and at the close of all the evidence; overruled; exception.

Verdict: Guilty of murder in the first degree as to Woodrow Cotton. Not guilty as to Margaret Cotton.

Judgment: Death by asphyxiation.

The prisoner appeals, assigning errors.

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

Clyde A. Douglass, Sam J. Morris, and R. Ben Templeton for defendant, appellant.

STACY, C. J. The principal question for decision is whether separate indictments against husband and wife for the same homicide may be consolidated and tried together, over objection of defendants, when the wife's testimony, though admitted only as to her, is inculpatory of the husband. A careful perusal of the present record engenders the conclusion that the testimony of the *feme* defendant was necessarily hurtful to her husband.

It should be remembered that neither defendant was here competent or compellable to testify against the other. *S. v. Harbison,* 94 N. C., 885. Either might have testified for the other, but neither was competent to testify against the other. C. S., 1802; *S. v. Jones,* 89 N. C., 559. The defense of the wife tended strongly to incriminate the husband. They were not making a joint defense.

Counsel for the husband felt impelled to cross-examine the wife following her examination-in-chief, as did the solicitor for the State also, and it was during these cross-examinations that her testimony was particularly harmful. It is true, the trial court carefully instructed the jury not to consider anything she said as evidence against the male defendant, but with the burden of the wife's defense pointing unerringly to the husband's guilt, it is not perceived how its baneful effect could be erased from the minds of the jury. *S. v. Helms, post,* 592.

Without questioning the power of the court to consolidate cases for trial in proper instances, and its discretionary authority ordinarily to deal with an application for a severance, we are forced to the conclusion that on the instant record the provisions of C. S., 1802, have been impinged by reason of the character of the wife's defense. It would seem that a mistrial and severance at the close of all the evidence would have been in order.

There are other exceptions appearing on the record worthy of consideration, especially the one addressed to certain exceptive remarks of the solicitor, but as these are not likely to arise on another hearing, we shall not consider them now.

New trial.

CLARKSON and SEAWELL, JJ., dissent.

O. W. DUKE AND HIS WIFE, L. ESTELLE DUKE, v. C. E. PUGH.

(Filed 11 December, 1940.)

Tender § 1: Mortgages § 27—Debtor must tender principal due with interest thereon to date of tender.

In order to constitute a valid tender, the debtor must offer or pay into court the principal due plus interest thereon to the date of the tender, and where there is a controversy between the parties as to the balance due on the mortgage indebtedness, and it appears from the mortgagor's own testimony that the amount tendered by him as the full amount of the debt with interest, failed to include interest for the entire period prior to the tender, the failure of the court to call this phase of the case to the attention of the jury is prejudicial error, since even though the discrepancy is small, the mortgagee is entitled thereto, and may not be required to cancel and surrender his note and mortgage for less than the full amount due.

APPEAL by defendant from *Alley, J.*, at June Term, 1940, of GUILFORD. New trial.

This was an action to cancel a note and mortgage. Plaintiff alleged that the balance due on the note and mortgage (originally in sum of $2,250.00, dated 4 December, 1925) was only $426.00; that on 29 June, 1939, he had tendered that amount to the defendant in full settlement, and, upon defendant's refusal to accept it, had paid it into court. Defendant contended the amount tendered was insufficient.

Plaintiff testified that the note and mortgage required monthly payments of $25.00 on the 4th of each month, and that he had kept these payments up, with interest, to and including the payment due 4 June, 1932; that on that date the balance due was $300.00; that he now only owes that amount, plus interest to the date of tender, 29 June, 1939, making a total of $426.00, and no more. Defendant testified that the last payment received was on 3 February, 1932; that the balance then due was $550.00; that nothing had been paid since, and that he refused

to accept the amount tendered on 29 June, 1939, as insufficient to settle the debt in full.

Appropriate issues were submitted to the jury and answered in favor of plaintiff. From judgment decreeing cancellation of the note and mortgage, defendant appealed.

Hines & Boren and E. D. Kuykendall for plaintiff, appellee.
A. Stacey Gifford and Thomas J. Hill for defendant, appellant.

DEVIN, J. The determinative issue raised by the pleadings and submitted to the jury was whether the sum of $426.00 tendered to the defendant by the plaintiff 29 June, 1939, was the amount then due on the note and mortgage. Upon that issue the trial judge charged the jury if they found by the greater weight of the evidence that plaintiff had reduced the principal to $300.00, and that on 29 June, 1939, there was a balance of only $300.00 due, which, with interest, would amount on that date to $426.00, and that this amount was tendered on that date, they should answer the issue in favor of the plaintiff; otherwise not.

This instruction, to which exception was duly noted, overlooked the testimony of the plaintiff that he had reduced the principal of the debt to $300.00 4 June, 1932; that he did not claim any other payment thereafter, and that on 29 June, 1939, he had tendered $426.00 in full settlement. From this testimony it is apparent that the tender fell short of the amount due by $1.25. The difference was the interest on $300.00 for twenty-five days (4 June to 29 June). The defendant was not required to accept less than the full amount of his debt and interest.

It is true, taking the figures in accord with the testimony of the plaintiff, the difference was small, but plaintiff had staked his case upon the claim that $426.00 was the exact amount due and had tendered that amount, and no more, in full settlement. Defendant could not be required to cancel and surrender his note and mortgage for less than the full amount due.

To constitute a valid tender the offer must include the full amount the creditor is entitled to receive, including interest to the date of the tender. 62 C. J., 660; 26 R. C. L., 639; *Owens v. Ins. Co.,* 173 N. C., 373, 92 S. E., 168; *Smith v. Pilcher,* 130 Ga., 350. "Mistake in tendering an amount less than the sum due is the misfortune of the tenderer, and the position of the parties remains the same as if no tender had been made." 62 C. J., 661.

In *Rolfe v. Ins. Co.,* 106 Me., 345, it was said: "On July 18, 1907, the defendant tendered to the plaintiff $584.23. But this was not enough, for there was due on that date, including interest, $584.32. The differ-

ence is small, but the plaintiff was entitled to it. The tender was insufficient in amount."

Defendant's exception to the court's failure to call to the attention of the jury this phase of the case, as presented by the testimony of the plaintiff, must be sustained. The error pointed out was prejudicial to the defendant, and for this reason we are constrained to grant a

New trial.

WILL McMILLAN v. O'NEAL BUTLER.

(Filed 11 December, 1940.)

1. Automobiles § 18a—Question of proximate cause held for jury upon evidence in this case.

This action was instituted to recover damages to plaintiff's car resulting from a collision with defendant's car. The evidence tended to show that plaintiff was driving on a dirt road which intersected a hard surface highway, that he stopped in obedience to a road sign before entering upon the intersection, that he did not see defendant's car although the view was clear and unobstructed for a distance of from 240 to 295 yards, and that defendant's car struck him before he had cleared the intersection. There was evidence that defendant approached the intersection along the hard surface highway at 75 or 80 miles an hour. Defendant testified that his speed was not more than 40 or 50 miles an hour. *Held:* Conceding that both drivers may have been negligent, defendant's motion to nonsuit on the ground of contributory negligence was properly overruled, the question of proximate cause being for the jury.

2. Negligence §§ 5, 19b—

When more than one legitimate inference can be drawn from the evidence, the question of proximate cause is for the jury and defendant's motion to nonsuit on the ground of contributory negligence is properly overruled.

3. Trial § 32—

Where defendant's request for instructions on a particular aspect of the case is given in a special instruction by the court after recalling the jury, and the instruction is correct and adequate upon the point, defendant may not successfully contend on appeal that the charge was erroneous for the failure of the court to give more particular or slightly different instructions upon the same aspect.

APPEAL by defendant from *Clement, J.*, at April Term, 1940, of SCOTLAND.

Civil action to recover damages for an alleged negligent injury to plaintiff's property.

The facts are these: On Sunday afternoon, 3 December, 1939, defend-

ant was traveling in his automobile on Highway No. 74 between Hamlet and Laurinburg. A dirt road crosses this highway about one mile west of Laurinburg. The plaintiff, driving southward on the dirt road, approached the intersection in his automobile and stopped in obedience to the sign appearing on the side road. He says that he looked in both directions before entering upon the intersection and did not see the defendant's car coming from the west, albeit he had a clear and unobstructed view for a distance of from 240 to 295 yards. It is in evidence that the defendant approached the intersection at a rate of 75 or 80 miles an hour. His own testimony is, that his speed was not more than 40 or 50 miles an hour. He struck the plaintiff's car before it had cleared the intersection and knocked it around without turning it over. Both cars were badly damaged, but none of the occupants sustained any serious injury.

The usual issues of negligence, contributory negligence and damages were submitted to the jury and answered in favor of the plaintiff, the amount of damages being assessed at $300.

From judgment on the verdict, the defendant appeals, assigning errors.

Cox & Cox for plaintiff, appellee.
Gibson & King for defendant, appellant.

STACY, C. J. The defendant feckfully contends that the plaintiff contributed to his own injury by driving in front of an on-coming car without keeping a proper lookout or without heeding what a proper lookout would have disclosed, and that recovery should be denied on the ground of plaintiff's contributory negligence. *Tart v. R. R.*, 202 N. C., 52, 161 S. E., 720.

Conceding that both drivers may have been negligent, we think the question of proximate cause, and hence the issue of ultimate liability, was for the jury. *Lincoln v. R. R.*, 207 N. C., 787, 178 S. E., 601; *Oldham v. R. R.*, 210 N. C., 642, 188 S. E., 106; *Boykin v. R. R.*, 211 N. C., 113, 189 S. E., 177. The rule is, that when more than one legitimate inference can be drawn from the evidence, the question of proximate cause is for the twelve. *Wadsworth v. Trucking Co.*, 203 N. C., 730, 166 S. E., 898.

The defendant also assigns as error the failure of the court to instruct the jury "that regardless of whether the plaintiff actually saw the defendant's approaching car, he would be guilty of contributory negligence if he had a clear and unobstructed view of the highway for a distance of from 240 to 295 yards and could have seen the defendant in time to have avoided the collision if he had been keeping a proper lookout."

Conceding the appropriateness of such an instruction on the record as it appears, we think the court fairly met the issue when he recalled the jury and gave the following special instruction: "It was the duty of the plaintiff, before attempting to cross the highway, to keep a proper lookout for cars approaching on the highway; and, if the jury shall find from the greater weight of the evidence that the plaintiff failed to keep a proper lookout and that his failure to keep a proper lookout was a proximate cause of the injury to his automobile, then the plaintiff would be guilty of contributory negligence, and he would not be entitled to recover any damages from the defendant."

Thus, it appears the trial court dealt with the situation in the very language of the defendant's prayer. Of course, hindsight is usually better than foresight, and the defendant now prefers a slightly different instruction, but the charge as given was all that was requested at the time, and it seems adequate.

A careful perusal of the entire record leaves us with the impression that the case has been tried in substantial conformity to the decisions on the subject and that the verdict and judgment should be upheld. It is so ordered.

No error.

BANK OF PINEHURST v. L. L. GARDNER AND PERCY L. GARDNER.

(Filed 11 December, 1940.)

1. Execution § 19—

Where after sale of property under execution the judgment creditor posts an advance bid within ten days and resale is ordered, and no notice of the resale is given the judgment debtor or the purchaser at the first sale, the judgment debtor is entitled to an order for a resale of the property upon his motion aptly made, the requirement of notice to the judgment debtor of sale of his property under execution being applicable to resales as well as to first sales. C. S., 688, 689, as amended by Public Laws of 1927, ch. 255.

2. Same—

Dissolution of restraining order restraining the judgment creditor from interfering with the property bought by the judgment creditor at the execution sale does not preclude the judgment debtor from thereafter making motion in the cause for a resale for want of statutory notice of the sale at which the judgment creditor purchased.

APPEAL by plaintiff from *Clement, J.*, at May Term, 1940, of MOORE. Affirmed.

Motion of defendant P. L. Gardner for resale of real property under execution was allowed, and plaintiff appealed.

W. A. Leland McKeithen for plaintiff, appellant.
Seawell & Seawell for defendants, appellees.

DEVIN, J. The procedural question presented by this appeal arose upon the following facts:

Plaintiff bank obtained a money judgment against the defendants. Execution issued and the homestead of defendant P. L. Gardner was laid off. The sheriff advertised and sold the excess and the property was bid off by counsel for Ruth W. Gardner for fifty dollars. Within ten days thereafter the plaintiff, the judgment creditor, posted advance bid, and resale was ordered. No notice of second sale was given defendant P. L. Gardner, the judgment debtor, or to Ruth W. Gardner. After advertisement the property was sold by the sheriff and bid off by plaintiff for fifty-five dollars, and sheriff's deed executed to plaintiff. At the instance of defendant restraining order issued restraining plaintiff from interfering with the property. This was later dissolved. As plaintiff claimed damages in the sum of $500.00 on account of issuance of the restraining order, it would seem that the property was worth much more than the amount bid.

Defendant P. L. Gardner then moved before Judge Clement for a resale of the property under execution, on the ground that the judgment debtor, P. L. Gardner, had received no notice of sale, as required by C. S., 689. This motion was allowed and resale ordered. Plaintiff appealed.

These facts reveal the propriety of the action of the court below in ordering a resale of the property. *Register Co. v. Holton,* 200 N. C., 478, 157 S. E., 433; *Weir v. Weir,* 196 N. C., 268, 145 S. E., 281. An examination of sections 688 and 689 of the Consolidated Statutes, as amended by Public Laws 1927, ch. 255, makes it apparent that the requirement of notice to the judgment debtor whose real property is about to be sold applies to resales of the property as well as to first sales. C. S., 688, as originally codified specifically refers to resales and prescribes the manner of advertisement, and C. S., 689, requires that "in addition to the advertisement above required, the sheriff shall in every case" give notice to the defendant in the manner therein prescribed. This provision of the statute was not observed in the instant case, and the property was bid off by the plaintiff, the judgment creditor, for fifty-five dollars. *Williams v. Dunn,* 158 N. C., 399, 74 S. E., 99.

In *Williams v. Dunn,* 163 N. C., 206, 79 S. E., 512, *Walker, J.,* thus states the law: "The law requires a sheriff to advertise a sale under

execution and to serve a copy of the advertisement upon the defendant ten days before the sale. Revisal, secs. 641, 642 (now C. S., 688, 689). A failure to comply with this provision of the statute, which is directory, will not render the sale void as against a stranger without notice of the irregularity, nor can it be assailed collaterally, but in such a case the defendant may, on motion, or by direct proceeding, have the sale vacated." Defendant was not precluded by reason of the dissolution of the restraining order from entering motion in the cause for a resale of the property on account of the irregularity noted.

The judgment of the court below is

Affirmed.

MRS. J. B. McGILL, MOTHER OF DECEASED EMPLOYEE, V. R. McGILL, AND J. D. BRIDGERS, NEPHEW, v. TOWN OF LUMBERTON, EMPLOYER, AND MARYLAND CASUALTY COMPANY, CARRIER.

(Filed 11 December, 1940.)

1. Master and Servant § 40d—Evidence of death by violence raises presumption of death by accident.

Claimants' evidence tended to show that deceased was employed as chief of police of defendant municipality and that deceased died as a result of a shot from a pistol while he was in his office. *Held:* Proof of death by violence raises a presumption of accidental death, casting the burden of going forward with the evidence upon the employer and insurance carrier to show that deceased killed himself, when relied on by them, sec. 13 of the Compensation Act (Michie's Code, 8081 [t]), and claimants' 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, and such finding is upheld in accordance with the former decision in this case. (*McGill v. Lumberton*, 215 N. C., 752.)

2. Master and Servant § 55d—

The findings of fact of the Industrial Commission are conclusive on the courts when the findings are supported by any competent evidence, notwithstanding that the court, if it had been the fact-finding body, might have reached a different conclusion, the finding of facts from the evidence being the exclusive function of the Industrial Commission.

3. Appeal and Error § 49b—

The doctrine of *stare decisis* requires that decided cases should be given great weight when the same points again come up in litigation in the same jurisdiction, and that the court should not swerve or depart from the prior decisions from any private sentiments or judgment.

STACY, C. J., and WINBORNE, J., concurring.

BARNHILL, J., dissents.

APPEAL by defendants from *Stevens, J.*, at May Civil Term, 1940, of ROBESON. Affirmed.

The findings of facts and conclusions of law are as follows:

"This case was originally heard before Commissioner Dorsett at Lumberton, N. C., September 16, 1937. An opinion was filed October 5, 1937, in which it was held that the plaintiffs' deceased did not sustain an injury by accident arising out of nor in the course of his regular employment. An award was duly issued in accordance with said opinion on October 11, 1937. The plaintiffs appealed in apt time to the Full Commission, and it was heard before the Full Commission at Raleigh, N. C., on December 7, 1937. The opinion of the Full Commission was filed on February 12, 1937, affirming the findings of fact, conclusions of law, and the award of the hearing Commissioner, and an award was duly and properly issued in accordance therewith. The plaintiffs took an appeal in apt time to the Superior Court where the matter was heard before his Honor, Judge Sinclair, in the December Term, 1938, of Robeson County Superior Court. The Full Commission was affirmed and the case was appealed to the Supreme Court. The Supreme Court remanded the case to the Industrial Commission through the Superior Court 'to the end that the North Carolina Industrial Commission, applying the legal principles here declared, may proceed to findings of fact and a determination of the claim in accordance with prescribed practice.'

"In the able opinion rendered by *Winborne, J.*, it is said that 'While the burden of proof is upon those claiming compensation throughout to prove death of employee resulting from injury by accident arising out of and in the course of his employment, when evidence of violent death is shown, they are entitled at least to the benefit of the inference of accident from which, nothing else appearing, the Commission may find, but is not compelled to find, the fact of death resulting from injury by accident—a constituent part of the condition antecedent to compensation, injury by accident, arising out of and in the course of employment. In other words, this inference is sufficient to raise a *prima facie* case as to accident only. Then if employer claims death of employee is by suicide, the statute places the burden on him to go forward with proof negativing the factual inference of death by accident.'

"The Full Commission has written to both parties and the defendants do not desire to further argue the case before the Full Commission. Therefore, the Full Commission is deciding this case without additional evidence or further oral argument.

"Section 13 (8081 [t]) of the Compensation Law reads, in part: 'No compensation shall be payable if the injury or death was occasioned by the intoxication of the employee or by the willful intention of the

employee to injure or kill himself or another. . . . The burden of proof shall be upon him who claims an exemption or forfeiture under this section.'

"The Full Commission has carefully reviewed the evidence in this case and after a further consideration of the evidence the Full Commission orders and directs that the original findings of fact of the hearing Commissioner be affirmed except as to Findings of Fact Nos. 5, 7 and 8, and as to those it is ordered that they be vacated and set aside. The Commission further orders and directs that the conclusions of law and award based thereon be vacated and set aside.

"In lieu of Findings 5, 7 and 8 (of the former opinion), the Full Commission makes the following *Findings of Fact:*

"1. That the death of the deceased, V. R. McGill, was the result of an injury and accident which did arise out of and in the course of his employment as chief of police of the town of Lumberton.

"2. That said deceased, V. R. McGill, did not commit suicide.

"3. That said deceased, V. R. McGill, left his mother, Mrs. J. B. McGill, as the only person wholly dependent upon him for support at the time of his injury and death.

"To sustain the position of the defendants that the deceased committed suicide we have evidence that the deceased was found dead in his office; that the office was not disarranged; that the discharged pistol was owned by the deceased; that the pistol was in such close proximity to the deceased's forehead that it caused powder burns, penetrating the skin; and that the pistol had a definite safety lock which would ordinarily prevent an accidental discharge of same.

"On the other side of the picture we have evidence that the deceased was a vigorous police officer, and the defendants have offered no evidence, either direct or by cross-examination, tending to establish a motive for suicide.

"The law placing the burden on the defendants to prove that the deceased did commit suicide, and the presumption being that he sustained an injury by accident, the Full Commission orders and directs that an award issue providing for the payment of compensation at the rate of $18.00 per week to the mother, Mrs. J. B. McGill, who was wholly dependent upon said deceased at the time of his injury and death; that said compensation shall be paid on the weekly installment basis not to exceed 350 weeks or $6,000; that since the compensation will total $6,000 no separate order will be issued as to the payment of burial expenses.

"It is ordered that the defendants pay the cost of the several hearings and trials. T. A. Wilson, Chairman. Examined and approved by: Buren Jurney, Commissioner."

In the second and final notice of formal award, is the following:

"The Full Commission directs that the original findings of fact in the opinion filed by then Commissioner J. Dewey Dorsett, on October 5, 1937, be affirmed, except as to Findings Nos. 5, 7 and 8, and as to these it is ordered that they be vacated and set aside; and it is further ordered and directed by the Full Commission that the conclusions of law and the award dated October 11, 1937, based thereon, be vacated and set aside, and in lieu of Findings Nos. 5, 7 and 8, the Full Commission makes the following:

"Findings of Fact: That the death of the deceased, V. R. McGill, was the result of an injury by accident which arose out of and in the course of his employment as chief of police of the town of Lumberton, defendant employer herein; that the said deceased did not commit suicide; and that the deceased, V. R. McGill, left his mother, Mrs. J. B. McGill, as the only person wholly dependent upon him for support at the time of his injury and death; and that the average weekly wage was in excess of $30.00.

"Defendants shall pay to the said Mrs. J. B. McGill, mother of the deceased, V. R. McGill, compensation at the rate of $18.00 per week for a period of 322⅔ weeks, or $6,000.00.

"Note: Since the compensation will total $6,000.00 no separate order will be issued as to the payment of burial expense.

"Defendants shall pay the cost of the several hearings and trials. N. C. Industrial Commission, By: T. A. Wilson, Chairman."

The defendants excepted and assigned error and appealed to the Superior Court from the award of the N. C. Industrial Commission entered as above, on 16 December, 1939.

The judgment of the Superior Court is as follows:

"This cause came on for hearing at the May, 1940, Civil Term of the Superior Court of Robeson County, before his Honor, Henry L. Stevens, Jr., Judge Presiding, upon the appeal of defendants from the findings of fact, conclusions of law and award of the North Carolina Industrial Commission in this cause, entered on December 16, 1939. After full consideration of the findings of fact, conclusions of law and the award of the Full Commission and the argument of counsel for both plaintiffs and defendants:

"It is considered, ordered and adjudged, that the findings of fact and conclusions of law of the Full Commission, entered in this cause as of December 16, 1939, are proper and justified from all the evidence in this cause, and the same are hereby adopted as the findings of fact and conclusions of law by this court, and the award of the Full Commission, entered hereon, that compensation at the rate of $18.00 per week be paid to the mother of the deceased, Mrs. J. B. McGill, and that said compen-

sation shall be paid on the weekly installment basis not to exceed 350 weeks, or $6,000.00, be, and the same is, hereby approved and adopted by this court.

"It is further considered and adjudged that the death of V. R. McGill was caused by an injury by accident arising out of and in the course of his employment by the town of Lumberton, N. C., and that the said V. R. McGill did not commit suicide, and that claim for compensation be and the same is hereby allowed and that the objections and exceptions of defendants to the award of the North Carolina Industrial Commission, as aforesaid, be and the same are overruled and denied.

"It is further ordered that defendants pay the cost of this action. It was agreed by counsel for plaintiffs and defendants, upon the hearing of this cause, that judgment might be signed by the court out of term and out of the district. Henry L. Stevens, Jr., Judge Presiding."

The defendants made numerous exceptions and assignments of error and appealed to the Supreme Court. The material one is set forth in the opinion.

F. Ertel Carlyle and McLean & Stacy for plaintiffs.
W. C. Ginter and Varser, McIntyre & Henry for defendants.

CLARKSON, J. The exception and assignment of error of defendants, which we cannot sustain, is as follows: "For that the court erred in concluding that 'The death of V. R. McGill was caused by an injury by accident, arising out of and in the course of his employment by the town of Lumberton, N. C., and that the said V. R. McGill did not commit suicide.' "

In a letter addressed to the North Carolina Industrial Commission by counsel for defendants, dated 11 July, 1939, is the following: "If we can be of any service or aid the Commission in filing of briefs or presentation of additional evidence, we shall expect to be commanded by you."

In the findings of fact of the Full Commission is the following: "The Full Commission has written to both parties and the defendants do not desire to further argue the case before the Full Commission. Therefore, the Full Commission is deciding this case without additional evidence or further oral argument."

The evidence in this case, which was considered before, is the same on the present appeal. The case was decided by the North Carolina Industrial Commission in conformity with the opinion in the former case. 215 N. C., 752. We see no reason to go into the matter again, as there was sufficient evidence for the North Carolina Industrial Commission to consider. We think there was sufficient competent evidence to support

the findings of the North Carolina Industrial Commission, and, on the facts found, the conclusions of law are correct.

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." *Blassingame v. Asbestos Co.*, 217 N. C., 223 (235).

In *MacRae v. Unemployment Compensation Commission*, 217 N. C., 769 (778), is the following: "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 Commission, 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.'"

In *S. v. Dixon*, 215 N. C., 161 (167), we find: "Decided cases should be regarded as weighty authority, at least within the courts which decided them. As Broome puts it in that veritable storehouse of legal learning, Legal Maxims, 'It is, then, an established rule to abide by former precedents, *stare decisis*, where the same points come up again in litigation, as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion, as also because, the law in that case being solemnly declared and determined what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or swerve from according to his private sentiments; he being sworn to determine, not according to his private judgment, but according to the known laws and customs of the land—not delegated to pronounce a new law, but to maintain and expound the old one—*jus dicere et non jus dare.*' Legal Maxims, 8th Ed., p. 147."

The North Carolina Industrial Commission, the fact-finding forum, could have found from the evidence, when this case was remanded to it, in favor of defendants. This was not done, but the Commission decided in favor of plaintiffs. We are bound by its findings. For the reasons given, the judgment in the court below is

Affirmed.

STACY, C. J., and WINBORNE, J., concur on the ground that the case is controlled by the decision on the former appeal and the revised findings of the Commission made in accordance therewith.

BARNHILL, J., dissents.

STATE v. HARRISON HELMS.

(Filed 11 December, 1940.)

1. **Criminal Law § 31c—**

Testimony of a fingerprint expert as to the identity of the fingerprints of defendant with those found at the scene of the crime, which could have been impressed only at the time the crime was committed, is competent as substantive evidence tending to show that defendant was present when the crime was committed and that he at least participated in its commission.

2. **Criminal Law § 52b—Whether fingerprints identified as those of defendant could have been impressed only at time crime was committed held for jury.**

The evidence tended to show the breaking and entering of a dwelling and the taking of property therefrom of a value in excess of $20.00, and that entry was effected through a porch window. Fingerprints identified as those of defendant were taken from the window. The evidence also disclosed that defendant was a painter, and prior to the night of the crime had been employed in painting in the house. There was also evidence that after all the painting was finished the windows had been washed on both the inside and outside. *Held:* Whether the evidence establishes beyond a reasonable doubt that the fingerprints could have been impressed on the window only at the time the crime was committed is a question for the jury, and defendant's motions for nonsuit were correctly denied.

3. **Criminal Law § 51—Solicitor's reference to failure of defendant's wife to testify held prejudicial and not properly corrected by court.**

During the absence of the judge, the solicitor in his argument to the jury called the jury's attention to the fact that defendant's wife had not testified in his behalf, and persisted in the argument after objection by defendant's counsel. Upon its return, the court sustained the objection, and near the conclusion of its charge to the jury stated that the law did not permit such comment and that the jury should not let the argument influence it. *Held:* The solicitor's comment violates C. S., 1802, and was prejudicial, and called for prompt, peremptory and certain caution by the court not only that the argument should be disregarded but that the failure of defendant's wife to testify should not be considered to his prejudice, and the action of the court in merely sustaining the objection and the caution later given by the court near the conclusion of the charge is insufficient to free the case of prejudice.

STATE *v.* HELMS.

APPEAL by defendant from *Alley, J.*, at July Criminal Term, 1940, of UNION.

Criminal action tried upon an indictment charging the defendant with feloniously breaking and entering a dwelling house with intent to commit a felony therein, and with larceny of a metal lock box and contents of the value of more than $20.00, the property of D. L. Middleton.

Upon the trial below the State offered evidence tending to show facts pertinent to this appeal substantially these: At intervals between 27 April and 31 May, 1940, defendant had done some painting on the inside of the dwelling house of D. L. Middleton in Monroe, North Carolina. Later, at some time between 4 June and 7 June, 1940, while D. L. Middleton and his wife were away, the dwelling house was broken into—entry being effected through a window on the back porch, and the metal lock box of D. L. Middleton, in which there were $200 in money and valuable papers, was stolen. When Mrs. Middleton, on returning in the late afternoon of 7 June, discovered that the house had been entered in her absence, she called the police and then a finger print expert was summoned. From the window on the back porch where the entry had been effected the expert lifted and developed a negative and made prints therefrom of the little finger of a right hand. Later he took fingerprints of defendant, and developed a negative and made prints therefrom of the little finger of defendant's right hand. On the trial the witness identified these prints and same were introduced in evidence by the State without objection. The witness was then asked this question: "Q. I wish you would take these prints and point out one by one, beginning with No. 1, which is the top of the print, the whorl, begin there and point out to the jury the peculiar characteristics and the comparison between the two points?" Objection by defendant overruled; the court holding that fingerprint evidence is substantive evidence, permitted it to be introduced as such, to which defendant excepted. Then after pointing out characteristic marks of similarity, the witness testified that in his opinion the two prints are identical.

The State introduced other evidence of circumstances which it contends tend to show the guilt of defendant.

On the other hand the defendant offered evidence of his good character, and testified that he did not break into the dwelling nor steal the metal lock box, and that while painting in the house he had occasion to open the window from which the expert took the fingerprints, and contends that if the fingerprint taken were his, the same must have been made when he opened the window while painting.

In answer thereto, the State offered evidence tending to show that after the painting was done the windows were washed on both the inside and the outside.

The record shows that, "Counsel for defendant objects to the argument of the solicitor to the jury to the effect that the wife of the defendant did not go upon the stand as a witness for defendant. The court is not present at the time and the solicitor says that he will argue the point in spite of the objection of the defendant. At the close of all the arguments and after the court had returned to his seat the objection was brought to the attention of the court, at which time the court sustained the objection." Exception. The record further shows that the court then proceeded to give his charge to the jury, and, just before concluding, stated: "Now, gentlemen, the court was sitting out in the room there while the arguments were going on where I could get a breath of fresh air, and I understood that during the argument the counsel for the defendant objected to an argument made by one or both of the counsel for the State that the defendant had failed to put his wife on the witness stand as a witness in his behalf to prove some fact, whatever it may have been, if material to his case. This, gentlemen, was an inadvertence on the part of counsel for the State. It has always been the law in this State that counsel cannot comment upon the failure of the defendant to go on the stand and testify in his own behalf and in recent months the Supreme Court has held that the same rule applies to a defendant's wife because a man and his wife at common law are considered one and the same person and their relationship is such that the law doesn't permit any comment to be made. That was an inadvertence on the part of counsel for the State and you will not let that argument influence you one way or the other."

Motions of defendant for judgment as in case of nonsuit at the close of the State's evidence, and again at the close of all the evidence, were overruled. Defendant excepted in each instance.

Verdict: Guilty as charged in the bill of indictment.

Judgment: On the count charging breaking and entering, imprisonment and to be worked on public highways. On the count charging larceny, prayer for judgment continued during good behavior—the court reserving the right to pronounce judgment at any subsequent term.

Defendant appeals to Supreme Court, and assigns error.

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

Coble Funderburk for defendant, appellant.

WINBORNE, J. The defendant presses for error in the main these three assignments: (1) The admission of expert testimony as to fingerprints as substantive evidence; (2) the refusal of the court to grant the motions for judgment as in case of nonsuit; and (3) "the argument of

the solicitor to the jury to the effect that the wife of this defendant did not go upon the stand as a witness for defendant." We are of opinion that the first two assignments are not tenable, but that on the facts of this record the third is well taken.

1. Regarding the first and second assignments. It is well established that evidence of the correspondence of fingerprints, when given by a fingerprint expert, is admissible to prove identity. 20 Am. Jur., 329, Evidence, sec. 357; 23 C. J. S., 755, Criminal Law, secs. 876, 877, 887; *S. v. Combs,* 200 N. C., 671, 158 S. E., 252; *S. v. Huffman,* 209 N. C., 10, 182 S. E., 705. See, also, Annotations 16 A. L. R., 370; 63 A. L. R., 1324.

In *S. v. Huffman, supra,* this Court said: "The testimony of the fingerprint expert was competent as evidence tending to show that defendant was present when the crime was committed and that he at least participated in its commission," citing *S. v. Combs, supra.*

Evidence of fingerprint identification, that is, proof of fingerprints corresponding to those of the accused, found in a place where the crime was committed under such circumstances that they could only have been impressed at the time when the crime was committed, may be sufficient to support a conviction in a criminal prosecution. 20 Am. Jur., pp. 329 and 1076, Evidence, secs. 357 and 1223.

Applying these principles to the evidence shown on the record on this appeal, we are of opinion that the evidence of fingerprint identification was properly admitted, and is sufficient to take the case to the jury. Whether or not all the evidence is sufficient to establish beyond a reasonable doubt that the fingerprints found on the window at the place of the crime correspond with those of the defendant, and, if so, that under the circumstances of the case, as the jury find them to be, the fingerprints so found could only have been impressed on the window at the time when the crime was committed, is a matter for the jury.

2. As to the third assignment: The Legislature has provided by statute, C. S., 1802, that: "The husband or wife of the defendant, in all criminal actions or proceedings, shall be a competent witness for the defendant, but the failure of such witness to be examined shall not be used to the prejudice of the defense. . . .

The latter part of the quoted portion of the statute has been the subject of discussion by this Court in the case of *S. v. Cox,* 150 N. C., 846, 64 S. E., 199; *S. v. Spivey,* 151 N. C., 676, 65 S. E., 995; *S. v. Harris,* 181 N. C., 600, 107 S. E., 466; *S. v. Watson,* 215 N. C., 387, 1 S. E. (2d), 886.

In *S. v. Cox, supra,* the State called the wife of defendant, who was under subpœna, and tendered her to defendant for examination. The court ruled that she could only testify for defendant. Then the solicitor,

in his argument to the jury, commented on the failure of the defendant to corroborate his testimony by his wife. Defendant objected. Speaking to the question, the Court said: "The tender of the wife by the State and the remarks of the solicitor sharply called attention to the failure of the defense to examine the defendant's wife. Objection was made, but the court, instead of telling the jury that they should not let that fact prejudice the defendant, on both occasions rather accentuated the matter by telling the jury that the State could not use the wife of the defendant as a witness, but that he could. The effect, though unintentional on the part of his Honor, was to throw the fault of the wife not being a witness upon the defendant, since he could have put her on and the State could not. There was no caution that such failure to use the wife as a witness should not be considered by the jury. Yet the tender, and the remarks of counsel being called to the judge's attention, called for such caution, and his failing to give it was prejudicial."

In *S. v. Spivey, supra,* the Court, after setting out in full the matters pertaining to the incident to which the exception related, said: "There was a similar incident in *S. v. Cox,* 150 N. C., 846, but his Honor, in the present case, observed the caution pointed out in that case, which the learned judge who tried Cox' case had unintentionally failed to observe. While it was improper for the solicitor to tender the prisoner's wife, with the remark made by him, yet his Honor corrected the error fully." The assignment of error was overruled.

In *S. v. Harris, supra,* upon objection to question tending to show that the wife of defendant had been subpœnaed by defendant and discharged as his witness, the court below ruled out the question and read the statute to the jury. (C. S., sec. 1802, quoted above.) On appeal, this Court held that the caution was sufficient to cure any prejudicial effect.

In *S. v. Watson, supra,* the solicitor having commented upon the failure of the defendant to call his wife as a witness in his behalf, objection to which was overruled by the court, it is held that the argument of the solicitor runs counter to the prohibitory provisions of the statute, C. S., 1802, as applied in *S. v. Cox, supra,* and is prejudicial error.

In the present case, though unintentional no doubt, and in the heat of debate, the argument of the solicitor, as the record shows, was made and persisted in after objection by counsel for defendant. It runs counter to the prohibitory provisions of the statute, C. S., 1802, and is prejudicial to defendant. When brought to the attention of the court, it called for prompt, peremptory and certain caution to the jury, not only that the jury should disregard the argument but that the failure of the wife of defendant to be examined as a witness in his behalf should not be used to the prejudice of defendant. Even then, it may be fairly

doubted that the harmful effects of such argument could have been dispelled from the minds of the jury.

We are of opinion, and hold, that merely sustaining the objection is not sufficient caution. Nor does the caution later given by the court free the case of the prejudice already done to the rights of defendant. See *Jenkins v. Ore Co.*, 65 N. C., 563; also *S. v. Tucker*, 190 N. C., 708, 130 S. E., 720; and *Conn v. R. R.*, 201 N. C., 157, 159 S. E., 331, where authorities are reviewed.

For the error pointed out, there must be a

New trial.

S. L. MURPHY AND WIFE, MILDRED MURPHY, v. THE CITY OF HIGH POINT, A MUNICIPAL CORPORATION.

(Filed 11 December, 1940.)

1. Municipal Corporations § 12—

The powers of a municipality have been greatly enlarged so that, in many respects, it is authorized to act officially outside its corporate limits, and since a municipality may act only through its officers and agents, its officers and agents are empowered to act officially outside its limits in discharging their duties relating to the extraterritorial powers conferred upon the municipality.

2. Venue § 1c—

Since a municipality may act only through its officers and agents, an action against a municipality is an action against "a public officer" within the meaning of the provisions of C. S., 464.

3. Same—

The proper venue of an action against a municipality is the county where the cause of action, or some part thereof, arose. C. S., 464.

4. Same—Complaint held to allege tort committed by municipality in county in which action was instituted.

The complaint alleged damage to plaintiff's land resulting from the negligent operation of defendant municipality's sewage disposal plant. The action was instituted in the county in which the land lies and in which the municipality maintained and operated its sewage disposal plant. The municipality made a motion that the action be removed to the county in which it is located. *Held:* The alleged negligent acts resulting in the injury to the land occurred at the point where defendant municipality maintained its sewage disposal plant and the cause of action there arose, and therefore the municipality's motion for change of venue was erroneously granted. C. S., 463, 464. *Cecil v. High Point*, 165 N. C., 431.

APPEAL by plaintiffs from *Nettles, J.*, at September Term, 1940, of DAVIDSON. Reversed.

Civil action heard on motion for change of venue.

The defendant city, as a part of a sewage disposal system, has acquired land in Davidson County and constructed thereon a sewerage disposal plant. The sewage is piped from the city to the disposal plant and thence to Rich Fork Creek. The defendant likewise collects waste water containing dye from various industrial plants within its corporate limits, conveys the same by pipe to the plant in Davidson County and thence to Rich Fork Creek.

Plaintiffs allege that the defendant, in the operation of its plant in Davidson County, negligently permits raw sewage to be by-passed through said plant into the open stream of Rich Fork Creek; that it negligently fails to properly purify the sewage before dumping it into Rich Fork Creek; and that it discharges into said stream the dye water gathered from industrial plants. They further allege that this causes offensive odors and creates a condition dangerous to the health of those living or working near said stream and has greatly damaged their real property situate upon said stream.

The defendant, before the time for answering expired, moved the court to remove said cause to Guilford County for trial for the reason that the defendant is a municipal corporation located in said county.

The clerk of the Superior Court entered a judgment allowing the motion of the defendant and removing the cause to the Superior Court of Guilford County. The plaintiffs appealed. Upon the hearing of plaintiffs' appeal in the Superior Court judgment was entered affirming the order of the clerk. Plaintiffs excepted and appealed to this Court.

Don A. Walser and P. V. Critcher for plaintiffs, appellants.
G. H. Jones for defendant, appellee.

BARNHILL, J. Counsel properly concede that the decision of the question presented is made to turn upon the correct interpretation of the opinion in *Cecil v. High Point,* 165 N. C., 431, 81 S. E., 616. The defendant contends that under said decision the proper venue for the trial of this cause is in Guilford County. The plaintiffs contend that under a proper construction of the language used by the Court in that case the proper venue is in Davidson County where plaintiffs' land is situate.

In that decision the apparent conflict in the provisions of C. S., 463 (Rev. 419), and C. S., 464 (formerly Rev. 420), is reconciled, the Court holding that under the facts in that case the proper venue for an action for damages to real property located in Davidson County resulting from the improper operation of a sewerage plant by the defendant municipal corporation in Guilford County was the county of Guilford.

What, then, is the import of the decision in the *Cecil case, supra?* A careful examination thereof discloses that the court came to these conclusions: (1) That as a municipal corporation acts through its officers an action against a municipal corporation is an action against "a public officer" within the meaning of the provisions of C. S., 464; (2) that, ordinarily, public officers act officially within their bailiwick; (3) that when sewage is improperly discharged into a stream causing damage to land adjacent to the stream the wrongful act is committed at the point where the wrong is committed and not where the injurious results finally take effect; (4) that under the terms of C. S., 464, the proper venue of an action against a municipal corporation is "where the cause of action arose"; and (5) that the cause of action is the act of the officers and thus the cause of action arises where the city or its public official commits the wrong which is the basis of the suit.

Having come to these conclusions the court properly held that, as it was alleged by the plaintiffs that sewage was improperly discharged into the stream within the corporate limits of the city, the county in which the city was located was the proper venue notwithstanding the fact that through the flow of the stream the injurious results took effect in another county.

It is to be noted that the primary and controlling language of C. S., 464, as held in the *Cecil case, supra,* is "where the cause, or some part thereof, arose." It was so held in *Steele v. Comrs.,* 70 N. C., 137, where it was said: "Now as an officer's official acts are confined to his county, and as the cause of action is his official act, it follows that the cause of action spoken of 'arose' in the county in which the commissioners acted, and not out of their county, where they did nothing 'by virtue of his office.'" *McFadden v. Maxwell,* 198 N. C., 223, 151 S. E., 250; *Kellis v. Welch,* 201 N. C., 39, 160 S. E., 281; and *Kanipe v. Kendrick,* 204 N. C., 795, 169 S. E., 188, are to like effect.

Since the rendition of the opinion in the *Cecil case, supra,* in 1914 the powers of a municipality have been materially enlarged and extended so that its officers and agents are now authorized, in many respects, to act officially outside its corporate limits. In many instances the official conduct of municipal officers is not necessarily "inherently local" and their official acts are not, in all respects "within their bailiwick." See ch. 136, Public Laws 1917, and ch. 158, Public Laws 1923.

Now two or more municipalities may jointly provide, establish, maintain and conduct a supervised recreation system and acquire property therefor. Ch. 83, sec. 5, Public Laws 1923. To do so requires officers or agents of either one or both municipalities proceeding under this provision to perform certain official acts outside the corporate limits of the municipality of such officers or agents. Likewise, municipal officials

may now: (1) Acquire, lay out, establish and regulate parks outside the corporate limits of the city. C. S., 2787 (12); (2) enact and enforce ordinances relating to the rights of way of all water, sewerage and electric light lines of the city outside the corporate limits and within one mile thereof. C. S., 2790; (3) acquire, manage and control lands used for streets, water, electric lights, power, gas, sewerage or drainage systems or other public utilities, parks, playgrounds, cemeteries, wharves or markets outside the city. C. S., 2791; (4) manage and control parks and squares without the city limits. C. S., 2793; (5) acquire, establish and maintain a hospital, or hospitals, pest houses, slaughter houses, rendering plants, incinerators and crematories outside but within three miles of the corporate limits. C. S., 2796; (6) own and maintain its own light and waterworks system to furnish water, etc., to the city and its citizens and to any persons desiring the same outside the corporate limits of the city. C. S., 2807; and particularly, (7) acquire, provide, construct, establish, maintain and operate a system of sewerage for the city, and if it shall be necessary in obtaining proper outlets to such systems, to extend the same beyond the corporate limits and to condemn a right of way, or rights of way, to and for such outlets. C. S., 2805.

When a municipality undertakes to exercise the authority thus vested in it, it is essential that its officers and agents perform official acts in respect thereto outside the corporate limits of the city. No other conclusion is logical. When public utilities are constructed and maintained outside the corporate limits of a city such plant must be operated and controlled. The agents and officials of the city who operate these utilities are acting for and in behalf of the city. Their acts are the acts of the municipality. When their conduct in respect thereto gives rise to a cause of action the cause of action arises where the act is committed. This conclusion is in full accord with, and is supported by, the opinion in *Cecil v. High Point, supra.*

The defendant, acting under the statutory provisions heretofore cited, established a sewage disposal plant in Davidson County. In connection therewith it acquired a right of way for and constructed and operated outlets to such system. No wrong was committed and no injury resulted from the discharge of sewage and dye water into the pipe lines leading to the disposal plant located in Davidson County. The wrong, if committed at all, was committed when the agents of the defendant permitted raw sewage to be by-passed through the disposal plant and discharged, together with improperly treated sewage and dye water, into Rich Fork Creek. These alleged negligent and wrongful acts were committed by the city through its officers and employees within Davidson County. Thus the cause of action, if any, "arose" in that county.

A city may not extend its public utilities beyond its corporate limits and maintain plants in a county other than the one in which it is located without incurring the attendant liabilities. If defendant has committed a wrong in Davidson County which results in the taking, in whole or in part, of the land of plaintiffs, it may not now retreat to its own county and require plaintiffs to pursue it there for re-dress.

Under C. S., 463, and C. S., 464, as construed and applied in the *Cecil case, supra,* Davidson County is the proper venue for the trial of this action.

The judgment below is

Reversed.

JOHN D. BIGGS, AS RECEIVER, ON BEHALF OF HIMSELF AND ALL OTHER CREDITORS OF THE ESTATE OF HUGH A. MOFFITT, v. J. S. MOFFITT, INDIVIDUALLY, AND AS ADMINISTRATOR OF THE ESTATE OF HUGH A. MOFFITT, AND THE FIDELITY & CASUALTY COMPANY OF NEW YORK.

(Filed 11 December, 1940.)

Pleadings § 21—

After time for filing answer has expired, the defendant is not entitled to amend as a matter of right, even though the amendment is not sought for the purpose of delay and even though it will not result in the loss of the benefit of a term of court at which the case might otherwise be docketed for trial, the matter of amending after the time for filing the pleading has expired being addressed to the discretion of the court. C. S., 545.

APPEAL by defendant, The Fidelity and Casualty Company of New York, from *Rousseau, J.,* at 15 April, 1940, Civil Term, of GUILFORD.

Civil action to compel defendants, administrator and surety on his bond, to account for his administration of the estate of Hugh A. Moffitt, deceased.

The case was heard in the trial court on motion of plaintiff to strike from the record an amended answer filed on 24 April, 1940, by the defendant, The Fidelity and Casualty Company of New York. The amended answer so filed is identical with the answer originally filed with the added plea of the three-year statute of limitations.

In regard thereto the court below finds in brief these facts: The action was instituted on 18 September, 1939. By consent order, time for answering was extended to 10 November, 1939. The defendant, The Fidelity and Casualty Company of New York, filed answer on 3 November, 1939; and on 24 April, 1940, filed herein in the office of the clerk

of Superior Court an amended answer, with copy for plaintiff, which reads: "The defendant, The Fidelity and Casualty Company of New York, pursuant to the provisions of the Consolidated Statutes of North Carolina, section 545, files this its first amendment to the answer, which is not filed for the purpose of delay and which is filed at a time when the plaintiff will not thereby lose the benefit of a term for which the cause is or may be docketed for trial." The court, finding the facts to be as thus stated, held as a matter of law that the defendant cannot file this amended answer as a matter of right, and, as a matter of law, allowed plaintiff's motion and ordered the amended answer stricken from the files.

From this order, the defendant, The Fidelity and Casualty Company of New York, appeals to the Supreme Court and assigns error.

C. L. Shuping and Thomas Turner, Jr., for plaintiff, appellee.
Sapp & Sapp for defendant, appellant.

WINBORNE, J. This appeal presents this question: After the time for answering the complaint has expired, may the defendant, under the provisions of C. S., 545, file an amended answer, as a matter of right?

The decisions of this Court answer "No." McIntosh, N. C. P. & P., p. 512; *Barnes v. Crawford,* 115 N. C., 76, 20 S. E., 386; *Goodwin v. Fertilizer Works,* 121 N. C., 91, 28 S. E., 192; *Discount Corporation v. Butler,* 200 N. C., 709, 158 S. E., 249.

It is proper here to note that this statute is in the main a part of section 131 of the Code of Civil Procedure of North Carolina, ratified in 1868, bearing the heading: "Amendments of course after allowance of demurrer." After slight changes, brought about by amendment, Public Laws 1871-2, ch. 173, and when incorporated in the Code of 1883, it became section 272 of the Code, and so remained until the adoption of the Revisal of 1905. At that time, after deleting unimportant portions, the section was divided and included therein as sections 505 and 506, which are now sections 545 and 546 of the Consolidated Statutes.

As C. S., 545, the statute provides that: "Any pleading may be once amended of course, without costs, and without prejudice to the proceedings already had, at any time before the period for answering it expires; or it can be so amended at any time, unless it is made to appear to the court that it was done for the purpose of delay, and the plaintiff or defendant will thereby lose the benefit of a term for which the cause is, or may be, docketed for trial; and if it appears to the court or judge that the amendment was made for that purpose, it may be stricken out, and such terms imposed as seem just to the court or judge."

This Court, in interpreting the section prior to the adoption of the Revisal of 1905, appears to hold that a pleading may be amended of course, without costs and without prejudice to the proceedings already had, only when done before the time for answering that pleading has expired, and that after time for answering the pleading has expired, an amendment thereto may not be made as of right, but is a matter addressed to the discretion of the court.

In *Goodwin v. Fertilizer Works* (1897), *supra, Faircloth, J.*, said: "The plaintiff sued for a penalty of $200, before a justice of the peace, and the defendant denied the allegations of the complaint and pleaded the statute of limitations. On appeal in the Superior Court the plaintiff asked leave to amend his complaint by inserting a second cause of action, which was refused. He claimed the right, as of course, under the Code, sec. 272. The motion, coming after the time for answering had expired, and after answer had been filed, was too late, as a matter of course. The privilege of amending is at the discretion of the court, and its decision is not reviewable," citing authorities.

Then after the adoption of the Revisal of 1905, the Court adhered to the rule as stated in the *Goodwin case, supra.*

In *Discount Corporation v. Butler* (1931), *supra, Brogden, J.*, speaking for the Court, said: "C. S., 545, provides for amendments to pleadings. In the case at bar no effort was made to amend the pleadings before the time for answering expired. After the time for answering has expired it has been the uniform practice to apply to the court for permission to amend."

In McIntosh, N. C. P. & P., p. 512, treating the subject of "Amendments as of course," the rule is stated thus: "After the time for answering expires, leave of court must be had before an amendment."

As thus construed, the clause "or it can be amended at any time" appearing in the section does not have reference to the right to amend as a matter of course, but means that after the time for answering it has expired, the matter of amending the pleading "without costs and without prejudice to the proceeding already had" is addressed to the discretion of the court, even though the amendment be not for the purpose of delay and be filed at a time when the plaintiff or defendant, as the case may be, will not thereby lose the benefit of a term for which the cause is or may be docketed for trial.

While there may be logic in the earnest argument of counsel for defendant that the statute should be otherwise construed, we think that orderly procedure will best be conserved by adhering to the construction of the statute as heretofore declared by this Court.

The judgment below is

Affirmed.

STATE v. GEORGE A. JOHNSON.

(Filed 20 December, 1940.)

1. **Criminal Law § 48b—**

The admission of evidence generally and without qualification will not be held erroneous, even though the evidence is competent only for the purpose of corroboration, when at the time of its admission defendant does not request that its purpose be restricted.

2. **Burglary § 10: Criminal Law § 53d—Where all the evidence shows that dwelling was actually occupied, instruction that verdict of burglary in second degree is not permissible, is without error.**

In this prosecution for burglary, defendant relied upon the defense of intoxication. All the evidence tended to show that the dwelling was actually occupied at the time it was broken and entered, and that the offense was committed at nighttime. The court fully and correctly charged the jury upon the defense of intoxication, and charged the jury that it might find defendant guilty of burglary in the first degree, guilty of an attempt to commit burglary in the first degree, guilty of breaking and entering otherwise than burglariously, guilty of an attempt to break and enter otherwise than burglariously, or not guilty. The court refused to give defendant's requested instruction that the jury might render a verdict of guilty of burglary in the second degree. After the charge, the jury returned and requested further instructions on the defense of intoxication, which were given, and then the jury asked whether it might return a verdict of guilty of burglary in the second degree. The court answered in the negative, and further charged that there was no evidence to support a verdict of second degree burglary, and again instructed the jury as to the verdicts permissible on the evidence. *Held:* C. S., 4641, does not authorize an instruction that the jury may render a verdict of burglary in the second degree in its discretion irrespective of the evidence, and the further instruction that there was no evidence tending to support a verdict of burglary in the second degree, is in accordance with law and is without error.

DEVIN, J., concurring.
SCHENCK, J., joins in concurring opinion.
STACY, C. J., dissenting.
BARNHILL, J., dissenting.
WINBORNE, J., dissenting.

APPEAL by defendant from *Frizzelle, J.*, and a jury, at August Civil Term, 1940, of ROBESON. No error.

This is a criminal action. The bill of indictment by the grand jury, upon which defendant was tried, was for burglary in the first degree. The jury returned a verdict of guilty of burglary in the first degree. Judgment of the court below was death by asphyxiation.

The evidence was to the effect: That Ruth Currie and her husband, Fred L. Currie, were living in a house alone in Pembroke, N. C., facing

on the Lumberton-Charlotte Highway. Their nearest neighbors were Mrs. Cooke, who lived on the right, and Mr. and Mrs. Wiggins, in front and across the highway, and the Littletons.

Mrs. Ruth Currie testified, in part: "There is another lot near my home used as a place to keep second-hand automobiles; that is on the next lot to my house, adjoins my house, starts on the front and goes right on back to the woods. That lot is kept lighted at night, either three or four lights out there. It was lighted on the night of July 28, I noticed it, the light was shining through my window." She knew the defendant, George A. Johnson. He was employed by Mrs. Cooke and was working for her two or three months. He mowed her (Mrs. Currie) lawn once a week. She had a little dog named Midgett, that usually barked at night and could be heard every time he barked. The dog got friendly with defendant, as he would feed the dog "give him scraps out at night."

On the night of 28 July, she saw defendant at the Tyner Motor Company, at 9:00 o'clock, and had a conversation with him about mowing her lawn. He said, "I will do it Monday morning." She saw him again about 11 o'clock, when she was at a neighbor's house, Mrs. Robt. L. Littleton, who lived near her on the same side of the street. She was there listening to the radio. He and Willie Lee, who worked at the Tyner Motor Company, came by and stopped there and talked a few minutes and went toward her house. Mr. and Mrs. Littleton drove her home about 25 minutes to twelve. Her husband had gone to bed and she went to the living room and listened to the radio. She went to bed about 25 minutes to one o'clock. "When I turned off the light and went to my room Mr. Currie was asleep then; he and I slept in the same bed, and in the same room. I immediately went to sleep after I went to bed. I woke up, when he touched me I woke up. I was on my back and on the left-hand side of the bed, Mr. Currie on the right-hand side, and I felt something crawling on my leg, and when I did, I did like that and touched his hand, and sat up, and looked down and he was on the floor with his head down like that, and I screamed and woke Mr. Currie—I call him Judge—and he rose up and said I was having a nightmare, and when I said there is a man in the room he got up and ran. I saw him. He went toward the hall and into the kitchen. I saw him and recognized him from the light shining right in the window. The garage lot lights were shining through my window, my bed was near the window, it was between two windows in the corner of the room, and he was on the floor by the bed. After I screamed and said there is a man in the room, Mr. Currie got up, the gun was over in a chest drawer where I kept his socks and everything, and he grabbed the gun *and said it was the Negro George that works for Mrs. Cooke;* he ran out and went upstairs

and came back and went to the front of the house, and Mr. Currie goes to the telephone, and I was right behind him, and he called the city police in Pembroke, couldn't get anybody to answer, then called Lumberton and got Sheriff Wade, and he told him he would be over there immediately, and in the meantime Sheriff Wade called Carl Maynor. My husband also called Mr. Littleton and Mrs. Littleton answered the telephone, and they came immediately to my house. I told them exactly what I told Mr. Currie. I told them he was touching me and I woke up, he was going up my leg like a bug crawling on me. It was a real hot night and I had turned the sheets down at the foot of the bed; my night clothes were not down when I went to bed, I pulled it to here (indicating about half way the thigh), but it was right along here when he touched me (indicating about the waist line)." . . . Several of the neighbors came and some officers. "Mr. Currie and Mr. Purcell and Mr. Littleton all went around the house. I was not with them, but I went around the house. I observed that he pushed a hole in the screen with a stick, burnt at one end, and looked like he put his hand in it; the screen fastens with a hook, and you have to pull it up and pull it off to take it off, and it was set against the wall on the outside; the stick was right on the ground, it had a charred end to it. The screen in the window nearest to the bed was unhooked and pushed out; it was unhooked so all he would have to do was jump out of the window, had the round hook pushed open and the screen pushed out; that screen was closed when I went to bed. That screen in the kitchen window that we found removed was locked; the window was pulled up but the screen was locked. Our house was locked, the screen door was locked. This happened between 3:00 and 3:30 o'clock in the morning, it was dark. We had a garbage can, it sits at the corner of the back porch and we had it buried in a hole about 18 inches deep, maybe a little bit more, and he took the garbage pail and lifted it completely up. It was gone out of that hole, it was by the window where Mr. Currie sleeps, on the side of the bed Mr. Currie sleeps, at the back window. The top was bent in where he stood up on it. The window at my head was unfastened after I went to bed and went to sleep. . . . It was the screen to the window in the kitchen that had the hole in it; it was leaning against the wall of the house; the stick was laying down on the ground. . . . I slept on the left side of the bed next to the window. The can was at the window next to Mr. Currie's side of the bed. *When I observed the defendant he was there in the room right next to the bed kneeling down, on his knees on the floor,* and when I hollered he got up and ran. He ran right straight through the door. It was a moonlight night. There was missing from the home *Mr. Currie's watch, knife, pocketbook,* and he had some letters, had a lot of receipts in his pocketbook. He had

his clothes in the chair that was next to the mantelpiece in our bedroom. . . . The next time I saw the defendant, after seeing him in my bedroom, was right here in the courtroom. *He is the man I saw in my bedroom; he is the man I saw working for Mrs. Cooke;* the defendant is the man I saw feed my dog, the man that promised to cut my grass on Monday morning. Q. State whether or not this defendant here is the person you saw in your house there by your bed that night? Ans.: Yes, sir." On cross-examination: "He didn't move until Mr. Currie answered me; I knocked his hand off of me when I sat up in bed and when Mr. Currie answered, he started running, he turned around just like this and ran out in the hall. . . . The defendant was perfectly normal when I saw him. I asked him when he was going to mow the lawn. I heard him talking to Willie Lee, his condition seemed to be all right. He didn't talk to me like an intoxicated man. I saw him in my home around 3:00 or 3:30 o'clock. I didn't have occasion to verify that but it was around that time. I had been asleep something like an hour or two. As to any misgivings in my mind about the identity of this man I saw in my room, there are not many colored people in Pembroke, and the minute he stood up I recognized him. . . . *I am satisfied beyond even a shadow of a doubt that, notwithstanding the fact it was in the darkness, I am not mistaken; I wasn't mistaken the minute I woke up and saw him and there hasn't been a doubt in my mind from that night on.* . . . (Re-direct): I told Mrs. Littleton this defendant is the man who I saw in my room, I also told Mr. Wiggins, Sheriff Wade, Mr. Purcell, Mr. Crump, Shell Warrix, and all of them when they got there. Mr. Wade or Mr. Crump picked up some struck matches, I saw them pick them up at my window and at Mr. Currie's window, I don't know whether there was any at the window where he went out or not." She was corroborated by her husband, Fred L. Currie, who testified to other facts as to how the burglar got in and out of the house. He also testified: "I didn't miss the watch not until the Sheriff brought the watch up; that must have been 5:30 or 6:00 o'clock after he arrested the Negro."

Bernice Robeson testified, in part: "When he (defendant) came back last time it was between 3:00 and 3:30 o'clock; it was after that I heard the scream and saw him running. (Cross-examination): Willie Lee and him were drinking a little bit that night, I think they were; I don't know that George was pretty drunk, he didn't act like it. . . . I don't know whether he was drunk or sober, he didn't act to me like he was drunk when he was scratching on the screen; he didn't say what he came back there for, I didn't ask him. . . . I saw him in the moonlight, the moon was shining that night. I didn't go back to sleep after he scratched on my window. It was about thirty minutes after that

and I heard Mrs. Currie scream. When I heard Mrs. Currie scream I saw him running from over there, he run between the garage and my house."

She was corroborated by Mrs. Robt. L. Littleton, who testified, in part: "I saw her (Mrs. Currie) again after 3:00 o'clock after a phone message was received. I saw her at her home. In consequence of the phone call we went immediately, my husband and I, up to Fred Currie's home. My husband and I got up immediately after the phone call and went there, and when we drove up in the yard—I don't imagine it took us more than five or six minutes—Mrs. Currie opened the door and was highly nervous and of course we ran in immediately, and she said, 'That Negro George Johnson has been in my bedroom and touched me,' kept saying it over and over, and of course we tried to comfort her, and my husband left immediately, I don't know where he went, but I think he drove up town immediately to see if he could see any person. She described what had happened to her, she told me in detail. She said she was lying in the bed. (By the Court): Consider this, gentlemen, only for the purpose of corroborating Mrs. Currie, if you find it does corroborate her.—She was lying in the bed and was awakened by this hand on her leg and she aroused up immediately and screamed, she saw the figure of a man crouching by the side of her bed, and it wasn't until her husband answered her that he wheeled on his all fours and went out of the room, and she told me she was definite it was George Johnson. . . . I also recall seeing, when the officers were there, match stems at the window and also saw a piece of molding off a screen, also a stick, looked like he pushed in the screen, screen punched out, sharp pointed stick. I guess the piece I saw was a piece of molding, something that is on a screen, you know."

Robert Littleton testified, in part: "I went up there. The first one I saw when I got there was Mrs. Currie. I was in front and my wife behind, and she opened the front door, and she said, 'He has been feeling of me,' that was exactly the words she said, and she said it over and over, she was crying very hard when we went in the room, and she told me about it. . . . I examined the windows in the house. I first looked around at the window around next to her bedroom and saw it had been opened; she told us it had been opened; we looked at it; the hook on the screen had been unfastened and the screen pushed out. On the side of the house next to Mrs. Cooke's the screen had been removed and a short stick, looked like maybe a piece of broom handle, and end of it looked like it had been burned some, was laying down under where the window was, a hole was pushed through the screen right at the bottom. . . . I mean the screen was removed. I tried to see if I could get any paint off on my hands like I observed on his, and I did. It was

white paint. The paint I got on my hands came off of the part of the house around the window sill. I saw the garbage can, I saw the hole where it had been sitting, looked like it had been freshly moved, and moved to the back bedroom window, and the lid was caved in. I don't know whether it was caved in before, and fresh dirt on the top of it. I don't believe any matches were found where the screen had been removed, but matches were at the window at the head of Mrs. Currie on the right side, and around where the garbage can was."

Sheriff E. C. Wade, who was telephoned for, came at once. He corroborated Mrs. Currie. He went to defendant's home. "I remember the pocket of the pants this watch was in, it came out of the watch pocket on the right-hand side of his pants, front of the trousers. . . . When I left that house I came back to Mrs. Currie's and had the watch in my hand when I went in. She said, 'That is Judge's watch.' I said, 'Who, Mrs. Currie?' She said: 'We call him Judge.' . . . I observed his condition and walked back up with them to my car. If he was drinking it wasn't enough to tell it, he might have been drinking some that night but he didn't show any signs of being drinking then, perfectly sober." Qualified by counsel for defendant on the *voir dire.* (The court holds that the statement, confession, was free and voluntary.) "I asked him why he went in the house, he says, 'I don't know,' he said, 'I was drinking I reckon or drunk.' He said he got the watch off of the mantelpiece in Mr. Currie's room."

Ralph Purcell testified, in part: "I received a message on the night of the 28th of July about ten minutes until 4:00 o'clock. In consequence of that call I went to Pembroke and went to Mr. Currie's. . . . When I got (defendant) out of the house there his trousers were wet, damp. I wouldn't be positive whether he had them on or not when I got him up. . . . He had some matches in his pocket and they were exactly like the ones we found around the window, same type matches, matches that come out of a box you strike them on, one of those square boxes. . . . (Cross-examination) I cannot say that his appearance indicated he might have been drinking the night before."

F. E. Brisson, deputy sheriff of Robeson County, after being qualified, testified, in part: "I recall when this defendant was placed in jail following his arrest. I talked with him on Tuesday after he was put in there on Sunday night. Mr. Crump was over there and he called me in the room and he told us about going in the house and getting a watch. . . . He first made the statement that he went in the house and got the watch and pocketbook and he said he lost the pocketbook going through the field, went down the highway and went through the cornfield toward Juddy Maynor's, and he said he must have lost it, and that was

about all the statement he made. I did not talk with him more than that one time."

Shelby Warrix testified, in part: "On the morning following this alleged crime Sunday morning I saw the defendant George Johnson, Mr. Purcell was with him. I got close enough to him to observe his condition. I smelt some whiskey on him but he wasn't under the influence then. That was around, I imagine around 6:00 o'clock in the morning. I could not tell that he had been drinking to any appreciable extent any more than I smelt some on him. I am deputy chief of police of Pembroke."

F. L. Crump testified, in part: "I am deputy sheriff of Robeson County. I saw this defendant Johnson early in the morning following his arrest around 6:30. As to his condition he seemed to be normal. I couldn't tell he had been drinking from the way he looked or acted."

The defendant testified, in part: "I know Mr. and Mrs. Fred Currie. The best I can remember, that Saturday I was down town and messed around there a little and started to drinking liquor. It was round about 9:00 o'clock, a little after 9:00, that I took the first drink; it was a right heavy drink first starting off. Me and Willie Lee and Bernice were together when I took the first drink. Bernice is the colored girl that went on the stand. She took a drink then. I took more drinks that night. We got another drink that night over at Mandy Carter's. I got hold of the package I carried to her house at 11:00 o'clock. We were leaving Mandy's house and she left ahead of us and she told me to get the shoes and I went and got the shoes. She went on ahead of me. We had got all the liquor we had before I carried the shoes to her. I reckon I had drunk about a pint. I drank liquor and beer. I disremember how much I drank. I was good and high. I remember carrying the girl's shoes to her. I remember that. I don't remember how long I stayed when I carried her shoes, I didn't stay long. I don't remember what I did after that. I went home, that is where I thought I went. I don't remember exactly which way I went when I went home. I think I went by Ernest's house and went on home. I think I did, I am not positive. I have been drunk before like that, I have been drunk lots. I have been drunk about three times and served time for it in South Carolina. I don't remember going to this house. If I did I don't remember anything about it. . . . (Cross-examination) So far as I can remember I was drunk when I left Bernice's house, that is all I know. I cannot swear what time it was. Something like 1:00 o'clock, I guess, I don't know. I don't recall going back to Bernice's house between 3:00 and 4:00 o'clock. I don't remember knocking at the window, and then on the side of the house. I don't know whether I had sense enough to leave when she told me she was going to call

Mrs. Cooke if I didn't leave and go home. I went home when I left there I guess. I guess I went home, when I woke up next morning I was at home. I was at home when the officers woke me up. . . . I don't remember that I went there and took a stick and punched a hole in the wire. I don't remember cutting it right where I could reach in there and unfasten the staple. I don't remember raising the screen and taking it out, and I don't remember laying it down side the house. I don't remember when I crawled in the window. I didn't see the paint in the creases of my fingers. The sheriff showed me one little streak on this finger. I played ball caused my shirt to be torn across there. Mr. Currie's house is painted white. I don't know that it is painted white around the window where the screen was taken out, I didn't pay it that much attention, all I seed was a white house. I don't remember a thing about going in his kitchen that night about 3:00 or 4:00 o'clock, or going over to the side of the bed where Mrs. Currie was. I don't know why I happened to go in the room where Mr. and Mrs. Currie were. I don't remember that I went in the room and went to the side of the bed where Mrs. Currie was sleeping. I don't remember seeing the shoes on the side of the bed where Mrs. Currie was sleeping and moving them so I could get side of the bed, so I could get close; I don't remember taking my hand and putting it on the lady. I was so drunk I wouldn't swear I did or didn't. When I woke up the next morning the cops were there. I don't know anything about putting my hand on the lady when she was in bed that night. I don't know anything about it. I was drunk and don't remember anything. I don't remember when she pushed my hand off. I don't remember anything about getting down side of the bed. I didn't hear her scream. I don't remember anything about jumping up and with my head ducked down, ran out the door. I don't remember whether I ran in the side of the wall or not. I don't remember whether I ran under the bed or upstairs. I don't remember that I ran back through the kitchen. I don't remember reaching up on the mantel and getting the man's watch, I don't remember anything about it. . . . Sheriff Wade never showed me that watch while I was in jail. I deny it because he didn't show it to me. He didn't show me any watch. . . . I didn't tell Mr. Wade that when I went in Mr. Currie's house I not only got his watch but I got his pocketbook. . . . He said, 'There is but one thing you can do and that is to own it, this watch came from your house.' He asked me six or seven times. 'I don't want any lying out of you to go up with the trial, you know the watch came from your home and it will really convict you.' 'Nothing else to do and if you got the watch from my house, I will say the watch came from my home.' I told Mr. Crump I lost the pocketbook going through the woods. . . . I finally told

them I took the watch from off the mantelpiece and lost the pocketbook as I was running. I did not tell them I got the pocketbook out of the man's pants in the house. What I told them that I confessed the watch was coming from my house, they told me all about it, said Mrs. Currie said the watch was on the mantelpiece, and after I made my confession to them, they said, 'George, there ain't but one thing, to plead guilty to the crime of the watch as the number compares with the one they have.' *I confessed this house burglary between Mr. Brisson and Mr. Crump. I confessed I went in Mr. Currie's house to Mr. Crump, that is the one I told. I confessed this burglary in the presence of this officer right here after he told me about it and in the presence of Mr. Brisson. . . . In this crime here, breaking in Mrs. Currie's house, I don't remember about them catching me. I have admitted it, and I didn't do it until they had caught me redhanded.*"

Earline Jacobs testified, in part: "George Johnson is my brother. He lives with me. We live in Pembroke. I remember him coming home on the night of July 27 of this year, Saturday night. He got home around 12:30 or 1:00 o'clock. I had been asleep. When I waked up I heard him stumbling in the room, and I said to him like this I said, 'Dee is that you,' we calls him Dee, I said, 'Dee, is that you, what ails you boy, why don't you go on to bed,' and about that time he said all right and I heard the bed cry when he got on it, you know how the bed do. He was high. There has been drinking in my family and with other members of my family. I drinks some. And Frank my husband and Howard Lee and a bunch of them be's drinking. I heard him stumbling around and I thought he was intoxicated."

The defendant made several exceptions and assignments of error and appealed to the Supreme Court. The material ones and necessary facts will be set forth in the opinion.

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

John S. Butler, Angus Medlin, and McLean & Stacy for defendant.

CLARKSON, J. The first question involved, as stated by defendant: Did the court err in allowing witnesses to testify to conversations with the chief prosecuting witness in the absence of defendant? We think not. As to this question, "It is addressed to the refusal of the court to sustain defendant's objection to conversations had between Mrs. Currie and the witnesses, Littleton and Sheriff Wade, in the absence of defendant. This was hearsay testimony and if it was offered as corroborative evidence, it should have been limited to that purpose by the court and not offered as substantive evidence, as it was."

Rules of Practice in the Supreme Court, part of Rule 21 (213 N. C., p. 821): "When testimony is admitted, not as substantive evidence, but in corroboration or contradiction, and that fact is stated by the court when it is admitted, it will not be ground for exception that the judge fails in his charge to again instruct the jury specially upon the nature of such evidence, unless his attention is called to the matter by a prayer for instruction; *nor will it be ground of exception that evidence competent for some purposes, but not for all, is admitted generally, unless the appellant asks, at the time of its admission, that its purpose shall be restricted.*" (Italics ours.)

In the corroborating testimony of Mrs. Robt. L. Littleton, the court instructed the jury: "Consider this, gentlemen, only for the purpose of corroborating Mrs. Currie, if you find it does corroborate her." The testimony of Mr. Littleton and Sheriff Wade, we think, comes under the latter part of the above rule. At least, we can see no prejudicial error. The exception and assignment of error cannot be sustained.

The defendant says in his brief: "However, defendant *relies mainly* upon what he contends to be the error of the court, set out in defendant's Exception 7. The jury, after deliberating for some time, returned to the courtroom and asked the court this direct question, 'If we find that he was intoxicated, can we return a verdict of second degree burglary?' The court replied, 'No, sir. I instructed you that you could only find the defendant guilty of burglary in the first degree, or guilty of attempt to commit burglary in the first degree, or guilty of breaking and entering otherwise than by burglarious, or guilty of an attempt to break and enter otherwise than burglariously.' The charge of the court, in response to the direct question of the jury, was tantamount to a nullification of section 4641, C. S., which says that 'When the crime charged in the bill of indictment is burglary in the first degree, the jury may render a verdict of guilty of burglary in the second degree, if they deem it proper so to do.'"

We give the entire record of what took place: "After some deliberation the jury returns to the courtroom and asks for further instructions by the court. By juror: 'We would like to know a little further with reference to this drunk or intoxicating phase of the law.' By the court: 'What further information as a matter of law do you desire?' (By juror): 'Now if he was intoxicated, what degree would he have to be intoxicated to be held responsible for his conduct?' By court: 'I think I instructed you that the degree of intoxication would have to be such as would make it impossible to form a felonious intent. That is a matter for the jury. In this case the defendant has testified and offered testimony which, he contends, tends to support him, that he was drunk to such an extent that he did not know where he was or what he was doing.

The State, on the other hand, has offered testimony tending to show that he was absolutely sober, so that that becomes—whether he was drunk enough—becomes a question of fact for the jury. Upon that defense it is incumbent upon the defendant—he pleads that as a defense—therefore, the burden is upon him to satisfy you, not beyond a reasonable doubt, nor by the greater weight of the testimony, but merely to satisfy you, that he was so drunk that he did not have the mental capacity to form a felonious intent, in this case the intent to commit either larceny or rape, after he got on the inside of the house, if he did get on the inside of the house. That is just about as clear and definite as I know how to make it. If he were so drunk that he could not form a criminal intent, a felonious intent, then he could not be guilty.' (By juror): 'If we find that he was intoxicated, can we return a verdict of second degree burglary?' (By the court): 'No, sir. I instructed you that you could only find the defendant guilty of burglary in the first degree, or guilty of attempt to commit burglary in the first degree, or guilty of breaking and entering otherwise than by burglarious, or guilty of an attempt to break and enter otherwise than burglariously. There is no evidence in this case to support a verdict of second degree burglary. Second degree burglary is where the breaking and entering with intent to commit a felony, is at a time when nobody is occupying the house. It is second degree burglary for a person to break and enter a residence of any kind, in the nighttime while the house is unoccupied. All of the evidence in this case shows that particular house was occupied and, therefore, it could not be burglary in the second degree. There is not a scintilla of evidence nor contention that the house was unoccupied at the time. I do not submit it to you upon the question of second degree burglary at all. Now, does that help you any? Does that throw any further light upon it? *You will just remember there are five verdicts in this case that you may render: You may find him guilty of burglary in the first degree, or you may find him guilty of an attempt to commit first degree burglary, or you may find him guilty of breaking and entering otherwise than burglariously, or you may find him guilty of an attempt to break and enter otherwise than burglariously, or you may find him not guilty.*' The jury returned a verdict of guilty of burglary in the first degree against defendant George A. Johnson."

When we consider this exception and assignment of error made by defendant, we give what the court below had theretofore charged. The court charged the jury so clearly and ably the law applicable to the facts, in some 20 pages, that defendant took no exception and assigned no error.

N. C. Code, 1939 (Michie), sec. 4232, is as follows: "There shall be two degrees in the crime of burglary as defined at the common law.

If the crime be committed in a dwelling-house, or in a room used as a sleeping apartment in any building, and any person is in actual occupation of any part of said dwelling-house or sleeping apartment at the time of the commission of such crime, it shall be burglary in the first degree. If such crime be committed in a dwelling-house or sleeping apartment not actually occupied by anyone at the time of the commission of the crime, or if it be committed in any house within the curtilage of a dwelling-house or in any building not a dwelling-house, but in which is a room used as a sleeping apartment and not actually occupied as such at the time of the commission of the crime, it shall be burglary in the second degree."

Section 4233: "Any person convicted, according to due course of law, of the crime of burglary in the first degree shall suffer death, and anyone so convicted of burglary in the second degree shall suffer imprisonment in the State's Prison for life, or for a term of years, in the discretion of the court."

The court charged, after stating the crime as set forth in the bill of indictment: "Burglary at the common law was the breaking and entering of the mansion house or dwelling house of another in the nighttime with the intent to commit a felony therein. That was the definition of burglary under the law of this State until the year 1889, when by legislative enactment the crime was divided into two degrees, first and second. Under our statute thus dividing burglary into two degrees, burglary in the first degree is where the crime is committed in a dwelling house or in a room used as a sleeping apartment in any building and any person is in the actual occupation of any part of said dwelling or sleeping apartment at the time of the commission of such crime. If such crime be committed in a dwelling house or sleeping apartment not actually occupied by anyone at the time of the commission of the crime, or if it be committed in any house within the curtilage of a dwelling house, or in any building, but in which a room is used as a sleeping apartment and not actually occupied as such at the time of the commission of the crime, it shall be burglary in the second degree. We have a statute in this State making it a crime to break and enter a dwelling otherwise than burglariously, and that statute reads as follows: 'If any person with intent to commit a felony or other infamous crime therein shall break or enter the dwelling house of another otherwise than by a burglarious breaking, he shall be guilty of a felony.' (N. C. Code, 1939 [Michie], sec. 4235). The Supreme Court has held in a number of cases that where the evidence is sufficient to justify it upon the bill of indictment charging a defendant with burglary in the first degree, it is the duty and mandatory upon the court to submit to the jury the question of whether or not the defendant is guilty of breaking and entering

the dwelling house in question at the time and place mentioned in the bill of indictment otherwise than burglariously, and that it is error for the court to fail or refuse to do so. So that, under the evidence in this case, the court charges you, gentlemen, that you may render one of several verdicts according as you may find the facts to be under the law that will be given to you in the course of the charge by the court for your guidance. *You may find the defendant guilty of burglary in the first degree, or not guilty; you may find the defendant guilty of an attempt to commit burglary in the first degree, or not guilty; you may find the defendant guilty of breaking and entering of the residence of Mr. Currie otherwise than by a burglarious breaking and entering, or not guilty; or you may find him guilty of an attempt to break and enter otherwise than burglariously the residence of Mr. Currie; or you may render a verdict of not guilty.*" In the charge the court below followed the law as laid down in this jurisdiction. He charged the law as theretofore written and reiterated in the recent case of *S. v. Morris,* 215 N. C., 552 (553), as follows: "The court instructed the jury that, under the evidence, only one of two verdicts might be rendered: 'That is, you can find this defendant guilty of burglary in the first degree or not guilty.' Exception. All other portions of the charge are admitted to be correct. In apt time, the defendant requested the following special instruction: 'Our law provides (C. S., 4641) that when the crime charged in the bill of indictment is burglary in the first degree, the jury may render a verdict of guilty of burglary in the second degree if they deem it proper to do so and I instruct you that you have the right to return a verdict of guilty of burglary in the second degree.' Instruction refused; exception. Verdict: 'Guilty as charged.' Judgment: Death by asphyxiation. The defendant appeals, assigning errors. . . . (pp. 555-556). The only question debated on argument and in brief is whether the court committed error in refusing to submit the case to the jury on the charge of burglary in the second degree as requested by the prisoner in his prayer for special instruction. The authorities answer in the negative. *S. v. Spain,* 201 N. C., 571, 160 S. E., 825; *S. v. Ratcliff,* 199 N. C., 9, 153 S. E., 605. It is provided by C. S., 4641, that upon an indictment for burglary in the first degree, the jury may render a verdict of burglary in the second degree 'if they deem it proper so to do.' But this, according to our previous decisions, does not, as a matter of law, authorize the trial court to instruct the jury that such a verdict may be rendered independently of all the evidence. *S. v. Johnston,* 119 N. C., 883, 26 S. E., 163; *S. v. Alston,* 113 N. C., 666, 18 S. E., 692; *S. v. Fleming,* 107 N. C., 905, 12 S. E., 131. It has been said, however, that in such a case, a verdict of burglary in the second degree, if returned by the jury, would be permitted to stand, notwith-

standing evidence of occupancy of the dwelling house at the time of the alleged offense. *S. v. Smith,* 201 N. C., 494, 160 S. E., 577. And this upon the principle that the verdict, being favorable to the prisoner may not, for this reason, be successfully challenged by him. *S. v. Alston, supra.* Here, all the evidence establishes the actual occupation of the dwelling house at the time of the offense. *S. v. McKnight,* 111 N. C., 690, 16 S. E., 319. This precluded the court from submitting the case to the jury on the charge of burglary in the second degree as defined by C. S., 4332. *S. v. Spain, supra,* and cases there cited. Speaking to the question in *S. v. Ratcliff, supra,* it was said: 'There is no evidence on the present record of burglary in the second degree as defined by C. S., 4232, unless the jury disbelieve the evidence relating to occupancy. *S. v. Alston,* 113 N. C., 666, 18 S. E., 692. All the evidence tends to show that the dwelling house was actually occupied at the time of the alleged offense. Hence, under these conditions, according to our previous decisions, an instruction that the jury may render a verdict of burglary in the second degree, "if they deem it proper to do so" (C. S., 4641), would be erroneous, though a verdict of burglary in the second degree, if returned by the jury, would be permitted to stand, such a verdict, under the circumstances, being regarded as favorable to the prisoner. *S. v. Fleming, supra; S. v. Alston, supra.* This may seem somewhat illogical, in view of C. S., 4640 and 4641, nevertheless it is firmly established by a number of decisions.' " We think this case is authority for the additional charge after the jurors' request, and the exception and assignment of error made by defendant cannot be sustained. The *Morris case, supra,* is approved in all particulars in the last case on the subject. *S. v. Chambers, ante,* 442, filed 7 November, 1940.

The court below correctly charged the jury as to the rights of defendant to satisfy the jury "that at that time he was too drunk, too deeply under the influence of intoxicants, to make it possible to form a felonious intent to commit a felony therein, it would be your duty to render a verdict of not guilty of burglary in the first degree," etc. The court had theretofore in the charge followed the decisions of this Court when drunkenness was a defense for crime. This, and no other part of the charge, was excepted to. The evidence, direct and circumstantial, which we fully set out, is overwhelming that defendant committed the crime. He himself said: "In this crime here, breaking in Mrs. Currie's house, I don't remember about them catching me. I have admitted it, and I didn't do it until after they had caught me redhanded."

It appears from the record that defendant's sole defense was based on drunkenness. He had the benefit of a clear and correct charge on that aspect. The evidence disclosed that defendant had a fair and impartial

trial from a judge who carefully followed the decisions of this Court on every aspect of the case and applied the law applicable to the facts.

The law as stated in this opinion has been the well-settled law in this State since *S. v. Fleming,* 107 N. C., 905 (1890)—for half a century—and has been followed ever since in numerous decisions, with no modification or equivocation by any member of this Court. Public Laws of 1889, ch. 434, was construed in that opinion. At p. 909, in a unanimous opinion of the Court, it was written: "We do not understand the provisions of the statute that, on an indictment for burglary in the first degree, the jury can return a verdict of burglary in the second degree; 'if they deem it proper so to do,' to make such verdict independent of all evidence. The jury are sworn to find the truth of the charge, and the statute does not give them a discretion against the obligation of their oaths. The meaning of this provision evidently is to empower the jury to return a verdict of guilty of burglary in the second degree upon a trial for burglary in the first degree, if they deem it proper so to do from the evidence, and to be the truth of the matter."

The defendant admitted that he was caught "redhanded," breaking and entering a home after midnight and attempting to commit rape and did commit larceny. The State's evidence was to the effect that he was "perfectly sober" and his actions indicated it. In the breaking and entering he showed intelligent care in the manner of his approach.

For the reasons given, we find

No error.

DEVIN, J., concurring: This case was tried below in strict accord with the uniform decisions of this Court. The evidence was fully sufficient to warrant the verdict. The dwelling house of the prosecuting witness, then and there occupied by him and his wife, was broken and entered in the nighttime (about 3:00 a.m.) by the defendant, with intent to commit a felony. Property was stolen and an assault attempted on the person of prosecutor's wife. The defendant was positively identified, the stolen property found in his possession, and he confessed his guilt.

The defendant excepted to the failure of the presiding judge to instruct the jury that they could return a verdict of guilty of burglary in the second degree. The statute dividing the crime of burglary into two degrees, C. S., 4232, provides, in effect, that if the crime of burglary, as defined at common law, be committed "in a dwelling-house not actually occupied by anyone at the time of the commission of the crime . . . it shall be burglary in the second degree." Thus was created a separate and distinct criminal offense.

By C. S., 4641, it is provided that when the indictment is for burglary in the first degree, "the jury may render a verdict of guilty of burglary

in the second degree if they deem it proper so to do." This statute, sec. 3, ch. 434, Public Laws 1889, was interpreted by this Court in 1890, shortly after its enactment, in *S. v. Fleming,* 107 N. C., 905, 12 S. E., 131, where, in an opinion by *Chief Justice Clark,* it was said: "The meaning of this provision evidently is to empower the jury to return a verdict of guilty of burglary in the second degree upon a trial for burglary in the first degree, if they deem it proper so to do from the evidence, and to be the truth of the matter." The Court did not interpret the statute as authorizing an instruction to the jurors that they might find contrary to the evidence in the case and contrary to their oaths as jurors "to render a true verdict according to the evidence."

This interpretation of this statute has been adhered to without exception down to and including *S. v. Fain,* 216 N. C., 157, 4 S. E. (2d), 319, where the same point was raised and it was said, "The pertinent decisions are to the effect that this statute (C. S., 4641) does not, as a matter of law, require or authorize the trial court to instruct the jury that such a verdict may be rendered independently of all the evidence." And in *S. v. Morris,* 215 N. C., 552, 2 S. E. (2d), 554, it was held by a unanimous Court that the trial judge committed no error in refusing to instruct the jury in the exact language of section 4641.

But the defendant relies mainly on his exception to the statement of the judge in reference to a question by a member of the jury. The question was, "If we find that he was intoxicated, can we return a verdict of second degree burglary?" The answer was, "No, sir. . . . There is no evidence in this case to support a verdict of second degree burglary. Second degree burglary is where the breaking and entering with intent to commit a felony is at a time when nobody is occupying the house."

The significance of this colloquy is understood when it is remembered the only defense of the defendant was that he was intoxicated and didn't know what he was doing. In his charge, and in response to further inquiry by the jury, the judge correctly and fully instructed the jury upon the law relating to intoxication as affecting responsibility for crime. He also instructed the jury as to possible verdicts of attempt to commit burglary in the first degree, and as to nonburglarious breaking and entering. But he distinctly, and I think properly, instructed them that there was no evidence of burglary in the second degree, for the very patent reason that the house was in fact occupied at the time of the breaking and entering, as shown by all the evidence.

I think the defendant was convicted according to law, and that there was no error in the trial.

SCHENCK, J., joins in this opinion.

STACY, C. J., dissenting: The issues here involved are fundamental. The prisoner avers that a statute stands between him and the verdict finally rendered by the jury. Its application is invoked. What is the answer?

Our previous decisions are to the effect, that on an indictment for burglary in the first degree, the *defendant* is not entitled as a matter of right to have the case submitted to the jury on the charge of burglary in the second degree unless there is evidence to support the milder verdict. C. S., 4640. *S. v. Johnston,* 119 N. C., 883, 26 S. E., 163; *S. v. Cox,* 201 N. C., 357, 160 S. E., 358; *S. v. Morris,* 215 N. C., 552, 2 S. E. (2d), 554. This is far from saying, however, that in such a case, the *jury* may not render a verdict of burglary in the second degree "if they deem it proper so to do." Both the legislative will as expressed in the statute, C. S., 4641, and the pertinent decisions on the subject are to the contrary. *S. v. Alston,* 113 N. C., 666, 18 S. E., 692; *S. v. Fleming,* 107 N. C., 905, 12 S. E., 131. Silence and misdirection are not the same, either in meaning or in effect.

Indeed, it may be doubted whether in any conviction of burglary in the first degree the evidence would not also support a charge of burglary in the second degree, considering the differences between the two offenses. *S. v. Alston, supra; S. v. Ratcliff,* 199 N. C., 9, 153 S. E., 605. The statute dividing burglary into two degrees, first and second, and the above section are all parts of the same act, ch. 434, Public Laws 1889. C. S., 4232 and 4233; *S. v. Foster,* 129 N. C., 704, 40 S. E., 209. But however this may be, to say the statute is applicable only when the character of the house, or its occupancy, or both, are debatable issues is to ignore its terms altogether. When there is evidence of a milder verdict, C. S., 4640, applies, and there is then no need to invoke the provisions of C. S., 4641.

What the jury here wanted to know was whether it could return a verdict of burglary in the second degree. The court answered in effect, "No, you are not permitted to render such a verdict on the evidence in the case." This was erroneous. The rights of the defendant in the first instance and the prerogatives of the jury are perhaps not the same, albeit they may in the end become one and the same. The jury, upon its own inquiry, was entitled to know the provisions of the statute and its prerogatives in the matter. *Ita lex scripta est.* Had the jury returned a verdict of burglary in the second degree without making the inquiry, it would have been legally acceptable. *S. v. Alston, supra; S. v. Fleming, supra.* Yet because of the inquiry, the jury is denied the advisability which the General Assembly has said it shall have.

Furthermore, if we are to adhere to the significance sometimes imputed to C. S., 564, the court's reply would seem to carry an expression

of opinion that the character and occupancy of the house had been sufficiently established. *S. v. Starnes, ante,* 539.

A jury is not required to assign any reason for its verdict. Nor is it obliged to be logical. It ill behooves the Court, in its present illogical position, to require consistency of the jury.

The verdict which the jury sought to render was within the terms of the statute, C. S., 4641, which provides that "When the crime charged in the bill of indictment is burglary in the first degree, the jury may render a verdict of guilty of burglary in the second degree if they deem it proper so to do." Hence, the overshadowing question here presented is whether a statute, which has never been declared unconstitutional and is not now challenged, can be set at naught or disregarded in a capital case, when its provisions are duly and appropriately invoked. My vote is for a negative answer.

BARNHILL, J., dissenting: While I concur in what *Stacy, C. J.,* says in his dissenting opinion, the question here presented is of such import that I feel impelled to comment further. There is more involved than the life of the defendant, vital as that may be. This Court, in *S. v. Johnston,* 119 N. C., 883, to a large extent, emasculated the statute under consideration. Now it proposes to reduce it to a mere shadow, without life, meaning or substance. In so doing it ventures into the field of legislation and invades the province of the General Assembly. This we should painstakingly refrain from doing.

In applying the act this Court originally held—with a logic I do not desire to attempt to defend—that, in the absence of evidence tending to show burglary in the second degree, the judge is not required to instruct a jury that it may return a verdict of burglary in the second degree "if they deem it proper so to do," *S. v. Johnston, supra.* This Court has since followed that interpretation of the statute to the end that there may be a reasonable degree of certainty in the law.

But there is a decided difference between a failure to charge and a positive instruction in direct contradiction of the statute. They are as alike as chalk and cheese. The former decisions are not in point or controlling. And, in arriving at a proper conclusion, we are unhampered by precedent.

Formerly, in any prosecution under a bill charging a capital felony, the jury was required, upon the requisite proof and finding, to return a verdict which made the death penalty compulsory. The Legislature saw fit to change this rule in cases where burglary in the first degree is charged. Now, under C. S., 4641, the jury may return either one of two verdicts *on the same—not different—proof and finding.* Being fully satisfied of the existence of every essential element necessary to

constitute the crime designated as burglary in the first degree, it may yet "if they deem it wise so to do" elect to return a verdict of burglary in the second degree. This is the law as written by the Legislature. Our province is to interpret and apply the law—not to veto or to nullify.

What motivates the jury and causes it to deem it wise to return the milder verdict is immaterial. It may be a desire to be merciful, or there may be some lingering doubt as to some feature of the evidence, or a repulsion against capital punishment, or as here, a mitigating circumstance which, while not sufficient to warrant complete exculpation, tends to lessen the gravity of the offense. *Non constat* the existence of every essential element of burglary in the first degree, a verdict of guilty of burglary in the second degree is lawful. It being the law, the jury had a right, at least upon its own request for information, to know its authority.

While this Court has properly and repeatedly disapproved the theory that the degree of guilt may be determined arbitrarily in the discretion of the jury without regard to the facts in evidence, there was here no attempt on the part of the jury to exercise discretion against the obligation of its oath. It is expressly authorized, upon the findings of fact which constitute burglary in the first degree as defined in the statute, to return a verdict of burglary in the second degree. Thus the jury was seeking to return a verdict expressly authorized by statute upon the facts found.

Nor can the charge be sustained on the theory that there was no evidence to support a verdict of burglary in the second degree. To prove burglary in the first degree, of necessity, the State must first prove all the essential elements of burglary in the second degree. Thus, it is no more logical to hold that upon a bill of indictment charging murder in the first degree the jury may return a verdict of guilty of murder in the second degree than it is to say that upon an indictment of this type the jury may return a verdict of burglary in the second degree. Furthermore, how may it be said that the jury was not warranted in returning a verdict of burglary in the second degree and at the same time to hold that it was authorized under its oath to return a verdict of guilty of an attempt to commit the crime of burglary, thus finding that the defendant did not enter the dwelling house; or a verdict of a non-burglarious breaking, thus finding that the building was not a dwelling?

The case comes to this: the jury found facts which constituted the crime of burglary in the first degree as defined by the statute. It did not desire to return a verdict which entailed the death penalty. Neither did it wish to return a verdict of one of the lesser degrees defined by the court and thus stultify itself. It sought information as to its rights and in reply to its inquiry received instructions from the court in direct

contradiction of the statute. Pursuant to this charge, upon the facts found by it, the jury returned the verdict which appears of record.

That this charge was harmful is apparent. It will cost the defendant his life. If it was likewise erroneous, as I contend that it was, the defendant should be awarded a new trial.

WINBORNE, J., concurs in the dissents of *Stacy, C. J.*, and *Barnhill, J.*, and adds the following:

Are the courts at liberty to disregard the provisions of a statute when its provisions are properly invoked? No, but in my opinion, the decision in this case has the effect of doing that very thing.

It is noted that C. S., 4641, as originally enacted, was section 3 of chapter 434 of Public Laws of 1889, entitled "An act to amend the law of burglary." Now, in order to ascertain what the Legislature intended by that section, let us see the act, and the situation at the time.

When this act was proposed the Legislature was faced with the law with respect to burglary as it then existed: (1) The common law crime of burglary, and (2) the statutory crime, that is, the statute which provides that "If any person shall enter the dwelling house of another with intent to commit any felony or other infamous crime therein, or being in such dwelling house, shall commit any felony or other infamous crime therein, and shall, in either case, break out of said dwelling house, in the nighttime, such person shall be guilty of burglary." The Code of North Carolina, 1883, sec. 995.

And, as a punishment, the law then provided that: "Any person convicted, according to due course of law, of the crime of burglary, shall suffer death." The Code of N. C., 1883, sec. 994.

Confronted with the law that any conviction of burglary carried the death penalty, the Legislature of 1889 passed the act, chapter 434, which reads as follows:

"Section 1. That there shall be two degrees in the crime of burglary as defined at the common law and in section nine hundred and ninety-five of the Code of North Carolina. If the crime be committed in a dwelling house, or in a room used as a sleeping apartment in any building, and any person is in the actual occupation of any part of said dwelling house or sleeping apartment at the time of the commission of said crime, it shall be burglary in the first degree. Second. If the said crime be committed in a dwelling house or sleeping apartment not actually occupied by anyone at the time of the commission of the crime, or if it be committed in any house within the curtilage of a dwelling house or in any building not a dwelling house, but in which is a room used as a sleeping apartment and not actually occupied as such at the

time of the commission of said crime, it shall be burglary in the second degree.

"Section 2. That section nine hundred and ninety-four of the Code of North Carolina be amended so as to read as follows: "Any person convicted, according to due course of law, of the crime of burglary in the first degree shall suffer death; and anyone so convicted of burglary in the second degree shall suffer imprisonment in the State's Prison for life, or for a term of years, in the discretion of the court."

"Section 3. That when the crime charged in the bill of indictment is burglary in the first degree, the jury may render a verdict of guilty of burglary in the second degree *if they deem it proper so to do.*"

These several sections of this act remained intact until the adoption of the Revisal of 1905, when sections 1 and 2 became parts of chapter 81, entitled "Crimes," and were designated as sections 3331 and 3330, respectively. Upon the adoption of the Consolidated Statutes of North Carolina, 1919, these sections were incorporated in and as a part of chapter 82, entitled "Crimes and Punishments," and are now Consolidated Statutes, sections 4232 and 4233.

But in the Revisal of 1905, section 3 of the said Act of 1889 was transferred to and became a part of chapter 80 on "Criminal Procedure," pertaining to trials in the Superior Court, and was designated as section 3270, and in like manner became a part of C. S. of North Carolina, 1919, on "Criminal Procedure," chapter 83, section 4641.

For more than fifty years this statute, now C. S., 4641, has stood in the books in bold relief. The language of it is plain and free from ambiguity and expresses a single, definite and sensible meaning, a meaning which under the settled law in this State is conclusively presumed to be the one intended by the Legislature. *Asbury v. Albemarle,* 162 N. C., 247, 78 S. E., 146; *Mfg. Co. v. Turnage,* 183 N. C., 137, 110 S. E., 779; 44 L. R. A., N. S., 1189; *Motor Co. v. Maxwell,* 210 N. C., 725, 188 S. E., 389.

Defendants in other cases have undertaken in vain as a matter of right to invoke its provisions, but not until the present case has the jury in effect asked if there is such a provision in the law. I think the jury is entitled to know it.

Here the dual inquiry by the jury on its return to the courtroom for further instruction is significant. The jury wished to know, first, to what extent must the defendant have been intoxicated before it could find him to be not responsible for his acts, that is, not guilty. And, then, if the jury should find that he were not intoxicated to that extent, but did find that he was in fact intoxicated at the time of the commission of the crime, could it return a verdict of burglary in the second degree.

The inquiry is tantamount to the jury saying to the court: "Is there a statute or provision of law whereby under the circumstances of this case we could render a verdict of second degree burglary if we deem it proper so to do?" Never before has this Court considered a like question from the jury.

It is apparent that the jury was groping to find a way within the law under the circumstances of this case for a verdict which would save the life of the defendant. The Legislature has provided it in C. S., 4641.

It is argued here with logic that if the court below was correct in telling the jury that it positively could not do what the statute says it could do, the court is in the anomalous position of saying that it is all right for a jury to exercise the right given by the statute provided it does not know the right exists, but when the jury asks the court if that right exists, it is proper for the court in reply to use language which denies existence of the statute.

This pertinent question is also forcefully presented: "Supposing the jury, in asking the court the question which it did, had used just a little different language, but meaning the same thing, and have said to the court: 'Does not section 4641 of C. S. of North Carolina provide that when the crime charged in the bill of indictment is burglary in the first degree, the jury may render a verdict of burglary in the second degree, if they deem it proper so to do?' and supposing the court had answered that question, 'No, sir'; would he have committed reversible error?" I hold to the view that to let such answer stand as the law removes from the statute the last vestige of meaning, and in effect nullifies it.

"No person ought to be . . . deprived of his life . . . but by the law of the land." Const. of North Carolina, Art. I, sec. 17.

STATE v. FRED E. DALE, ALIAS JIMMY DALE.

(Filed 20 December, 1940.)

1. Criminal Law §§ 7, 11: Conspiracy § 1—

A criminal conspiracy is a felony and therefore no statute of limitations bars a prosecution therefor.

2. Indictment § 8: Conspiracy § 4: False Pretenses § 2—

The indictment charged defendants with conspiracy to defraud by means of false pretense and with obtaining money by false pretense. *Held:* The charge of conspiracy does not merge with the statutory offense of obtaining money by false pretense, and the indictment charges two separate offenses and is good.

3. Indictment § 11: Conspiracy § 4: False Pretenses § 2—

While ordinarily an indictment charging two separate offenses in one count is bad for duplicity, a charge of conspiracy to defraud by false pretense and a charge of obtaining money by means of false pretense in consummation of the conspiracy may be joined in one count, since the charges grow out of a single transaction or series of transactions relating to a single common design, and the denial of defendant's motion to quash and the denial of his motion to compel the solicitor to elect between the counts, are properly refused.

4. Criminal Law § 78e—

Ordinarily, an exception to the charge will be considered only in the light of the stated ground of exception.

5. Indictment § 21—Defendant held not to have properly presented contention that he could not be convicted of both crimes charged in indictment.

Defendants were charged with conspiracy to defraud by means of false pretense and with obtaining money by means of false pretense. A general verdict of guilty was rendered, and appealing defendant contended that he had been prejudiced in being held accountable for both crimes charged in the indictment. *Held:* Defendant should have presented his contention by submitting prayers for special instructions or by objecting to instructions given, or after verdict was entered, he could have caused inquiry to be made as to how the jurors stood upon each of the counts, and his objection to instructions for that the court did not separately charge the law as to each of the counts does not properly present his contention that he could not be held accountable for both crimes.

6. Conspiracy § 4—

An indictment charging a conspiracy to obtain money by false pretense need not allege that the misrepresentations were such as to cause or induce the payment of money, since an indictment for conspiracy need not define the crime, which is the subject of the conspiracy, with legal and technical accuracy.

7. False Pretenses § 2—

Where the false representations alleged are such as would naturally result in extorting or inducing a man to give up money, in this case that the prosecuting witness was the father of a child by the *feme* defendant, the failure of the indictment to allege a causal relation between the representation and the obtaining of the money is not fatal.

8. Indictment § 11—

An indictment which alleges sufficient matter to enable the court to proceed to judgment will not be quashed for duplicity and indefiniteness, or for mere informality or refinement. C. S., 4623.

9. Conspiracy § 5—

When a *prima facie* case of conspiracy is made out, the acts and declarations of each conspirator in furtherance of the common purpose are admissible against all, and the order of proof within the limitations of the rule rests largely in the discretion of the trial court.

STATE *v.* DALE.

APPEAL by defendant from *Johnston, J.,* at 16 August, 1940, Extra Term, of MECKLENBURG. No error.

The appealing defendant, Fred E. Dale, *alias* Jimmy Dale, Mrs. Fred E. Dale, *alias* Rene Duffy, and Dr. W. E. Wishart, were tried at the July Term, 1940, of Mecklenburg Superior Court, upon a bill of indictment reading as follows:

"The Jurors for the State upon Their Oath Present, That: Fred E. Dale, *alias* Jimmy Dale, Mrs. Fred E. Dale, *alias* Rene Duffy, and Dr. W. E. Wishart, late of the County of Mecklenburg, on the 1st day of April, 1938, with force and arms, at and in the County aforesaid unlawfully, willfully and feloniously, conspired, confederated and agreed together to knowingly, devisingly, and intending to cheat and defraud Rufus Bryant of his goods, moneys, chattels and property, and in furtherance of such unlawful, willful and felonious conspiracy, did then and there unlawfully, willfully and feloniously, knowingly, devising and intending to cheat and defraud Rufus Bryant of his goods, chattels and property, did then and there unlawfully, willfully and feloniously and designedly falsely pretend to Rufus Bryant, knowingly, that Mrs. Fred E. Dale, *alias* Rene Duffy, was pregnant and was going to become a mother of a baby and that Rufus Bryant was the father of the child with which she was pregnant and of which she was to become a mother; whereas, in truth and fact the said Mrs. Fred E. Dale, *alias* Rene Duffy, was not pregnant and that Rufus Bryant was not the father of the child of which she claimed to be pregnant, and that she was not to become the mother of a baby, as they, the said Fred E. Dale, *alias* Jimmy Dale, Mrs. Fred E. Dale, *alias* Rene Duffy, and Dr. W. E. Wishart, then and there well knew to be false, by color and means of which said false pretense and pretenses they, the said Fred E. Dale, *alias* Jimmy Dale, Mrs. Fred E. Dale, *alias* Rene Duffy, and Dr. W. E. Wishart did then and there unlawfully, willfully, feloniously, knowingly and designedly obtain from the said Rufus Bryant, the sum of $2,000.00 in money, being then and there the property of the said Rufus Bryant, with intent to cheat and defraud the said Rufus Bryant and did cheat and defraud the said Rufus Bryant to the great damage of the said Rufus Bryant, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State."

Before pleading to the bill of indictment the defendant, through his counsel, moved to quash the bill of indictment, filing a written motion as follows:

"The defendants, and each of them, move the court, in apt time, to quash the indictment in this action, for that upon its face it is void as a matter of law, in that:

"1. It charges a crime under the common law, that is classified under the common law as a misdemeanor, and the indictment was found and returned by the grand jury more than two years after the alleged commission thereof, contrary to the statute.

"2. It alleges the consummation of the alleged conspiracy and the commission of a statutory crime, and the alleged conspiracy merges as a matter of law into the statutory crime.

"Wherefore, defendants pray that the indictment be declared void and quashed.

"This July 16, 1940."

Subsequently, a "Supplement or Addition to Motion to Quash" was filed, as follows:

"The defendants, and each of them, by way of supplement or addition to motion to quash of July 16, 1940, allege:

"3. That the count in the bill of indictment charges two separate, independent and distinct offenses, in that the first part of the count charges a conspiracy to defraud one Bryant, and the latter part of the count charges the crime of cheating and defrauding the said Bryant, and the said count is fatally defective for duplicity, and in the event that the State fails to elect the crime upon which it is proceeding against the defendants, the defendants are entitled to have the bill of indictment quashed."

These motions in all of their aspects were denied and the defendant excepted.

The defendant then moved, *ore tenus,* to quash the bill of indictment upon the ground that on its face it does not allege any criminal offense. This motion was also denied and defendant again excepted.

Thereupon the defendant moved that the court require the solicitor to elect whether he would proceed on the apparent alleged conspiracy or on the apparent alleged obtaining of money under false pretense. The motion was denied and defendant excepted.

The trial proceeded, and the evidence and its inferences taken in the light most favorable to the State, stated in narrative form and summarized, may be presented as follows:

Betty Austin, a witness for the State, testified that she had begun to date men in hotels for hire in Richmond, Va., and that she continued that practice for several weeks there, then came to Raleigh, North Carolina, for the same purpose, in May, 1938, and soon thereafter filled a date with Jimmy Dale. She went with Dale from Raleigh to Charlotte and then out to his home, 1548 Duckworth Avenue, and met his wife, whose nickname in the home was "Sunny" Dale, and a girl there known as "Boots." She remained in the Dale home about a week, during which time she filled dates with men in hotels and apartments, where

she was carried by Jimmy Dale. After an absence from Charlotte of two or three months, she returned some time during the month of August. At that time Jimmy, Sunny, Boots, and a maid were at the Duckworth Avenue house. After witness had been there a couple of days the three of them, that is, Jimmy, Sunny, and the witness, were sitting together in the living room and witness asked Sunny Dale why she was gaining in weight and the reply was that she was going to have a baby. When witness told her that she was under the impression that she could not have children and that she had told her that when she was there before, Sunny Dale told her she was not really going to have a child; that she had had an operation performed to keep her from giving birth to children; that the operation had been performed by Dr. Wishart. "She said she wasn't going to have it herself, but there was an unmarried girl that was going to have a child, and that they were going to take the baby." Sunny Dale said "that she was going to say that it belonged to this old farmer (meaning Rufus Bryant), and the old farmer thought that she was going to have this child." "She didn't tell me the name of the farmer except that his name was Rufus. Both she and Dale talked about it any time during the day or the evening—about how they were to have this baby and how they were going to get it. I asked her how in the world she was going to tell this farmer she was going to have a baby if she couldn't, and if she wasn't going to see him any more before the child was born, and she naturally was inclined to be stout and she really gained. She looked like she could have been pregnant and she said that she was going to tell the farmer that the child was an eight-months baby. I was there about three weeks then, and I was there when the child was born."

Witness further testified that before the baby was born Sunny Dale, Jimmy and the witness went up to Charlotte to get a crib from some second-hand furniture dealer there. Dale left them parked in the street and went to see about the baby bed, and while they were there on the street Dr. Wishart came by and spoke to them. Sunny Dale asked Dr. Wishart "when the child was going to be born and he said he was expecting it at any time; that he had examined the mother of the child, and was expecting the child to be born any time. He asked her what she expected to do with it if the old farmer didn't take care of it, and she said she would leave it on some rich man's doorstep if she couldn't take care of it. Dale was not at the car when this was said."

Before the birth of the child the witness asked Sunny how she was going to have this child in the hospital, and supposing this farmer came to see her. She said the girl was going in the hospital under the name of Rene Duffy, and that was how the child was going to be born, and if he came to the hospital he wasn't going to be allowed to see her.

Dale and his wife had an ornamental deer on the mantelpiece on Duckworth Avenue. "Sunny called the deer 'Rufus,' and Mr. Dale said, 'Don't call my deer anything like that.'"

After the mother of the child went to the hospital the birth of the child was announced in the paper under the name of Mrs. Eugene Duffy. Sunny said the name was wrong and called the paper and tried to correct the name, and it came out again as Gene Duffy, when it was supposed to be Rene Duffy.

During her second stay in Charlotte the witness continued to go to hotels, Dale taking her there. He also took Boots when she was there and Sunny when she was well. She had a short sick spell from overeating. Also she had gotten both of her eyes blacked from going out on a date with a couple of fellows who were drinking. After the baby was born she began dieting and was really sick in bed for three days.

"Sunny" talked to witness about Rufus Bryant quite a bit, calling him "the old farmer," and when the child was born Bryant sent her some money. Jimmy also talked about it—how she met this farmer in a hotel, and the first time she met him he had given her $90.00 and at another time had given her $600.00 and they had bought the home on Duckworth Avenue and a Terraplane automobile. Witness said that "Sunny" told her the first time she met him in the hotel he asked her why she was doing this way and she told him her mother was ill and she needed the money for her mother; that he believed her and told her he would help her and gave her $90.00 then, and she stayed with him a while and went back to her and Jimmy's room and then came back and spent the rest of the night with him. At different times Mrs. Dale told the witness, in the presence of Jimmy Dale, about going to see Bryant near Wilson.

Witness was in a hotel the night the baby was born and Jimmy Dale came for her, told her the baby was born and that it was a boy. When witness went home Dale took her straight out to their house and Sunny asked her how much money she had. Witness told her and Sunny said: "Look what I've done, and I haven't even been out of the house," and she showed witness a $50.00 bill. Witness picked it up and Jimmy took it and put it in his pocket. Mrs Dale said she had gotten this $50.00 from Rufus.

On witness' second stay in Charlotte Jimmy Dale wanted her to go down to the tobacco section and get connected up with some old farmer, and wanted her to buy the vacant lot next to him, if she could get connected up with someone like that, so that whether or not she made any money at home she would still have money coming in all the time. "He said if I could get hold of an old farmer like Sunny had, I would be all right."

Before the baby was born, Mrs. Dale and Jimmy Dale talked over the whole matter of how the baby was to be obtained from the hospital. "When we were sitting there doing nothing we would usually all of us be together, and they both talked about it. I asked them how they were going to get the baby from the hospital. They said that Dr. Wishart was going to help them get the baby." Witness was at the Mayfair Hotel the night they went after the baby and when they brought it back Mrs. Dale called witness up to her room. "The bellboys always told them what room we went to and they always knew where to keep in contact with us." Mrs. Dale wanted witness to come home. "I was supposed to spend the night in the Mayfair Hotel, and so she kept on calling, and I wouldn't go home and Jimmy come after me. So when Jimmy came after me I went home and the baby was there, and the next day I asked her how they got the baby out of the hospital, and she said that she and Jimmy stayed on the elevator and waited and that Dr. Wishart brought the baby and told the officials in the hospital that the baby was going home with some relatives and that the mother was going home with some of the rest of her relatives."

Witness saw letters addressed to Rene Duffy, which Mrs. Dale said were from Rufus. Both Dale and Mrs. Dale read the letters.

After a short absence from Charlotte, witness returned and went out to the home of "Sunny," after having been advised that the latter was alone with the maid and the baby. After drinking a lot of beer, witness did not remember anything until she woke up screaming, with both of her arms cut. She said Sunny and the maid held her and tried to give her some kind of a capsule. She and Sunny and the maid had a struggle and they finally turned her loose and Sunny told her to go to the hotel and act as if nothing had happened, and that Dale would come and get her in the morning. Instead of going to the hotel, witness went to the police station, where she stayed three days. There she talked to Chief of Police West, to some men in the F. B. I., and to Mrs. Patterson and Mr. Littlejohn. There witness made and signed an affidavit which was put in the evidence in corroboration of this witness' testimony.

While witness was at the police station, and after she had made the affidavits, Mr. H. L. Strickland, an attorney, came to see her. One of her arms had become infected and Dr. Ray came to see her and told her she would have to go to the hospital to get her temperature down. Strickland took her but did not take her direct to the hospital, but, on the contrary, to his office in the Law Building, where Dr. Wishart and Sunny were. In their presence, Strickland proceeded to talk to her about the statement she had made, told her that it wasn't any good, and that she could say she was intoxicated when she was arrested and had signed the statement and there would be nothing done about it. That

there was nothing to it, and witness told him she was not going to sign anything then. She remained in Strickland's office about thirty-five or forty-five minutes. Strickland then took her to the hospital, where she remained two days. While at the hospital Mr. Strickland gave her a dollar with which to buy cigarettes, coming to see her twice each day and trying to get her to sign a statement, which witness refused.

Witness borrowed money on her watch to buy a bus ticket to her home near Evansville, Ind. Witness testified that when she got to the bus station "Lawyer Strickland walked up with some papers in his hand and some money and he wanted to know why I didn't wait at the hospital till he came by for me to take me to the bus . . . he had some papers in his hand and he said if I would sign these papers he would pay my way home and make it worth my while if I would sign these papers so that there would be nothing come up about this case any more, and if I did that it would be taken care of, and I said, 'No, man, I'm in a hurry, my bus is waiting for me and I'm going to catch the bus.'" Witness then went down to board the bus, and as she stepped on the bus he gave her a piece of paper and said, "Well, I'll give you my address and you keep in touch with me." The address was "Henry L. Strickland, Attorney at Law, American Trust Company, Charlotte, North Carolina."

Later witness met Jimmy Dale in Florence, South Carolina, went into a drugstore and had a Coca-Cola. Dale asked her how she got hurt. She told him that she did not remember; that all she knew was that when she woke up her arms were cut. Dale replied: "Well, you cost me about $5,000.00," and "if I go down for something I'm going to get you before I go."

On cross-examination by H. L. Strickland, attorney for Dale, this witness admitted that in April, 1939, she came to Charlotte to redeem a ring which had been pledged to Captain West for a loan; that she had gone to the office of H. L. Strickland, who assisted her in the return of the ring, and while in Strickland's office she signed an instrument, at the request of H. L. Strickland, which was the same document that Strickland had tried to get her to sign in his office, at the hospital, and at the bus station. The document is as follows:

"TO WHOM IT MAY CONCERN:

"This is to certify that last Sunday morning, November 13, 1938, I was arrested by a member of the City Police Force, and was locked up in the City Jail and confined there until late Wednesday afternoon, November 16, 1938. When I entered the jail, my arms were cut and bleeding, and I so advised the Chief of Detectives, Mr. Frank Littlejohn, and a lady by the name of Mrs. Patterson, who was a policewoman.

Notwithstanding this fact, they locked me in the jail without signing any warrant or charging me with any offense, and from time to time they took me out of jail and carried me to their office and quizzed me about matters pertaining to myself and also to other people of the City of Charlotte. I was not responsible for what I told the Police Department, because I had been drinking and my mind was not working clearly, and I was promised that I would be let out of jail if I made certain statements and charges against other people, and I wanted to get out of jail. I do not recall the statements I made, but I do know that my mind was not clear, and that any statement that I made, I was not responsible for. I might have made statements which were not correct, for the reason that I wanted to get out of jail.

"The purpose of this statement is to repudiate any statement that I have heretofore made to any City Policeman, Mr. Littlejohn or Mrs. Patterson or anyone else while I was under arrest at the Police Station, for the reason that I was not responsible, as I have hereinbefore stated, for anything that I might have said.

BETTY AUSTIN.

"Witness: HIRAM P. WHITACRE.

"I hereby employ H. L. Strickland, Atty. to handle the above case.

BETTY AUSTIN."

Rufus Bryant testified that he was forty-two years old and was living near Clinton, Sampson County, North Carolina; that he was a general farmer, raising tobacco. In the fall of 1937 he carried a load of tobacco to the market at Durham, North Carolina, where for many years he had sold the majority of his crop. He spent the night at a Durham hotel. He asked the bellboy if he could get him a woman that night, and, in response to that request, Rene Duffy came to his room, and he "had a date with her that night." He told the Duffy woman that he was a married man and had children and that he was not "a man of that type, and that was the first time I had ever done a trick like that, which it was." He asked her a lot of questions about her life and she told him she was a poor girl and that she had had hard luck, that her husband was dead and she had no way of getting money and was broke. "Finally I told her that if she'd quit that business and try to live a clean straight life, that I was not a rich man at all—I was a poor man and a hard working man—that I could help her some; that I didn't approve of such a life as that, that I was a clean man, that I always had been up until then, so I finally gave her some money that night." Witness next saw the woman about three weeks afterwards in Durham, when he again came to the tobacco market, and thereafter a few times during February or March, 1938, continuing his illicit relations with

her. On these occasions he gave her money—$10.00, $15.00, $20.00 at a time, sometimes $5.00.

The witness stated that later Rene Duffy told him she was pregnant and that he was the father of the child. From her looks witness thought it was true. She showed to be that way from then on until the birth of the child. "After she told me she was in that condition and I was responsible for it, I gave her some additional money." The first amount was for a house in Charlotte—any reasonable amount. The Duffy woman told witness that she would like for him to look out "to prepare a place for her and the child to live, that there was nobody but just her and the child." He gave her money at that time for the purchase of a house, something like $600.00 for a down payment and afterwards a monthly payment of $40.00 a month, which Rene Duffy told witness were payments on the house at 1548 Duckworth Avenue, where she was then living. (The court sustained Dale's objection to the testimony in the above paragraph as applied to him.) Later, Dale and Mrs. Dale conveyed the property to Bryant. Witness had never known Dale until just before he got the deed to the property.

This transaction was in consequence of a call from Dale to a law office in Clinton that Bryant should meet Dale and wife between Rockingham and Clinton, or close to Rockingham. Bryant and his wife met Dale and his wife at the point indicated. Rene Duffy had been arrested at some time in Clinton. Dale had formerly mentioned himself as being Rene's brother-in-law. The case was pending against Rene at the time of this meeting.

The witness stated: "I guess she had been arrested down there because she had been laying up with me." "We met over at Rockingham." At that place the property was conveyed to Bryant and his wife.

The witness stated that he had given the woman other money besides the $600.00 and $40.00 a month mentioned. "I gave her money for the support of herself and the child. I wouldn't say that the list I have of the amounts I gave her from time to time is correct—but I have some idea about what I gave her." In all, the witness stated that he had paid Rene Duffy over $2,000.00.

In addition to this he had paid for Rene Duffy $100.00 hospital bills for some person that had been injured in a wreck by her car and $600.00 for damage to the cars.

At that time Rene Duffy told him that she had been taken down to police headquarters and that some letters Bryant had written her had been gotten hold of. That she had to get some money to have it settled. Bryant at that time gave her over a hundred dollars.

After he learned of her alleged pregnancy he gave her money to make payments on furniture—from time to time something in the neighbor-

hood of $400.00. In addition to this he gave her money for board before she purchased the house—some three or four months, at about $7.00 a week. This was before the child was born.

After notifying Bryant that the baby was born, Rene Duffy, or Mrs. Dale, applied to him for money from time to time. Bryant sent her money to pay her hospital bill, under the impression that she was in the hospital in connection with her pregnancy. He sent her money also because the baby was sick. During all this time he did not know that she was not pregnant and was not the mother of the child, nor that she could not have a baby. He gave her the money for herself and the baby. At the time he thought that there would probably be a baby and he didn't think it was anybody else's. He had been told that they thought the child would come before the nine months period. Rene Duffy told him that she had been examined by Dr. Wishart and was advised to that effect.

Witness saw the woman and the baby a number of times before he came to Charlotte, coming to Charlotte once or twice thereafter but not staying any length of time.

Witness identified a number of letters written by him to Rene Duffy, which were later introduced in evidence.

On cross-examination this witness admitted that he had, at the instance of Rene Duffy, signed a statement that he had given her money of his own free will, and that he had known all along that the child was not his, and that she had not extorted money from him; that he just wrote what Rene Duffy worded for him. There were other contradictions in the cross-examination.

Of the letters identified by Bryant and introduced as bearing upon the deception alleged to have been practiced upon him, the following excerpts are pertinent and are reproduced here solely under that necessity:

"Friday A.M.

"My Dearest Mother:

"I will write you a short note this A.M. Honey, how are you both getting along since I saw you? Surely do hope you all are well of those terrible colds.

"Honey, I cannot express to you my feelings of seeing you and the little one. Dear, you just don't know my heart and how I am worrying because all the pleasure of being with you both I am losing all of it. Honey, rite now is always the sweetest time of a little one's life, because they are never but once a child. Oh and how I always loved the little ones so much. Darling ours always would go to me in preference to anyone else.

"Honey you never had had this experience before but my dear you soon understand why I miss Little Howard so much. Oh Dear he was such a sweet child always smiling and a word for ever body just to fit so pleasant. Honey as you (missing word) and (missing word) get to be a little size then you know what a child's love really means. You see my Dear just as it is with me I only can think of him as I know how ever thing is. No matter how bad I want a sweet little kiss at night I can't get it for you both are to far away to reach so easy. And to my Dear it will be all I can do to keep both of you now in good Health and provide for you with all my other expense. Honey these cheep prices are about to worry me to death for it now looks like to me that it take ever penny of my crop to meet debts that are due now. And my Dear its another lonely year ahead before pay day again. But my Dear I strive on and on as long as I have breath to do with for love is all I live for my dear and that Great Home in life to come. Darling I do hope that you can realize and know how my love is so great for you. And want you to let you love be so great for me that I can just feel it ring through my Heart even if you are miles away from me. Well my Dear I am in Wilson today and it pouring Rain and I guess will be in Durham first of week. Listen my Dear I will send you a wire first what to do when I get there so you be on watch for it and Dear you need not wire me unless I say so first notice what the wire is.

"Honey I don't hardly feel like I have seen you both the time was so short. Honey I can see those little long strecher and little smiles as I think of seeing the little one. Such a sweet little thing as he is so happy to live for isn't it. Well Honey I only had a few minutes so I must close with all my love and Kisses are yours and little C. H. Look to hear from me first of next week. Bye. Your

Fore ever and ever,"

"My dearest one,

". . . My dear I thought of you just as I told you and I was thinking so earnestly about you both that you would get Home safe and alrite. My Dear I have thought so much of you both since I had to leave you.

". . . Honey after our pleasure it is so hard to have to separate so far apart and Honey the said part of it is that I am missing all of the little ones pleasure rite when he is so sweet. Honey you may think you understand but you don't. You are with him ever minute and hour and suppose you were as I am just see you both for one night and a part of a day then you have to leave you untill I can get away again. Surely My Dear it is awfull isn't it. My Darling I always thought I love you all I could but oh it is much different now and ever day I think of each

one of you I love both of you more and more. . . . Well bee real sweet and take good care of each one of you both untill I can see you all again. (Missing word) I see little one kicking his little feet and calling for his meals. Kisses to both of you and great big one to you.

As ever and always,
Good Bye."

J. Dan Stallings testified for the State that he had been operating a private detective agency in Charlotte and was employed by Dr. William E. Wishart to make a trip to Albemarle to contact a girl and her mother and "ask them not to make any statement to Chief Littlejohn." Witness could not make the trip at that time and later was told by Dr. Wishart to "just forget it." In the spring of 1939 he saw the Betty Austin affidavits in Chief Littlejohn's office. Witness thought they were the same affidavits now shown in court. Witness had a conversation with Dr. Wishart with respect to the affidavits and told him what they were about. At the request of Wishart he got copies of the affidavits and showed them to Wishart. He read them and asked him to tear them up or destroy them, which witness declined to do until paid for his services. He did, however, let Dr. Wishart have the affidavits to show to the Dales and, upon his return to the office, told him the affidavits were worth about a couple of hundred dollars. Wishart told him that he could not raise the money that night but that "if I would leave them there or tear them up and give him a couple of days, why they'd take care of it." Witness told Dr. Wishart he could not leave them under those conditions. He took them back to the police station and gave them to Littlejohn. Witness stated he was employed by Dr. Wishart, who was the pay-off man for himself, Keith Beatty and others, to investigate Littlejohn, but he found nothing against him.

Mrs. A. R. Manson, witness for the State, testified that she knew Essie Jake Melton, who lived at Albemarle. She was an unmarried girl but had become pregnant. The witness brought her to her home in Charlotte, where she stayed until the time she went to the hospital. Dr. Wishart attended her, having agreed to take her as a patient. The witness took her to Dr. Wishart's office several times. He came to see her several times before the baby was born and once afterward. In the Charlotte home and in the hospital she was known as Anna Carpenter. Witness took her to the maternity ward in the hospital, where the child was born. Dr. Wishart charged $250.00 for his services, which was paid him after the birth of the child. Witness had referred Dr. Wishart to a Mrs. Blackwelder, who was the grandmother of Essie Jake Melton, for instructions as to its disposition. The baby was never brought back to the home of the witness. She testified that Dr. Wishart told her he

could place the baby but it would cost a little something. Finally he asked if it would be all right if he placed it in a good local home, and witness replied that it would be all right if the home was good and A-1.

There was much evidence for the defense in contradiction of that of the State. It is not, however, pertinent for consideration on motion to nonsuit.

The defendant renewed his motion to require the State to elect on which offense it sought conviction and the motion was overruled. Defendant excepted.

There are numerous exceptions to the instruction given to the jury and exceptions to the refusal to give certain instructions.

The jury found for their verdict, guilty as to Fred E. Dale, *alias* Jimmy Dale, and Mrs. Fred E. Dale, *alias* Rene Duffy, and not guilty as to Dr. W. E. Wishart. Both of the convicted defendants appealed but Mrs. Fred E. Dale did not perfect her appeal or prosecute it in this Court. Only the appeal of Fred E. Dale, *alias* Jimmy Dale, is before the Court.

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

Thaddeus A. Adams for defendant, appellant.

SEAWELL, J. We first take up the motion to quash the bill of indictment, or to compel the State to elect upon which one of the crimes supposedly charged therein it would seek conviction.

The first objection to the indictment upon the score that it charges a misdemeanor, and prosecution on that charge is barred by the statute of limitations, has been withdrawn in deference to *S. v. Ritter,* 199 N. C., 116, 154 S. E., 62, in which the Court holds conspiracy to be a felony. See, also, *S. v. Lea,* 203 N. C., 13, 164 S. E., 737.

The second ground—that the alleged conspiracy merges, as a matter of law, into the statutory offense charged as its consummation, that is, obtaining money under false pretense—is not tenable, at least in this State. *S. v. Lea, supra.* The suggested doctrine of merger, if it obtains here at all, has never, as far as we are aware, been held applicable to a case of this kind. "The rule appears to be well settled in most jurisdictions that the conspiracy to commit a crime is not merged in the commission of the completed offense, but is a distinct offense of itself and is punished as such, notwithstanding its object, the admitted crime has been accomplished; and this seems to be now generally true, regardless of whether the conspiracy or its object be regarded as the same grade of offense, or one be regarded as higher than the other—as one a felony and one a misdemeanor." *Sneed v. United States,* 298 Fed., 911,

and authorities cited therein. See, also, 37 A. L. R., 772, and note; *Reg. v. Button,* 11 Q. B., 929 (*Lord Dunham*); Wharton Criminal Law, 11th Ed., 1605. The distinction was never based on sound reasoning and has practically disappeared from the American practice. *Heke v. United States,* 227 U. S., 131, 57 L. Ed., 450; *United States v. Rogers,* 226 Fed., 512.

The third ground advanced for quashing the bill of indictment challenges it upon the ground that two distinct crimes are charged in one count, and is, therefore, duplicitous and subject to be quashed if the State does not elect upon which crime it seeks conviction.

Generally speaking, a bill of indictment which charges two offenses in the same count is bad for duplicity. But there are some exceptions to this rule arising out of the relation of the offenses in the count to each other, and to the single transaction or series of transactions which grow out of one concatenated design.

This is especially true in indictments for conspiracy. In the prosecution of this particular crime it is generally held that a count is not duplicitous because it both recites the conspiracy to commit a criminal offense (which under our law is a complete crime without any overt act), and also describes the crime which was its consummation. Especially is that true where the conspiracy relates to statutory crimes which grew out of the facts of the conspiracy and were connected with it as overt acts in its accomplishment. 5 R. C. L., 1081; *United States v. Lancaster,* 44 Fed., 885; *Sneed v. United States, supra; S. v. Lea, supra.* "In conspiracy cases the court will never be keen to hold an indictment bad for duplicity." 37 A. L. R., 772, and note; *Reg. v. Button, supra; United States v. Vannatta,* 278 Fed., 559; *S. v. Waymire,* 52 Oregon, 281, 97 P., 46.

Since the bill was not duplicitous, the motion presented no ground either for quashing it or for compelling the solicitor to make an election.

The defendant complains, however, that after the theory of merger was rejected the State insisted on holding him to account for both crimes described in the bill. Such grievance as he may have had lay in the latitude given to the trial after it had passed this point—in some misdirection given the jury.

The unitary character of an offense against the law consisting of a series of acts or of two or more acts which are a part of the same transaction, some of them separately denounced by law, statutory or otherwise, and subject to prosecution separately, might have been presented to the jury in prayers for special instruction; or, failing that, instructions given contrary to the principle might have been brought up by appropriate exceptions. Scanning the exceptions to the charge, we find only one which brackets any statement relating to the two-count theory of

the indictment, which might fairly be considered as approaching this matter. But this exception is made to rest on a different ground, and does not present this objection. The defendant's twenty-first exception is to the following instruction: "This is the general law upon the second count in the bill of indictment, gentlemen." The court is referring to that part of the indictment which related to obtaining money under false pretense. In the record this exception is grounded upon the following objection: "The defendant, Jimmy Dale, excepts to the language embraced between (e) and (f)" [just quoted], "and especially in the light of the language following, intended by the court to explain said language, in that the two counts in the bill should have been separately stated and separately submitted and the law declared on each separately with reference to the evidence, which the court should have stated bearing on each issue separately and as to each defendant separately, which the court failed to do, leaving it uncertain upon which count the jury could or would convict." This must be taken to refer specifically to the manner in which the judge stated the law as applicable to the two offenses, upon the facts presented, and the fact that he did not present them separately to the jury in the manner suggested by the defendant in the exception, and not as referring to the original objection that the bill was duplicitous. This interpretation is put upon the exception in the statement of "questions involved" on the first page of defendant's brief: "should the court submit to the jury separate issues and separately 'state the evidence and declare and explain the law arising thereon' as to each, and likewise separately 'state the evidence and declare and explain the law arising thereon' on each issue as to each defendant?"

As stated, the specification made in this objection to the charge is obviously the failure of the judge to separate the offenses in his charge and instruct as to each separately with respect to each defendant, applying the law as it relates to the particular offense and the facts of evidence, and not to the fact that the court in its instructions submitted the indictment as containing two counts, under both of which defendant might be convicted.

The verdict was general and applied to the bill of indictment as a whole. It was the privilege of the defendant, when the verdict came in and before the verdict was entered or the jury was discharged, to cause inquiry to be made as to how the jurors stood upon each of the offenses upon which he was held to account. The court was not required to do so *ex mero motu.*

Defendant, *ore tenus,* demurred and moved to quash the bill of indictment for that it does not state a cause of action. This refers to the contention that the charge relating to false pretense does not show any causation between the representation alleged to have been made by de-

fendants and the obtaining of the money. The defect, if for the moment we consider it as such, would be unimportant in a charge of conspiracy, since in such a case it is unnecessary to describe the crime, which is the subject of the conspiracy, with legal and technical accuracy. *Williamson v. United States,* 207 U. S., 425, 52 L. Ed., 278; *Garland v. State,* 112 Md., 83, 75 Atl., 631.

Nevertheless, we think the objection without merit. The principle applied by the Court in *S. v. Whedbee,* 152 N. C., 770, 67 S. E., 60, we do not understand to be applicable where the surrendering of the money or other thing of value is the natural and probable result of the false pretense. Certainly, a mere "lie," which of itself and upon the face of the pleading offers no inducement to a man to give up his money, would not undergird the crime, but it may be seen as an important element in obtaining money under false pretense, when the latent connection is brought out. The indictment in *S. v. Whedbee, supra,* failed because the indictment did not bring the conduct of the victim into such relationship with the false pretense as to suggest a reasonable motivation for his act. The facts alleged in the indictment here, relating to the misrepresentation, *ex proprio vigore,* are such as to imply causation, since they are obviously calculated to produce the result. The representation of the defendant Rene Duffy, and her co-conspirators, that she was pregnant by Bryant; that she had a child by him; takes the pretense out of the category of a mere lie, to which no response may necessarily be expected. In this respect the indictment could not be improved without writing into it some needless affirmation of the wellsprings of human conduct and social impulses commonly known since the world began.

As bearing upon the numerous motions directed to defects in the bill of indictment, we think the following excerpt from the opinion by *Chief Justice Stacy* in *S. v. Lea,* 203 N. C., 13, 27, 164 S. E., 737, where the situation was not wholly dissimilar, is applicable: "The statute, C. S., 4623, provides against quashal for mere informality or refinement, and judgments are no longer stayed or reversed for nonessential or minor defects. C. S., 4625; *S. v. Beal,* 199 N. C., 278, 154 S. E., 604. The modern tendency is against technical objections which do not affect the merits of the case. *S. v. Hardee,* 192 N. C., 533, 135 S. E., 345; *Rudd v. Casualty Co.,* 202 N. C., 779. If the bill or proceeding contain sufficient matter to enable the court to proceed to judgment, the motion to quash for redundancy or inartificiality in statement is addressed to the sound discretion of the court. *S. v. Knotts, supra* (168 N. C., 173). There was no error in refusing to quash the indictments on the grounds of duplicity and indefiniteness. *S. v. Beal, supra.*"

The exceptions to the admission of evidence and to its application when admitted are of the usual character which we might expect to be

taken by prudent counsel in conspiracy cases. However, it is well understood that when a *prima facie* case is made out, the acts and declarations of the several defendants in the prosecution of the common purpose are admissible against each defendant. *S. v. Lea, supra; S. v. Jackson,* 82 N. C., 565. If orderly development of the case is to be followed at all, the admission of such evidence at any particular time must be largely a matter of discretion with the court, provided it does not violate the principle which we have just announced and go beyond it. In this case we do not find error in that respect. Here we think the court was careful to exclude such evidence as might be prejudicial to each defendant, and which did not come under the rule announced. Examining the exceptions to the evidence closely, we observe that the trial judge carefully confined the effect of the declarations of these parties as bearing upon the guilt or innocence of the persons making them.

Taking the charge as a whole, we do not find that the exceptions are sufficiently meritorious to warrant a new trial.

In the trial of the cause, we find

No error.

MRS. NEALER MERCER, ADMINISTRATRIX OF THE ESTATE OF A. H. MERCER, v. L. R. POWELL, JR., AND HENRY W. ANDERSON, RECEIVERS OF THE SEABOARD AIR LINE RAILWAY COMPANY, AND A. A. WEBB, ADMINISTRATOR OF G. S. STEPHENSON.

(Filed 20 December, 1940.)

1. Railroads § 10—

No presumption of negligence on the part of a railroad company arises from the mere fact that the mangled body of a man is found along the track.

2. Same—

A pedestrian voluntarily using a railroad track as a walkway is required to exercise due care for his own safety, and his failure to avoid a moving train is contributory negligence.

3. Negligence § 10—

It is only when the person injured has been guilty of contributory negligence that the doctrine of last clear chance may be invoked.

4. Same: Railroads § 10—Burden is upon party invoking doctrine of last clear chance to prove beyond speculation or conjecture every material fact necessary to support the issue.

Where plaintiff invokes the doctrine of last clear chance in an action to recover for the death of his intestate, killed when struck by a train, the burden is upon plaintiff 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 in the exercise of due care could have seen him in such condition in time to have stopped the train before striking him, and that there was a failure to keep a proper lookout, which failure was a proximate cause of the injury; and plaintiff must offer legal evidence in support of each of these material facts, and evidence leaving any one of them in mere speculation or conjecture is insufficient.

5. Railroads § 10—

The doctrine of last clear chance does not apply unless the licensee or trespasser upon the tracks is in an apparently helpless condition, since otherwise the engineer has the right to expect, up to the moment of impact, that he will exercise due care for his own safety and leave the track in time to avoid injury.

6. Same—Whether intestate was lying on track when struck, and if so, whether he had been in such position for length of time sufficient to invoke doctrine of last clear chance, held conjectural upon the evidence.

In this action by plaintiff to recover for the death of his intestate struck and killed by defendant's train, the evidence tended to show that intestate was seen in a drunken condition near the scene of the accident prior to twelve o'clock on the night of the fatal injury, that early on the following morning dismembered and mangled portions of his body and bits of clothing were found between the rails and on one side of the track, that blood was found on the inside of the rails and on the pilot of the engine about two inches from the bottom and near its center, and that between the rails opposite where the blood was found, there was a gouged out place in the dirt about three inches deep and the size of a man's body, that next to this place the grass was flat or mashed down about the area of a man's body and that opposite this place on the outside of the track near a dirt crossing were found burned match ends, cigarette ends and a cigarette package. *Held:* Although the evidence shows that the body was prone on the tracks when the train passed over it, the position of intestate when struck and how long he had been in that position is left in mere speculation and conjecture, and therefore the evidence is insufficient to take the case to the jury under the doctrine of last clear chance.

SEAWELL, J., dissenting.

CLARKSON and DEVIN, JJ., concur in dissent.

APPEAL by plaintiff from *Clement, J.*, at March Term, 1940, of RICHMOND.

Civil action for recovery of damage for alleged wrongful death. C. S., 160-161.

Plaintiff alleges that the intestate A. H. Mercer was killed on the early morning of 10 July, 1937, at around 3 o'clock, when an engine and train of defendants, and operated by G. S. Stephenson, engineer, ran over him at or near a point some three miles east of Laurinburg, known as Southerland Crossing, and that his death "was caused by the negligence and carelessness of the defendant receivers, and their said engineer, in that while plaintiff's intestate was in a prostrate and helpless condi-

tion on the defendants' said track, the defendants negligently and carelessly ran their engine and train upon and over his body"; in that defendants' engineer failed to have the engine equipped with proper lights, and to keep a proper lookout so that he could and would have observed the intestate to be in a prostrate and helpless condition in time to have avoided running over intestate; and in that said engineer "failed to sound the whistle of said engine" and "to give other warning that might arouse or startle the plaintiff's intestate."

Defendants deny the material allegations of the complaint and plead contributory negligence of plaintiff's intestate in bar of any right to recover herein.

After the institution of the action and answer filed, defendant, G. S. Stephenson, died, and A. A. Webb, who was duly appointed as administrator of his estate, was made a party defendant and came into court and adopted the answer of other defendants.

In reply, the plaintiff alleges that notwithstanding any negligence on the part of plaintiff's intestate, the defendants in the exercise of proper care could and should have discovered that he was in a helpless condition on their railroad track in time to have avoided running over him with their train, and that defendants had the last clear chance of preventing the injury and death of intestate.

On the trial below there was judgment as of nonsuit at close of plaintiff's evidence.

Evidence for plaintiff tended to show substantially these facts as of the date of A. H. Mercer's death, 10 July, 1937: On the Southerland farm in Scotland County, a dirt road "kept up by the State" leading from Highway No. 74 to the old Maxton-Laurinburg road crosses the main line, single track, of Seaboard Air Line Railroad, which runs from Wilmington *via* Lumberton, Maxton and Laurinburg to Hamlet, all in North Carolina. The railroad runs east and west and the dirt road north and south. This crossing is known as Southerland Crossing and is located about three or four miles east of Laurinburg, and one and three-fourths miles to two miles east of Dixie Siding, where Mercer was last seen. The railroad is straight and practically level, "no grade much," at this crossing. This condition extends a mile or more in both directions. For the entire width of the road across the track dirt is filled in level with the top of the rails, gradually sloping at the edges down to the level of the railroad ties, four or five inches below, thus forming a fill of that height. Grass was growing between and on the outside of the rails, but not on the road fill.

A. H. Mercer was in good health, one-armed, and weighed about 195 pounds. He lived in the town of Hamlet, and was engaged in the bottling business, selling more than 4,000 cases the month he was killed.

He left home about one o'clock in the afternoon of said date, driving a 1936 maroon Ford car; and about four o'clock next thereafter he appeared in Lumberton at the Green Frog, where drinks and beer were sold, and where he first treated "a bunch in there" to beer, and remained there two or more hours, drinking beer, ten or more bottles, until about dusk "six or seven or eight o'clock" when he left, "pretty drunk," walking up the street north. While at the Green Frog "he had a roll of money on him," and had a twenty dollar bill changed. Thereafter about nine o'clock he was first seen in West Lumberton running through the yard of Ed Parnell, to whom he was slightly related, and in 10 or 15 minutes he appeared bareheaded and in his shirt sleeves on the highway in front of the Parnell house, and on meeting Parnell "made a dive" at, struck and knocked him down, and then ran, striking and cutting his head on a tree. He refused to go to a hospital in an ambulance, but rode into Lumberton with one Jake Regan, a colored man whom he knew, and though the colored man tried to take him to a hospital he refused to enter one. At that time "he was drunk," "in a fighting and pugnacious mood," and "seemed to be bent on fighting with somebody." Through the colored man he hired for five dollars a taxi, driven by Donnie Lee Porter, an Indian boy, to take him to Laurinburg or Hamlet. On the way the taxi first stopped at a filling station just west of Lumberton, where one Prentiss Carter, an Indian, who had not before seen Mercer but who, after asking permission to go with them to Laurinburg, entered the taxi. The next stop was for about 15 minutes at a filling station operated by an Indian about one mile from Pembroke. Mercer went in there and washed the blood off his face, bought some beer and paid for it in change. They traveled, and on the way, Mercer "wanted to turn around and come back . . . wanted to get out . . . wanted to go back to Lumberton . . . but Donnie Lee would not let him . . . would not bring him back but kept on going" until between eleven and eleven-thirty o'clock they arrived at Bryant's filling station, just east of Laurinburg and about one and three-fourths miles from Southerland Crossing. There Mercer ordered beer and, according to Carter, drank a couple or three and, according to Bryant, an order for two beers and a Coca-Cola was filled and Mercer got out of the taxi with his beer in hand and went to the rear of the filling station, walking along the road leading across the railroad, saying he would be back in a few minutes. At that time he was staggering. So far as the evidence discloses he was not again seen alive. After searching in vain for him with a flashlight a few minutes later, around the back of the filling station and along the railroad, Donnie Lee Porter and Prentiss Carter left about twelve o'clock in the taxi, going toward Lumberton. Carter testified that they came back to Lumberton. One Bruce Peel,

who lived across the railroad about 75 or 80 feet from the right of way from the Bryant filling station at Dixie Siding, and who, on account of the heat of the night, was sitting on his front porch, testified that he saw a yellow car drive up to the filling station, and referring to someone coming out with a flashlight, he said, "I had not seen anyone go either way until they come with the light."

About twelve o'clock when Frank Carmichael, in returning to his farm for another load of cantaloupes which he was hauling, crossed the railroad at Covington Siding, located about two and one-half miles east of Laurinburg and one mile west of Southerland Crossing, "someone got to yelling" at him, "Hey, there," about three times, the voice sounding like it came from "on the south side of the railroad track." After reloading and while he was returning, and before he reached the railroad, close to one o'clock, a freight train passed going west, after which he and some colored men searched up and down the track "to see if they could find any signs of anyone being hurt there, but did not find anyone there."

Further, while Melvin Robinson, who had been packing cantaloupes, was going to his home about a mile from Southerland Crossing, between twelve-thirty and one o'clock, he heard someone "hollering down there . . . did not hear him say any words. Sounded like someone was kind of jolly and hollering."

Also, about three o'clock Bruce Peel, who was at home in bed at Dixie Siding, heard screaming, "sounded like a woman was putting up some screaming east of there. . . . The screaming did not last long . . . was in the direction of Southerland Crossing" . . . about two miles away, though he could not locate it.

Another Seaboard freight train, consisting of engine and "more than 15 or 20 cars," going west, running at 20 to 25 miles per hour, with good headlight, operated by G. S. Stephenson as engineer, and on which Jesse Staten was flagman, passed Southerland Crossing at some time that morning variously estimated to have been between three and five-thirty o'clock. This train, after leaving Lumberton, did not stop at Maxton or Southerland Crossing and not until it reached Dixie Siding, where it put off cars at the Morgan Mills. It did not blow for Southerland Crossing. The train could be heard before it could be seen by one 250 to 300 yards away. It was a fair night and the moon was shining; and also, there was fog up toward Maxton and down around Dixie Siding, but it was clear on the hills. The flagman, Jesse Staten, testified that he was riding on the left-hand side of the engine, sitting on the seat, in front of the fireman's box looking out in front, and "Yes, the fog kind of had your view cut off. I could see three or four car lengths,

something like that. . . . The headlight was burning all the way from Wilmington. . . . It was in good shape."

Dismembered, mangled and crushed portions of the body, including bits of flesh and blood, and portions and bits of clothing, were found, beginning with blood on inside of rails opposite the east edge of the road fill at Southerland Crossing and extending in a westerly direction for about two miles to Dixie Siding. There was blood all the way across the road fill, and a necktie untied, lying stretched out between the rails on the west side of the fill. Two or three steps from the railroad—four or five feet from the end of the ties—were one shoe and "the man's heart" lying in the edge of the weeds. Near Dixie Siding there were found a part of a pair of pants, including the watch pocket in which there was a dollar bill, and another part including the hip pocket in which there were ten dollars in bills, the driver's license and other papers of A. H. Mercer. These parts of clothing were nearer the right-hand rail looking west, and the bits of clothing and flesh found in that vicinity were on the spikes at the right-hand rail.

The grass on the east end of the road fill was mashed down in between the rails, variously described as "about the size of a man's body," . . . "looked like there had been a little scramble on the grass there . . . near the right-hand rail looking west," "looked like it was kind of flattened down . . . right at the crossing . . . might have been a foot or two from the crossing . . . a small place . . . something like 3 to 4 feet in length and not much more than 18 inches or two feet wide . . . long part of it ran up and down the T-irons." Outside of the rail on the north side of the railroad and on the east side of the highway there were some burned match ends, cigarette ends and a cigarette package, opposite the place in the grass above referred to. There was a "gouged out," "scuffed up" place in the dirt on the east side of the road fill next to the grass midway between the rails, something like three inches deep, "about the size of a good stout man's body, from his belt to his shoulders . . . 18 or 20 inches wide and about 3 feet long." The signs of blood on the inside of rails east of road fill were opposite this place. There was "a little blood on the pilot of the engine, . . . an inch or an inch and a half from the center of the pilot . . . about two inches from the bottom of the pilot. The pilot is kind of V-shaped."

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

Clyde A. Douglass and Jones & Jones for plaintiff, appellant.

Fred W. Bynum and Varser, McIntyre & Henry for defendants, appellees.

WINBORNE, J. This question determines the controversy on this appeal: Is there sufficient evidence to take the case to the jury under the doctrine of last clear chance which is invoked by plaintiff? The court below said "No." With this answer we are in agreement.

The principles of law here involved were recently restated and applied in the case *Cummings v. R. R.*, 217 N. C., 127, 6 S. E. (2d), 837. What is said there is applicable here.

At the outset let it be noted that this is not a case of a railroad crossing accident. To the contrary, plaintiff contends that at the time her intestate was struck by a train of defendants he was down in an apparently helpless condition on the railroad track east of Southerland Crossing.

No presumption of negligence on the part of defendant railroad arises from the mere fact that the mangled body of plaintiff's intestate was found on the track. This is the uniform holding in the decisions of this Court. *Upton v. R. R.*, 128 N. C., 173, 38 S. E., 736; *Clegg v. R. R.*, 132 N. C., 292, 43 S. E., 826; *Austin v. R. R.*, 197 N. C., 319, 148 S. E., 446; *Henry v. R. R.*, 203 N. C., 277, 165 S. E., 698; *Rountree v. Fountain*, 203 N. C., 381, 166 S. E., 329; *Ham v. Fuel Co.*, 204 N. C., 614, 169 S. E., 180; *Harrison v. R. R.*, 204 N. C., 718, 169 S. E., 637; *Fox v. Barlow*, 206 N. C., 66, 173 S. E., 43; *Cummings v. R. R., supra.*

In *Harrison v. R. R., supra,* this is said to be the prevailing rule, citing 22 R. C. L., 981, and continuing, "Thus it was held in *Ward v. Sou. Pac. Co.*, 25 Ore., 433, 36 Pac., 166, 23 L. R. A., 715 (as stated in the third headnote, which accurately digests the opinions): 'The finding of the body of a child on a railroad track, where it had been struck by a train, raises no presumption of negligence on the part of the company, although the track was straight and clear, where there is nothing to show the circumstances of the accident, or how long the child had been on the track when struck.'"

As stated in *Davis v. R. R.*, 187 N. C., 147, 120 S. E., 827: "The decisions in this State have been very insistent upon the principle that a pedestrian voluntarily using a line of railroad track as a walkway for his own convenience is required at all times to look and to listen, and to take note of dangers that naturally threaten, and which such action on his part would have disclosed, and if in breach of his duty and by reason of it he fails to avoid a train moving along the track, and is run upon and killed or injured, his default will be imputed to him for contributory negligence and recovery is ordinarily barred."

The doctrine of last clear chance does not arise until it appears that the injured party has been guilty of contributory negligence, and no issue with respect thereto must be submitted to the jury unless there is

evidence to support it. *Redmon v. R. R.*, 195 N. C., 764, 143 S. E., 829; *Cummings v. R. R., supra.* When the doctrine of last clear chance 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; *Cummings v. R. R., supra.*

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 issue, and the verdict thereon "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., 981. See, also, *Poovey v. Sugar Co.*, 191 N. C., 722, 133 S. E., 12.

In the *Poovey case, supra*, it is said: " 'The rule is well settled that if there be no evidence, or if the evidence be so slight as not reasonably to warrant the inference of the fact in issue or furnish more than materials for a mere conjecture, the court will not leave the issue to be passed on by the jury.' *Brown v. Kinsey*, 81 N. C., 244; *Liquor Co. v. Johnson*, 161 N. C., 77; *S. v. Prince*, 182 N. C., 790; *S. v. Martin, ante*, 404. This rule is both just and sound. Any other interpretation of the law would unloose a jury to wander aimlessly in the field of speculation."

Tested by these principles, the evidence offered with respect to the movements of the intestate, after he was last seen at Bryant's filling

station, a mile and a half to two miles west of Southerland Crossing, before 12 o'clock on the night preceding the finding of his mangled body on the railroad, is uncertain, conjectural and speculative. The physical facts present no reasonable theory to the exclusion of many others as to the circumstances under which the accident occurred. The crucial questions are these: In what position was intestate when struck by the train? If down on the track, or in an apparently helpless condition, how long had he been in that position before he was struck? As to these questions 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 conjecture.

The finding of burned match stems, cigarette stems and a cigarette package outside of the rail east of the dirt road adds no certainty to the uncertain factual situation. In the first place, the record fails to show that intestate smoked cigarettes. In the second place, if it had been shown that he did, isn't it more probable that while smoking he would have been standing or sitting than lying down? If he had been smoking while lying down inside the track, is it probable that all the match ends and cigarette ends and the cigarette package should have been thrown outside the rail? Certainly one guess is as good as another —the net result being a guess after all.

Likewise, how and when the grass on the inside of the track came to be mashed down in the manner shown is uncertain and of no probative value. Was the grass mashed by the trampling of someone while standing, or while sitting on the rail? Was it caused by some person sitting or lying down? Or, did someone stop there to smoke and rest from the burden of a load being carried? If either or the other, when was it? Again, any guess is as good as another—a guess after all.

But, supposing the grass was pressed down by the intestate lying there, when was it with regard to the time of the approach of the train that crushed the body? Was he lying there next to the right rail as the train approached? If so, how long had he been there? To answer, calls for more speculation.

It is argued that the scuffed out place in the dirt of the road fill indicated that he was down. To be sure the body was necessarily down when the train passed over it, but the question is, in what position was intestate when struck, and how long had he been in that position? The evidence is silent.

In fine, the probabilities arising from a fair consideration of all the evidence in the case afford no reasonable certainty on which to ground a verdict upon an issue of last clear chance.

Exceptions to evidence are untenable.

The judgment below is

Affirmed.

SEAWELL, J., dissenting: The decision in this case goes much further than any other case decided by this Court involving similar facts. It entirely repudiates the established principle that the wounds upon the body of the deceased, the manner in which it was mangled, dragged, and distributed along the track, is evidence that the person was lying down when struck. This is the basic fact to be established in the instant case; because if the man was down and apparently helpless, there is evidence to go to the jury on all of the elements involved under any of the typical cases which may be cited from our decisions. The leading decisions on this question are ignored: *Barnes v. R. R.*, 168 N. C., 512; *Powell v. R. R.*, 125 N. C., 372; *Holman v. R. R.*, 159 N. C., 44; *Hord v. R. R.*, 129 N. C., 306; *Cox v. R. R.*, 123 N. C., 604; *Henderson v R. R.*, 159 N. C., 583; *Treadwell v. R. R.*, 169 N. C., 694; *Fitzgerald v. R. R.*, 141 N. C., 535; *Carter v. R. R.*, 135 N. C., 498.

In *Henderson v. R. R., supra,* the evidence was that the body was between the rails, an arm under the trestle; that the body was mangled or, as one witness expressed it, "badly chewed up," "badly mashed up," and there was evidence of blood on the rail. The following is quoted in the opinion:

"Q. Did you see any blood, and where did you see it? A. That was on the north side of the trestle, and a bundle on this side—a bundle of overalls.

"Q. What did you see on the roadbed? A. I didn't see anything unusual except where the man was cut to pieces on the trestle.

"Q. Where was that? A. On the northeast side of the trestle.

"Q. Right on the side of it? A. You may say the first tie—right on the roadbed between the first and second tie.

"Q. With reference to the T-iron, where was it? A. It must have been right over the T-iron on the east side.

"Q. How far did you see the evidence on the track from where you first observed the condition? A. Over there south, it was about half a dozen or eight ties as far as it was. He was cut right alongside of the trestle after we crossed.

"Q. Where was the head? A. When I first observed the head it was down in the ditch.

"Q. How far was that from the other edge of the trestle? A. The head was north side of the trestle, eight or ten crossties from the trestle.

"Q. Where was the body? A. Right on the other side, just clear of the T-iron.

"Q. With reference to the railroad track? A. Right side of the track, just clear of the track on the edge of the crossties, on this end.

"Q. (The court): Was any part of the body between the rails or outside of the rails? A. To the best of my recollection, the head was

on one side of the railroad in the ditch and the body was on the other side of the track, and the arm was down under the trestle. I believe the other arm was badly mangled."

This is the only evidence in the case to establish the fact that the defendant was down when hit, and upon it the court reversed a judgment of nonsuit and sent the case back for trial.

The decision also ignores certain facts of the evidence and other facts of common knowledge. One is the construction of the modern locomotive, and the ancient locomotive, too, for that matter. The evidence shows that blood was found on the bottom part of the pilot. What the pilot in the locomotive is, and what it is for, do not have to be proved. It is commonly known that it is intended to throw obstructions off the track when they are struck. It runs within a few inches of the track, is in the form of an advancing wedge, slanting backwards away from the ground in such a manner as to render it practically impossible for a body to be cut and rolled when dragged under the engine and mangled as this body was, unless the person was lying down when struck. If either standing or sitting, the center of gravity of the body would be so far above the point of impact that a fast moving train would have thrown the body to the right or left, instead of smearing its vital parts along the inside of the track for 75 yards and leaving the contents of the pockets to mark the route of progress. This is why some of the cases I have cited refer to this mode of proof as a matter of common sense. It is as much a matter of common sense now as it was then.

Since there was blood on the lower part of the pilot of the engine, I make no comment on the speculative suggestion in the argument that the person might have suddenly appeared from practically nowhere and plunged into the side of the engine. It would seem that a performance of that sort also might have been observed, if not in time to prevent it, at least in time to be consistent with a reasonable lookout.

To the question—"How long had the body been there?"—another fact of common knowledge may stand as an answer—corpses do not bleed. The plaintiff alleges that the employees of the defendant company, the engineer and fireman, might have discovered the plight of deceased in time to have stopped the train, if a proper lookout had been kept, and on that point it cannot be denied that plaintiff has introduced evidence to establish the fact, which, according to the weight of authority, should go to the jury. *Sawyer v. R. R.*, 145 N. C., 24; *Brown v. R. R.*, 172 N. C., 607; *Powell v. R. R., supra; Deans v. R. R.*, 107 N. C., 686. I have the impression that if the body of this drunken man had been a crosstie chained to the bed of the track, or a chunk of solid granite of the same size which had wrecked the train and caused loss of life to those riding

thereon, we would have no difficulty in sustaining a challenge to the lookout.

If we are to depart from the precedents which have heretofore obtained in this matter, I think it would be better to formally overrule the cases cited, so that the profession might be no longer left in doubt as to what the law is.

CLARKSON and DEVIN, JJ., concur in dissent.

BANK OF PINEHURST v. R. A. DERBY.

(Filed 20 December, 1940.)

1. Process § 5—

Where the complaint fails to state a cause of action against the nonresident defendant, the service of process by publication and attachment is void, and the warrant of attachment will be dismissed upon motion of defendant aptly made upon special appearance.

2. Banks and Banking § 16: Constitutional Law §§ 15a, 20—Purchaser of stock prior to 1925 may not be held personally liable for amount by which sale of stock fails to realize assessment to make good impairment of bank's capital.

Plaintiff bank assessed its stockholders to make good an impairment of its capital. Ch. 4, Public Laws of 1921, as amended by ch. 56, Public Laws, Extra Session 1921. Under the provisions of the act it sold defendant's stock, but the sale failed to realize an amount sufficient to pay the assessment against the stock. This action was instituted by the bank against the stockholder to recover the deficiency as a personal liability of the stockholder under the provisions of ch. 117, Public Laws of 1925 (Michie's Code, 219 [f]). It appeared that defendant had purchased the stock prior to the enactment of ch. 117, Public Laws of 1925. *Held:* The Act of 1925, amending the statute by providing for personal liability of stockholders for the amount by which the sale of their stock fails to realize a sum sufficient to pay the assessment, provided a new remedy, and to permit the bank to maintain the action against the defendant stockholder who purchased his stock prior to the enactment of the amendment of 1925 would violate due process of law, Art. I, sec. 17, of the Constitution of N. C., sec. 1 of the 14th Amendment to the U. S. Constitution, and would impair the obligations of the contract, U. S. Constitution, Art. I, sec. 10, and further, the Act of 1925 cannot be given retroactive effect, and is, therefore, inoperative as to defendant.

3. Constitutional Law § 4a—

An act of the General Assembly in conflict with the Constitution is void.

4. Statutes § 7—

A statute will be presumed to be prospective in effect, especially if a construction giving it retroactive effect would be in derogation of common

law rights or would render the statute unconstitutional, and a statute will not be construed to have retroactive operation unless the intent to make it retroactive is expressed in clear, strong and imperative language.

BARNHILL, J., concurring in result.

STACY, C. J., and WINBORNE, J., join in concurring opinion.

APPEAL by defendant from *Clement, J.,* at May Term, 1940, of MOORE. Reversed.

This is an action brought by plaintiff against defendant to recover $990.00 and interest from 6 November, 1933. The plaintiff contends that defendant was a nonresident of North Carolina and that a valid warrant of attachment was levied on 1,113.24 acres of land belonging to him in Richmond County, N. C. The defendant entered a special appearance and moved to dissolve and dismiss the warrant of attachment.

On motion in the cause, after reciting the facts, the clerk of the Superior Court of Moore County, N. C., rendered judgment, in part, as follows: "It is, therefore, Considered, Ordered and Adjudged by the Court that the motion of the defendant to vacate, dissolve and set aside the Warrant of Attachment issued in this cause for the reasons therein set forth, or for any reason urged by the defendant, be, and the same is hereby denied; and it is further Ordered, Found and Adjudged that said Warrant of Attachment and the levy of the same on the property of defendant by the Sheriff of Richmond County are valid and binding in law." The defendant appealed from the judgment to the Superior Court.

In the judgment of the Superior Court is the following: "It is now Considered, Adjudged and Decreed by the Court that the judgment or order of said John Willcox, Clerk of the Superior Court, of date July 20, 1938, denying the motion of the defendant to vacate and set aside said Warrant of Attachment be, and the same is hereby affirmed and the motion of the defendant to vacate and set aside said Warrant of Attachment be, and the same is hereby denied and the appeal of the defendant therefrom is hereby dismissed."

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

U. L. Spence for plaintiff.

K. R. Hoyle for defendant.

CLARKSON, J. This case was here before on appeal. *Bank v. Derby,* 215 N. C., 669.

The plaintiff in its brief says: "It is not questioned that when the complaint on its face does not state a cause of action upon which a warrant of attachment may issue the warrant will be vacated upon

motion of the defendant upon a special appearance entered for that purpose. In the instant case, however, the complaint on its face is subject to no such infirmity and contains allegations of fact sufficient to award to the plaintiff the relief prayed for and to support the order of publication and the notice of publication, of the summons and of the warrant of attachment." *S. v. Abbott, ante,* 470. If the complaint does not state a cause of action, then we need not consider the summons and warrant of attachment.

The questions involved in this appeal: The record disclosed that the defendant, on 1 November, 1919, purchased 10 shares of the capital stock of the plaintiff, the Bank of Pinehurst. 10 shares, par value of $100.00 a share—total, $1,000.00. That under the impairment statute hereinafter set forth this stock was sold and purchased by plaintiff bank for $10. This action is brought, as alleged in the complaint: "That the capital stock of the plaintiff owned by the defendant as aforesaid alleged failed to bring the amount of the assessment against said stock and against the defendant as the owner thereof at the sale of said stock as aforesaid alleged, and the defendant is due and owing to the plaintiff the difference between the amount of said assessment on the stock of the plaintiff owned by the defendant aforesaid and the price said stock brought at the sale aforesaid, to wit, the sum of $990.00, with interest thereon from the 6th day of November, 1933, and the plaintiff is entitled to recover of the defendant judgment for said sum in this action." Demand for judgment for said amount.

The act under which plaintiff alleges a personal judgment against defendant is bottomed on an act of the General Assembly, 1925, ch. 117, hereafter set forth: (1) Would the maintenance of the action so impair vested rights and deny due process as to violate the recognized principles of constitutional law? We think so. (2) Is the Act of 1925, ch. 117, prospective and not retroactive, therefore inoperative in this aspect, so far as plaintiff is concerned? We think so. We think the complaint does not "state facts sufficient to constitute a cause of action." N. C. Code, 1939 (Michie), sec. 511 (6).

Section 219 (a), of N. C. Code, *supra:* "The stockholders of every bank organized under the laws of North Carolina, whether under the general law or by special act, shall be individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such corporations, to the extent of the amount of their stocks therein at par value thereof, in addition to the amount invested in such shares, except as otherwise provided. The term stockholders, when used in this chapter, shall apply not only to such persons as appear by the books of the corporation to be stockholders, but also to every owner of stock, legal or equitable, although the same may be on

such books in the name of another person; but shall not apply to a person who may hold the stock as collateral for the payment of a debt. Such additional liability as is provided in this section shall cease on July first, one thousand nine hundred and thirty-five, with respect to any shares which may have been or may hereafter be issued. (1921, ch. 4, s. 21; 1933, ch. 159: 1935, ch. 99, s. 1.)"

The section, *supra,* makes a stockholder personally liable to the creditors of a bank. This is not the present case. This action is brought under N. C. Code, *supra,* sec. 219 (f): "The commissioner of banks shall notify every bank whose capital shall have become impaired from losses or any other cause, and the surplus and undivided profits of such bank are insufficient to make good such impairment, to make the impairment good within sixty days of such notice by an assessment upon the stockholders thereof, and it shall be the duty of the officers and directors of the bank receiving such notice to immediately call a special meeting of the stockholders for the purpose of making an assessment upon its stockholders sufficient to cover the impairment of the capital, payable in cash, at which meeting such assessment shall be made; Provided, that such bank may reduce its capital to the extent of the impairment, as provided in section 217 (j). If any stockholder of such bank neglects or refuses to pay such assessment as herein provided, it shall be the duty of the board of directors to cause a sufficient amount of the capital stock of such stockholder or stockholders to be sold at public auction, upon thirty days notice given by posting such notice of sale in the office of the bank and by publishing such notice in a newspaper in the place where the bank is located, and if none therein, a newspaper circulating in the county in which the bank is located, to make good the deficiency, and the balance, if any, shall be returned to the delinquent shareholder or shareholders. If any such bank shall fail to cause to be paid in such deficiency in its capital stock for three months after receiving such notice from the commissioner of banks, the commissioner of banks may forthwith take possession of the property and business of such bank until its affairs be finally liquidated as provided by law. A sale of stock, as provided in this section, shall effect an absolute cancellation of the outstanding certificate or certificates evidencing the stock so sold, and shall make the certificate null and void, and a new certificate shall be issued by the bank to the purchaser of such stock; *but in the event the stock of any stockholder be sold as hereinbefore provided, and the said stock when sold fails to bring the amount of the assessment against said stockholder, then, and in such event, the said stockholder shall be personally liable for the difference between the amount of said assessment and the price brought by the sale of the said stock.*" (Italics ours.) Extra Session 1921, ch. 56, sec. 3; 1925, ch. 117; 1931, ch. 243, sec. 5.

This section first appeared in the Act of 1921, ch. 56, amending the Act of 1921, ch. 4. Its provisions are substantially similar to the National Banking Act, which was designed principally for the purpose of strengthening banks whose capital has become impaired. *Trust Co. v. Burke,* 189 N. C., 69. The 1925 amendment added the last nine lines, beginning with the word "but" after the semicolon. This was added to overcome the construction placed upon this section by the case cited above. The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

This statute creates a new liability and provides a special remedy for its enforcement, *viz.*: the sale of stock if the stockholder fails to pay assessment. This remedy is exclusive and actions on proceedings ordinarily available may not be resorted to. So a personal action against the stockholder for the difference between the price for which the stock sold and the amount of the assessment formerly could not be maintained. *Trust Co. v. Burke, supra.* The effect of this holding, that a personal action for the difference could not be maintained, was destroyed by the 1925 amendment which specifically provides for such an action, although the general rules laid down for the construction of this section still remains applicable.

The defendant purchased his stock in plaintiff's bank on 1 November, 1919. Plaintiff is now the owner of the stock purchased according to law, under the impairment statute, *supra.*

In *Trust Co. v. Burke, supra,* at p. 73 (filed 24 January, 1925), *Hoke, J.,* for the Court, said: "These suggestions, while to some extent involved in the inquiry, are not, as stated, definitely determined upon, and are here only referred to and approved in so far as pertinent, and as they may help to a proper apprehension of the question directly presented, to wit, the right of plaintiff to have personal judgment against defendant, a stockholder, on the assessment in the instant case for the amount of excess of the sum realized from the sale of his entire stock. For the reasons heretofore given, we are of opinion that no such recovery can be had, and the judgment overruling the demurrer must be reversed."

To meet this decision, the General Assembly on 4 March, 1925, passed the following (part of ch. 117): " 'But in the event the stock of any stockholder be sold as hereinbefore provided, and the said stock when sold fails to bring the amount of the assessment against the stockholder, then, and in that event, the said stockholder shall be personally liable for the difference between the amount of said assessment and the price brought by the sale of said stock.' "

We think the provision of the General Assembly making the defendant stockholder personally liable for the stock purchased 1 November, 1919, in plaintiff's bank, under the Act of 1925, unconstitutional, as

being retroactive and as impairing and destroying the obligation of a contract, affecting vested rights and denying due process.

N. C. Constitution, Art. I, sec. 17, is as follows: "No person ought to be taken, imprisoned, or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property, but by the law of the land."

U. S. Constitution, Art. I, sec. 10, in part: "No state shall . . . pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility."

U. S. Constitution, Amendment 14, sec. 1, in part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

It is well settled that the general laws of the State in force at the time of the execution of a contract enter into and become a part thereof. *Bateman v. Sterrett,* 201 N. C., 59; *Rostan v. Huggins,* 216 N. C., 386 (388).

In *Hicks v. Kearney,* 189 N. C., 316, at p. 319, it is said: " 'There is always a presumption that statutes are intended to operate prospectively only, and words ought not to have a retroactive operation unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the Legislature cannot be otherwise satisfied. Every reasonable doubt is resolved against a retroactive operation of a statute. If all of the language of a statute can be satisfied by giving it prospective action, only that construction will be given it. Especially will a statute be regarded as operating prospectively when it is in derogation of a common-law right, or the effect of giving it retroactive operations will be to destroy a vested right or to render the statute unconstitutional.' 25 R. C. L., 787; Black on Interpretation of Laws, 252. In *Greer v. Asheville,* 114 N. C., 678, it is said: 'Unless the legislative intent to the contrary is made manifest by the express terms of the statute, or by necessary implication arising out of it, it will, as a rule, be held to operate prospectively only—never retroactively.' "

The act in controversy, Public Laws of N. C., 1925, ch. 117, *supra,* did not make it retroactive. If it had, it was unconstitutional. It must be construed prospectively. Wade on Retroactive Laws, sec. 34, is as follows: "Laws construed to be retroactive only when such intention clearly expressed. One of the cardinal rules by which courts are governed in interpreting statutes is, that they must be construed as prospective in every instance, except where the legislative intent that they shall act retrospectively is expressed in clear and unambiguous terms, or

such intent is necessarily implied from the language of the statute, which would be inoperative otherwise than retrospectively. This rule rests upon no constitutional limitation of the legislative power, but is a doctrine of the common law, founded upon the recognized injustice of a method of making laws by which the Legislature looks backward to discover past errors to be corrected and past grievances to be remedied. In all retroactive laws there must be an element of surprise, by which the persons whose rights are affected are taken unawares. They are called upon to act in a manner different from what they had been led by the previous state of the law to anticipate. So repugnant is such a system of legislation to our natural sense of justice, that it has been stigmatized as more unreasonable than that adopted by Caligula, who was said to have written his laws in a very small character, and hung them upon high pillars, the more effectually to ensnare the people," etc.

An act of the General Assembly in conflict with the Constitution is void. *R. R. v. Cherokee County,* 194 N. C., 781; *S. v. Brockwell,* 209 N. C., 209.

In *Houston v. Bogle,* 32 N. C., 496 (504), *Pearson, J.,* says: "It is settled, that the Legislature cannot pass any declaratory law or act declaring what the law was before its passage, so as to give it any binding weight with the courts. A retrospective statute, affecting or changing vested rights, is founded on unconstitutional principles and consequently void. 1 Kent. Com., 455, and the cases cited." *Booth v. Hairston,* 193 N. C., 278.

In *Patterson v. Hosiery Mills,* 214 N. C., 806 (812), *Seawell, J.,* in clear language, for the Court says: "Whether the law itself makes the amendment, or as now, confers the power of amendment to the corporation, it will not be construed to operate retrospectively to the detriment of rights already vested under the old charter. *Greer v. Asheville,* 114 N. C., 678, 19 S. E., 635; *Fenner v. Tucker,* 213 N. C., 419, 196 S. E., 357. A contrary construction of the statute, giving authority to the retroactive provisions of the charter amendment under consideration, would do violence to the Constitution and would compel us to view the proposed action as the taking of property without due process of law."

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

Reversed.

BARNHILL, J., *concurring in result:* The date on which plaintiff purchased the stock in controversy is not alleged in the complaint. Standing alone, the complaint is sufficient, and, ordinarily, the defect in plaintiff's cause of action relied on by defendant, being latent, would be a matter in defense. However, the court below found as a fact—apparently by consent and at least without exception—that the stock was

acquired in 1919. In deciding the question presented it is permissible, therefore, for us to take cognizance of the fact thus found.

At the time defendant purchased this stock he became liable, in case of insolvency of the plaintiff, under the double liability statute, C. S., 219 (a). Subject to the terms of this section, which has since been repealed, he was the absolute owner thereof free of any claim against him or any right of assessment against the stock by plaintiff.

Ch. 56, sec. 3, Public Laws, Extra Session 1921, as amended by ch. 117, Public Laws 1925, and ch. 243, Public Laws 1931, is not unconstitutional as stated in the majority opinion. It is not so contended by the defendant. As it creates a new liability and provides a special remedy for its enforcement, it relates only to stock thereafter issued and acquired. That is to say, it operates prospectively—not retroactively. There is no language in the act which seeks to make it otherwise.

As the statute, as amended, is prospective in operation it does not affect defendant's vested rights in existence at the time of its enactment. Therefore, plaintiff has no cause of action to sustain the writ of attachment issued by the clerk and the service of summons by publication is void. We need say this and nothing more.

STACY, C. J., and WINBORNE, J., join in this opinion.

STATE OF NORTH CAROLINA v. VICTORIA GREER.

(Filed 20 December, 1940.)

Assault § 11—Defendant's evidence held to present question of self-defense, and court should have instructed jury thereon, even in absence of request.

Defendant was indicted for an assault on her husband with a deadly weapon with intent to kill, resulting in serious injury. Defendant's evidence was to the effect that her husband had been prosecuted for non-support and ordered to pay her a certain sum for her maintenance, that he had stated to her that the payments ordered would not do her any good because he was going to make her pay it all out for hospital bills, that prior to the day specified in the indictment he had beaten her almost to death, and had beaten her that very day, that later she met him at a neighbor's house and was talking to him when he suddenly pulled a pistol from his pocket, that she knocked the pistol from his hand and picked it up and ran out of the house to take it to the police station, that he followed her in a car, caught up with her and jumped out of the car and started arguing with her, that when he made a lunge toward her, she put up the pistol to protect herself, and out of fear and excitement, pulled the trigger, inflicting the wound. There was expert testimony that

defendant had been severely beaten by her husband and that his treatment had instilled in her uncontrollable fear and rendered her mental reactions abnormal. Defendant weighed about 110 pounds and her husband weighed about 170 pounds. *Held:* Defendant's evidence, notwithstanding the State's evidence in contradiction, and notwithstanding her declarations to others that the shooting was accidental, requires the court to charge on the law of self-defense as a substantive feature of the case, and the failure of the court to do so, even in the absence of a special request, constitutes reversible error.

APPEAL by defendant from *Pless, J.*, at September Term, 1940, of FORSYTH. New trial.

Victoria Greer was tried under the following indictment: "The Jurors for the State Upon Their Oath Present, That Victoria Greer in Forsyth County, on the 11th day of May, 1940, wound one John Greer with a deadly weapon, to wit, a certain pistol; and with the intent to feloniously kill, and did inflict serious bodily injury to the great damage of the said John Greer contrary to the statute in such cases made and provided, and against the peace and dignity of the State."

John Greer, husband of the defendant, testified that he went to his stepbrother's house to pay his wife $4.50 alimony due that month under Judge Lipfert's order, as the result of an indictment for nonsupport prosecuted against him by his wife. His wife, he testified, did not have a receipt, and left the house. He gave the money to his stepbrother's wife. He returned that night and got the receipt from her, and met his wife as he went out, and she asked to speak to him. They sat on the "settee" and she said, "John, I am in love with you. Come on back and live with me." He declined, and she told him if he did not, "You ain't going to be so hot." When asked what she meant, she said, "If you don't come back, you'll find out."

Afterward, according to his testimony, he went out, and was in his brother's car. She followed him to the car and repeated her request for him to come back. "There were five or six people in my brother's car when I got in it. They were: Stacy McLaurin, Nancy McLaurin, and a girl named Jessie who was Nancy's sister, Eloise Bohannon, and Paul Anderson. I went back to my brother's house and parked the car. My brother's house is about seven blocks from where my brother-in-law lives, and is on Cherry Street. I went in the house and told my sister-in-law how my wife threatened me. She says, 'There is nothing to that, just old love.' I thought nothing about it and sat there and talked a while. I went back out to the car. The people were still sitting in the car, never did get out. I was not drinking, and I never drank a drop of whiskey in my life. I sat in the car under the steering wheel for about five minutes and my wife walked up. This was about seven blocks from where I left her. She asked could she speak to me and I

said she could. I got out and we stood back of the car. I put my foot up on the bumper. She says, 'John, aren't you going home with me?' I says, 'No, I told you I wasn't.' She says, 'John, I feel sorry for you.' I didn't know what she meant. She kept saying, 'I feel sorry for you.' She would never say what she was going to do. I turned and went on and sat back in the car. She walked around beside the car, between the car and the house, and she pulled out a pistol. She says, 'All you damned Negroes get out of that car.' Everybody jumped out of the car and ran. I sat there in the car. She had the gun on me, and there was nothing for me to do. I got out on the opposite side of the car in the street. The car was between me and her. She had the gun dead on me. She says, 'Come out from behind the car or I will shoot through the car.' I circled behind the car. My brother at that time walked out of the door and called me. She looked at him and says, 'Bus Greer, you ain't got nothing to do with this.' She throwed the gun up and says, 'I am desperately in love with this man.' She kept chasing me around the car until I got tired of running around the car. She told me to come on out. I came on out from behind the car with my hands up. As I did, she had got the pistol leveled right dead in the middle of my stomach. She says, 'Get up the street in front of me.' I had my hands up and I walked up the street in front of her. She had the gun close to me in my back. The pistol was not touching me but it was real close. I walked up the street scared to look back. I was looking for her to shoot me any minute. I walked just about fifty feet between Seventeenth Street and the intersection, and she shot me. I had on these same pants. When she shot, I run. She snapped the gun at my back three times I know of. I don't know how many more. The gun didn't go off no more. She struck out behind me and run me around down Seventeenth, around Twentieth and on back into Cherry again—ran me about two blocks. When I got up on Cherry Street, I don't know which way she went."

Further testimony of this witness was as to the nature of the wound and statement of his difficulty in living with her.

The witness was corroborated in the main aspects of his testimony as to the shooting by Eloise Bohannon and John Pardue, and J. R. Bowles, of the detective division of the police department, stated that he saw no marks on defendant that night at police headquarters; that she had told him that John grabbed her arm and that the gun went off accidentally.

Victoria Greer, the defendant, testified as follows: "I am the wife of John Greer, the prosecuting witness. I recall the afternoon before the shooting occurred that night. My husband and I had been over to Squire Adams' office that day. It was after two o'clock that we left

there. After I had been home for an hour or more, my husband came to my home. He stopped at the house and came in and told me to write him a receipt. As I went to get the receipt in the bottom of the vanity drawer, this man strikes me across the head and knocks me to the floor and began beating me and kicking me and said, 'I asked you to take the nonsupport down and you didn't do it and I am not going to pay it. And if I do pay it, you are not going to reap the benefit of it because you will have to pay it out for doctor's bills.' He severely beat me there and forced me to drink something—I don't know what it was—and then told me if I would have him up what he would do to me and he left the house without even paying it. I did not go to a doctor just then. I did go to Dr. Jordan and he examined me. I went there several times, and also went to the hospital. After my husband whipped me that afternoon in my house, I next saw him that night. I don't know what time it was, but they say it was around ten o'clock. I went down to Mrs. Brockman's and was there talking to her and I went next door to see her aunty. When I came back to my home, John Greer was in the house standing in the front room near the center of the floor in the dark and as soon as I walked in the house, he began to argue with me about having him up, said I had taken out a warrant for him. I told him I hadn't taken out a warrant for him. He says, 'Oh, yes, you have.' I says, 'What's the matter with you today? You beat me up, it looks like you ought to be satisfied.' I sat down on the davenport and tried to explain to him. He had his hand in his left pocket. I asked him what he was doing with his hand in his pocket. Just as I said that, he jerked his hand out of his pocket with a short pistol in it. I knocked it out of his hands and run with it. I started down the steps and told him I was going to report the gun to police headquarters. He says, 'You are not; that is not my gun, it belongs to a girl.' As I run up the street, he passed me about middle ways of the block. I don't know which way he went. I tried to make it to my mother's house. This car drove up almost at Seventeenth and Cherry and someone says, 'There she is now.' As I walked about two or three steps, he parked the car and jumped out. He started arguing with me, swearing at me and telling me to give him the gun. I told him I wasn't going to give him the gun and was going to report the gun. He made advances toward me. By me being scared, and beat up, and excited, I put the gun up to protect myself just as he made a lunge toward me. When I threw the pistol up, he wheeled and that is when I squeezed the lemon squeezer and it pierced him in the side. I don't know what size pistol it was, but it was very short. I had it in my left hand and had a small pocketbook in my right hand. After this pistol exploded, I had two gashes cut on this left hand, and powder on the inside, kind of a scorched

place on the inside of my left hand. I bled. I had my hat and some of the blood is still on the hat. When the gun went off, it frightened me so bad I dropped the gun and run. I went down Seventeenth Street until I got to a little bridge, went across the bridge and came back to Cherry. I went down Cherry to the Old Town Road, across it, down to Thirteenth Street, crossed the Boulevard and went up Abattoir Street and into Trade Street. The police did not have to catch me; I gave up and told them what happened as best I could. Later on I was released on bond. I had never shot a pistol before and had never seen that pistol before that night. I don't know what became of the pistol. I dropped it there in the street and that is the last time I saw it. My husband said the pistol belonged to a girl by the name of Nancy B. that he was out with. That is Nancy McLaurin. My husband has beat me so many times, I haven't the slightest idea how many. It is more times than I even have fingers."

"He came to my house and beat me up that afternoon. That night I went down to his sister-in-law's. O. Z. Brockman is his stepbrother. I saw him there. I was alone when he came to my house in the daytime. Nobody saw him there but me. When I went down to O. Z. Brockman's Mrs. Brockman was there when he came in with this gun, but she was in the back room in the bed. I went next door to see Miss Rachael, her aunty. When I came back is when this man was in the house. He was at his stepbrother's house. I went in and we sat down on the davenport in the Brockman house. Mrs. Brockman was in the next room in the bed. He pulled out a pistol. I didn't holler. I weigh about 110 pounds. He weighed about 170 the last time I knew. When he came out with the pistol, I took it away from him by knocking it out of his hand and picking it up. I ran. I went out in front of him and went down the steps and up Twenty-Third Street. I lived on Twenty-Third Street. I was not especially going to the corner of Seventeenth and Cherry. I was going to try to make it over to my mother's to report this gun. I wanted my mother to go with me to police headquarters. I didn't report it to Mrs. Brockman because I was afraid he might catch me. He got in the automobile and passed me while I was still on Twenty-Third Street. There was no use to go back to Mrs. Brockman's because police headquarters is the place to go for things like that. My mother lived right behind the Children's Home at that time. To go on out Twenty-Third toward there you have to go by a graveyard to get to Twentieth and I was afraid. I never went that way to mother's. My mother lives on Glenn Avenue Extension. I always go down Cherry and get on Glenn Avenue Extension. I couldn't have gone out Twenty-Third."

She was corroborated, in part, by Nina Blanton, who testified: "I am the mother of Victoria Greer and I recall this Saturday night this shooting occurred. She came to my house after she had gone to police headquarters. I asked her how did she get a gun and whose gun it was and she told me she was down at Mr. Brockman's house and John was there and that she and him was arguing, sitting on the davenport, and she noticed him all the time with his hand in his left pocket. She said she asked him what it was or something, and he pulled his left hand out of his pocket and had this little pistol in it. She said she knocked it out of his hand and got it and run with it. She said she was on the way to headquarters to turn the gun in and she come in contact with him and was afraid he was going to finish her and through the excitement she shot him. I saw her body bruised up that Sunday morning. She had been beat with a stick, because the skin was all broken. I put white vaseline on her body myself. She was severely beaten by him. This was around five o'clock in the morning when I saturated her body with white vaseline. John came to my house on either Thursday or Friday afternoon before this thing happened. He was asking me to make her take this nonsupport down. I told him I couldn't. I says, 'If it was me, I would do it. It would have been down long ago.' He says, 'If you want her, you better make her take it down.' 'I am going to have it took down and no judge won't have to take it down.' I told my daughter what he said. She told me she went down some time during the week-end and tried to take it down."

Dr. J. C. Jordan, admitted to be an expert physician and surgeon, testified for the defense:

"I am a regular practicing physician here in the city and have been here six years. I treated Victoria Greer, I saw her first on 5-16-40. She came to me with the following complaint: 'My husband beat me about two months ago. Three weeks ago he kicked me. Then last Saturday he took my clothes off and beat me with his fists and a stick.' I had Victoria to disrobe in the office and examined her. I saw numerous whelps over her body and made an attempt to locate most of the whelps, which I found on her body. The locations were as follows: She had seven whelps in the upper left chest in the front. Twenty-seven on the left side from the crest of the ilium, the top of the pelvis to the shoulder. She had five in the upper center back. Seventeen on the right side. Twenty on the right buttox and leg and had a pulled tendon at the height of the tenth rib on the right side and the left shoulder blade was tender. On 5-22-40 I got word that the patient was so weak I had to hospitalize her. I placed her in the hospital that day and she was discharged from the hospital on 6-3-40 and I reëxamined her. I have an opinion satisfactory to myself as to what caused the pulled

tendon. I think that the pulled tendon which she had at the level of the tenth rib on the right was due to some blow which she had received at that point. When she first came to see me her physical condition was multiple abrasions of the entire body. As I continued to see the patient she developed a mental condition and I made a diagnosis of catamania. The patient was unable to take any food by mouth in any form. I sent the patient to the hospital because she couldn't eat. She didn't eat for two days, from 5-22-40 to 5-24-40. There was absolutely no way to keep the patient alive unless she ate and I felt hospital feeding by vein was the only way in which to keep her alive. I didn't send her to the hospital because of having heard she had taken some poison. I heard that, but there was no evidence of it that I found."

The jury found the defendant guilty of an assault with a deadly weapon, with intent to kill. The sentence was a period of not less than two nor more than three years in State's Prison. The defendant appealed.

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

Harry McMullan, Jr., and A. Tyler Port for defendant, appellant.

SEAWELL, J. Under the evidence in this case, was it the duty of the trial judge, without special request therefor, to instruct the jury upon the law of self-defense? We answer in the affirmative. C. S., 564; *S. v. Thornton,* 211 N. C., 413, 190 S. E., 758; *S. v. Bost,* 192 N. C., 1, 133 S. E., 176; *S. v. Godwin,* 211 N. C., 419, 190 S. E., 761.

The evidence was, of course, contradictory. But with this fact neither the trial court nor this Court has any concern in applying the principles of law involved. Indeed, upon appropriate instruction, the jury may have found the testimony relied upon by the State less credible than that of the defendant. On a matter of this kind, at least, the statement of the defendant must be accepted as true. *S. v. Finch,* 177 N. C., 599, 600, 99 S. E., 409.

There is much evidence in the record which should be considered upon the question of self-defense other than the immediate account which lifts the curtain upon the assault—the occurrences immediately preceding the meeting; the disparity in the size and strength of the parties, Greer weighed 170 pounds, the defendant was a frail woman weighing 110 pounds; the fact that he had previously beaten her almost to death, and renewed the beating that very day; the statement that if she did not "take down the alimony" she would have to pay it out in hospital bills; the fact that she was on her way to give his pistol to the police; the fact that his inhuman beatings had instilled into her uncontrollable fear, and

had rendered her mental reactions abnormal—all these considered in connection with her version of the encounter: "I tried to make it to my mother's house. This car drove up almost at Seventeenth and Cherry and someone says, 'There she is now.' As I walked about two or three steps, he parked the car and jumped out. He started arguing with me, swearing at me and telling me to give him the gun. I told him I wasn't going to give him the gun and was going to report the gun. He made advances toward me. By me being scared, and beat up, and excited, I put the gun up to protect myself just as he made a lunge toward me. When I threw the pistol up, he wheeled and that is when I squeezed the lemon squeezer and it pierced him in the side. I don't know what size pistol it was, but it was very short."

There is in this evidence an inference of self-defense which is not canceled out by the contradictory evidence of the State, even her own declaration to others that the actual shooting was accidental. In her own evidence she attributed it to a fear which neither humanity nor reason may disallow, and of which the law itself is considerate. Taking all the evidence together, the inference that defendant acted under a reasonable apprehension of great bodily harm cannot be said to be based on a mere scintilla.

There was error in failing to instruct the jury on the law of self-defense in connection with defendant's evidence, and she is entitled to a new trial. It is so ordered.

New trial.

DAVE LEONARD v. TATUM & DALTON TRANSFER COMPANY AND BRYANT ELECTRIC COMPANY.

(Filed 20 December, 1940.)

1. Master and Servant § 21a—

An employer who lends or hires an employee to another is not relieved of responsibility to third persons for the negligence of the employee unless the original employer surrenders control over the employee.

2. Automobiles § 24e—Whether truck owner furnishing truck for hire retained control over driver so as to be responsible to third person for driver's negligence held for jury.

The evidence tended to show that defendant transportation company furnished a truck and driver to its codefendant at a stipulated sum *per diem* to haul poles necessary in the performance of the codefendant's contract with the R. E. A., that under the agreement the codefendant furnished gas and oil and help to load and unload the poles, and designated the places to which the poles were to be unloaded, but did not direct the driver as to the routes to be taken or the time he should

report for work, that the transportation company employed and paid the driver, that the driver was in charge of the truck, and that the codefendant was without authority to hire or fire him. *Held:* Whether the relationship of master and servant existed between the transportation company and the truck driver so as to render it liable to plaintiff who was injured by the negligence of the driver, was properly submitted to the jury notwithstanding other evidence tending to support a contrary conclusion.

3. Automobiles § 14—Questions of negligence in stopping truck on highway without lights at night and contributory negligence of motorist colliding therewith held for jury.

The evidence tended to show that defendant's truck was loaded with telephone poles which were approximately the same color as the asphalt highway, that the poles protruded beyond the body of the truck, and that no flag or lantern was placed on the end of the poles, and that the truck was stopped on the highway at night without lights or reflectors, and that plaintiff, who had just passed a car traveling in the opposite direction and had dimmed his lights, ran his car into the rear of the truck resulting in the injuries in suit. *Held:* The questions of negligence in stopping the truck on the highway without lights at night and contributory negligence of plaintiff in colliding therewith were properly submitted to the jury.

4. Automobiles § 24e—

Where a defendant furnishing a truck for hire retains control over the driver so as to be liable to a third person injured by the driver's negligence in stopping the truck on the highway without lights at night, whether the truck was adequately equipped with lights when put into service under the contract is immaterial.

APPEAL by defendant Tatum & Dalton Transfer Company from *Rousseau, J.*, at 19 February, 1940, Term, of DAVIDSON. No error.

This is an action to recover damages for an injury to plaintiff alleged to have been sustained through the negligence of an employee of the defendant in the operation of a motor vehicle.

Since the appellant relies here mainly upon the refusal of the court below to grant its motion for judgment as of nonsuit, the evidence may be summarized from that point of view:

The appellant—Tatum & Dalton Transfer Company—a corporation, was the owner of tractors, trucks, and trailers, and was engaged in the transfer business in Greensboro and vicinity. The Bryant Electric Company, holding a contract with the R. E. A., entered into an agreement with the Tatum & Dalton Company under which the latter company furnished the former with a truck and driver at the price of $1.25 per hour.

In furtherance of this arrangement, Mr. Dalton, of the appellant company, hired Jones, subsequently charged with negligent operation of the truck, as driver. The truck was "picked up" at High Point, and,

with Jones in charge, put into the agreed service in Davidson County, hauling poles in connection with the construction of an electric line.

Evidence as to the agreement between appellant and the Electric Company appears in the record as follows:

"H. M. Bryant testified for plaintiff: I am president of the Bryant Electric Company. My company has a contract with the R. E. A. in this county for placing poles. Pursuant to our contract it was necessary for us to transport poles from different locations over the highways to the places where those poles were to be placed. Pursuant to our contract with the R. E. A., it was necessary for us to transport poles from different places in the county to the places where the poles were to be placed as directed. The poles are different sizes, different lengths, and different sizes in timber. They run from 25 feet to 50 feet, to the best of my knowledge. They are different classes of poles. I will say their color was black or brown."

"Well, I called Mr. Dalton and talked to him over the phone and told him that we had some poles to haul, and asked if he would furnish us a truck and man to haul these poles. He told me that he would, and the question came up about the price. I said, 'I will pay the same price I have been paying,' which was $1.25 an hour, 'and furnish the gas and the men . . .' the Bryant Electric Company to furnish the gas and Dalton was to furnish driver. That was from over here at this office, and he came over but I left the office, and turned my information over to Mr. Burgess, my superintendent; and that is what I paid Mr. Dalton is $1.25 an hour for the time he was hauling the poles."

"Well, I hired the truck to haul poles, but I was not over here, and all I can say is what my superintendent did about that. He was to direct how the hauling was to be done. I don't know that because that Mr. Burgess directed."

"We were to furnish necessary help to load the poles is what I told him. I didn't know how many men it would take and that was left entirely—I stated we were to furnish assistance to help load and unload the poles."

"We had this contract and part of our contract was to the effect that poles had to be delivered to certain places. We hired this truck and driver to haul those poles. Part of our agreement was to furnish gasoline. We furnished the gasoline. Yes, we furnished the necessary help to load the poles. I did not put this truck and driver under our superintendent. His name was Mr. Burgess. Yes, there was a Mr. Allen on the pay roll. I don't remember what he did. I know that I paid Mr. Dalton in accordance with our terms because he came by the office. It was $1.25 per hour. We didn't have this truck hauling transformers to my knowledge. We didn't have it hauling wire to my knowledge.

All that was in charge of our superintendent. So far as I know, the truck and driver did what our superintendent told him to do. I just turned it over to the superintendent, and so far as I know, the superintendent did what I said. The truck we got from Tatum & Dalton was to report at Lexington. At this time we had this R. E. A. contract."

"I did not know of my own knowledge in reference to this truck and driver as to what any of our superintendents or foremen did."

"There were maps in the office to indicate where the driver of this truck might take the poles."

The evidence as to the circumstances of plaintiff's injury is somewhat conflicting, but plaintiff's evidence tends to show that on 30 August, 1939, Jones drove the Tatum & Dalton truck to Silver Valley to get poles. Accompanying the truck were Foster Anderson, Robinson, and Curtis, employees of the Electric Company, who were there to load the poles under Jones' direction. The headlights were put on at Willomore Springs, some ten miles from where the accident took place.

While Jones testified that the truck never ceased moving until struck in the rear by plaintiff's car, other testimony was to the effect that it went dead. That there were neither lights nor lighting fixtures on the rear of the truck; no flags on the ends of the poles which projected some 16 feet over the end of the truck, and were black, like the road.

One witness said Jones gave him a paper flour sack and told him to go back and flag—that there were no reflectors on the rear of the truck. This witness, however, stated that he was trying to crank the truck when Mr. Leonard struck it. As to the truck, "It stopped right on just about the center of the highway." "The sacks would not last any more than three or four minutes, that torch he had lit. In about five minutes after that then the car hit the poles. There were no lights of any kind to the rear of that truck within five minutes to the time Mr. Leonard struck it." "The color of the road was black, the color of the poles was black . . . two and a half or two feet, off of the ground."

Sheriff Kimel testified that the road was straight for some distance, but that there was a dip down into where the car struck the truck. He also testified that there were no reflectors on the back of the truck and that there was not even a light assembly or fixture. A fixture had been broken off and the place was rusty.

The plaintiff Leonard testified that he met a car just before he ran into the truck and had put on his dimmers—that he did not see the poles, close to the ground, nor the truck at all, until he ran into it.

There was much evidence in partial contradiction. Evidence on the part of defendant Tatum & Dalton Transfer Company was to the effect that the truck was properly inspected and thoroughly equipped with lights before it was sent on the job.

There was evidence as to plaintiff's injuries.

Upon the submission of appropriate issues the jury found that Jones was not the employee of the Bryant Electric Company, but that he was the employee of the Tatum & Dalton Transfer Company, and, answering the issues of negligence and contributory negligence in favor of plaintiff, assessed the damages at $3,000.00. From the judgment thereupon defendant appealed.

Don A. Walser for plaintiff, appellee.
Sapp & Sapp for defendant, appellant.

SEAWELL, J. A person, natural or corporate, may lend or let a servant to another in such a way as to be relieved from liability arising out of injury to another through the negligence of the servant. But to bring this about, the control of the original employer over the acts of the employee must be so completely surrendered as to virtually suspend, temporarily, at least, any responsibility which might reasonably be associated with control.

We do not find such a situation to exist in the arrangement between appellant and Bryant Electric Company. The words employed in the contract are those of hire; but Tatum & Dalton Transfer Company not only hired Jones originally, but they seem to have paid him regularly during his service, during which he was in charge of the truck continuously. It is significant that as a part of the contract Bryant Electric Company agreed to furnish gas and oil and load the logs. This looks more like a hauling contract than the simple hiring of a truck and man, when these things would not be a matter of obligation to the owner of the hired truck or of understanding with him, but the concern only of the hirer. A person may hire a truck to haul his poles, if he please, but if that is the real nature of the transaction he doesn't need to agree with the owner to furnish the gas and load the poles. The contract is susceptible to the construction that what the Tatum & Dalton Company really undertook to furnish was service and that this, not the facilities for its accomplishment, was put under control of the Bryant Electric Company, and only so far as might be necessary to accomplish the purpose of the contract. *McNamara v. Leipzig,* 227 N. Y., 291, 125 N. E., 244; Berry, Law on Automobiles, Vol. 4, p. 587; *Long v. Eastern Paving Co.,* 295 Pa., 163, 145 Atl., 71.

"Where a truck owner contracted with a highway contractor to haul gravel at a fixed price, based on yardage and mileage, and the highway contractor had no control over the operation of the truck except to fill it, while the county employed an inspector to direct the unloading, the truck owner was found to be an independent contractor." *Burns v. Eno,* Iowa, 881, 240 N. W., 209 (1932). Berry, Law on Automobiles, *supra.*

"A truck owner was an independent contractor, rather than an employee, where he was engaged to haul asphalt at an hourly rate, subject only to orders as to the asphalt to be hauled and the place of unloading." *Long v. Eastern Paving Co., supra.*

The limited control which the Electric Company exercised over Jones is apparent from the testimony of both Bryant and his superintendent, Burgess, to whom he referred for enlightenment on this point. Burgess testified: "I did not at any time direct which route of travel Mr. Jones was to take other than the written instructions set out in the working sheet. I did not direct how many poles he should haul at a load. I did not direct how many hours he should work a day. I did not direct him to work at night. I did not tell Mr. Jones what time he should report for duty in the morning nor what time he should quit in the evening. I did not require Mr. Jones to report at the office at any time as to how many poles he had delivered on a given date or where he had delivered them. . . . I did not hire Mr. Jones. I did not have the right to fire him."

While the factual situations may at points vary, the case seems to fall substantially under the rule applied in *Wagner v. Motor Truck Renting Corp.,* 234 N. Y., 31, 136 N. E., 229 (1922), as stated in Berry on Automobiles, at page 787: "Where an owner of auto trucks hires them out at a *per diem* compensation, furnishing driver, oil, gasoline and accessories, and the driver is under the control of the owner during the entire period of hire, while the bailee cannot discharge the driver, and has no authority over him except to direct the place to which he shall drive, the owner is liable for an injury caused to a third person by the negligent act of the driver occurring during the period of hire, if the bailee has not interfered with the operation of the truck."

In substantial agreement will be found *Matlack v. Chalfant,* 69 Pa. Super. Ct., 49 (1917); *Spellacy v. Hagerty Motor Trucking Co., Inc.,* 182 N. Y. Supp., 355; *Norwegian News Co. v. Simkovitch,* 182 N. Y. Supp., 595; Berry on Automobiles, Vol. 4, pp. 786-787.

Upon this evidence we are unable to say, as a matter of law, that the relation of master and servant did not exist between the appealing defendant and Jones, the driver of the truck, at the time of plaintiff's injury, or that the jury were not warranted in finding that it did exist. In one aspect of the evidence relating to the contract, the case might, as contended by the defendants, fall within the holdings of the court in *Shapiro, Admr., v. Winston-Salem,* 212 N. C., 751, 194 S. E., 479, and similar cases cited in defendants' brief. But the evidence relating to this contract is contradictory, or, at least, capable of another construction favorable to the plaintiff. *Jeffrey v. Mfg. Co.,* 197 N. C., 724, 150 S. E., 503; *Norwegian News Co. v. Simkovitch, supra; McNamara v. Leipzig, supra; Braxton v. Mendelsome,* 233 N. Y., 122, 135 N. E.,

198. See 42 A. L. R., 1421. In this situation the matter was for the jury, under proper instructions by the court, and defendants' motion for judgment as of nonsuit on this ground was properly refused. *Dickerson v. Reynolds,* 205 N. C., 770, 172 S. E., 370.

Upon the question of negligence on the part of Jones, and contributory negligence on the part of plaintiff, we could not take the case away from the jury without running into serious difficulty with rules we have promulgated in like cases. There is sufficient evidence to sustain a verdict finding negligence. *Fox v. Army Store,* 215 N. C., 187, 1 S. E. (2d), 550; *Reid v. Coach Co.,* 215 N. C., 469, 2 S. E. (2d), 578; *Newbern v. Leary,* 215 N. C., 134, 1 S. E. (2d), 384; *Gates v. Max,* 125 N. C., 139, 34 S. E., 266; *Willis v. R. R.,* 122 N. C., 905, 908, 29 S. E., 941.

It is not necessary to pass upon the question whether the evidence tends to show that the truck was inadequately equipped with lights when put into service upon the highway by appellant.

In the trial of the case, we find

No error.

PIEDMONT MEMORIAL HOSPITAL, INC., v. GUILFORD COUNTY; GEORGE L. STANSBURY, CHAIRMAN, J. W. BURKE, R. C. CAUSEY, JOE F. HOFFMAN, FLAKE SHAW, ALL CONSTITUTING THE BOARD OF COMMISSIONERS OF GUILFORD COUNTY, NORTH CAROLINA; A. C. HUDSON, SUPERVISOR OF TAXATION FOR GUILFORD COUNTY; D. L. DONNELL, TAX COLLECTOR FOR GUILFORD COUNTY, NORTH CAROLINA; AND W. C. JOHNSON, TREASURER FOR GUILFORD COUNTY, NORTH CAROLINA.

(Filed 20 December, 1940.)

1. Taxation § 19—

The provision of Article V, section 5, of the State Constitution exempting from taxation property belonging to the State and to municipal corporations is self-executing.

2. Taxation § 20—

The provision of Article V, section 5, of the State Constitution that the General Assembly may exempt from taxation property held for educational, scientific, literary, charitable or religious purposes, is a grant of power and is not self-executing, and the power of the Legislature to prescribe such exemptions is limited by the terms of the grant.

3. Same—

Statutes exempting property from taxation because of the purposes for which the property is held must be construed strictly against exemption and in favor of taxation.

4. Same—Sec. 602 (a) applies to real property of private hospital in determining question of tax exemption.

Construing the statutory provisions relating to exemption of property from taxation in connection with the constitutional restrictions upon the power of the Legislature to exempt property from taxation, *it is held* that the real property of private hospitals is made a separate and distinct classification under section 602 (a) of chapter 310, Public Laws of 1939, and it is the legislative intent that the provisions of this section should control rather than the provisions of section 600 (7), exempting from taxation property of churches, religious societies and charitable institutions and orders, the language of section 600 (7), strictly construed, not being sufficiently broad to include property of private hospitals in view of the fact that section 602 (a) specifically deals with property of such institutions.

5. Same: Hospitals §§ 5, 7—Hospital not supported and controlled by public authority is private hospital, even though organized for public charity.

In determining the question of exemption from taxation, a nonprofit hospital established solely for charitable purposes through individual donations and which is governed by a self-perpetuating board of trustees named by the incorporators, is a private hospital as contradistinguished from a public hospital, which is one supported, maintained and controlled by public authority, and the distinction observed between charitable hospitals and those operated for gain or profit in determining liability for negligence, has no bearing in determining the question of tax exemption.

6. Taxation § 20—Taxes levied on real property of private hospital used for hospital purposes are subject to credit for services rendered indigent poor.

The first floor of plaintiff's building is rented out for stores and shops, the second floor is rented for offices for physicians and surgeons, the third and fourth floors are used for a hospital. *Held:* As to the first two floors, the General Assembly is without authority to grant any exemption from taxation, and as to the third and fourth floors, section 602 (a) of chapter 310, Public Laws of 1939, is applicable, and in accordance with its provisions, bills for services rendered the indigent poor may be allowed as a credit on taxes levied against this part of its property, but it is not exempt from taxation.

7. Same—

Plaintiff's hospital was organized solely for charity but collected from patients able to pay. Defendant county levied personal property taxes on plaintiff's hospital beds, equipment and furnishings. *Held:* Only the personal property used exclusively for charitable purposes is exempt from taxation under section 601 (5), chapter 310, Public Laws of 1939.

APPEAL by defendant from *Nettles, J.*, at October Term, 1940, of GUILFORD. Reversed.

This was a controversy without action to determine whether the plaintiff's property was exempt from taxation by Guilford County.

The authorities of Guilford County charged with the assessment and collection of county taxes duly listed for taxation for the year 1940 real

and personal property belonging to plaintiff at the assessed valuation of $93,930 for a four-story building and lot, in Greensboro, and $12,500 for personal property contained in the building. Plaintiff protested the assessment of this property for taxation, claiming exemption therefrom, and paid the tax levied on the property, $794.24, under protest, and now seeks to recover back the sum so paid, in accord with the provisions of the statute.

The agreed statement of facts, upon which the controversy depends, may be summarized as follows: The plaintiff is a nonprofit benevolent and charitable corporation, created and existing under the laws of North Carolina, and the defendants are the duly constituted taxing and fiscal officers of Guilford County. The object for which plaintiff corporation was formed, as expressed in its charter, is "to conduct without profit, and entirely and completely for charitable and humane purposes, a general hospital or hospitals, in the city of Greensboro and Guilford County, North Carolina, and to include such organizations and facilities as it may from time to time deem necessary or advisable in order to best serve the public and the community in which any such hospital is located." The corporation was empowered to purchase, lease, hold, mortgage and sell real and personal property; to rent space in its buildings and to receive pay for the use of rooms, services and hospital facilities supplied to patients in its hospital; the income of the corporation to be used to pay for purchase and repair of property, for services, supplies and other expenses incident to the operation of the hospital; any income not needed for such purpose to be used for care and treatment of indigent patients under rules and regulations prescribed by the directors; the corporation to have no capital stock and no members other than its board of directors and board of trustees. It is provided that the affairs and property of the corporation shall be managed by a board of directors and a self-perpetuating board of trustees, named by the incorporators.

The building in Greensboro sought to be taxed was acquired by gift 26 January, 1938, subject to a mortgage indebtedness now amounting to $90,000, at 5% interest, which debt the corporation assumed and upon which it is making payment in curtailment. The third and fourth floors of the building, together comprising a floor space of 23,458 square feet of a total of 37,978 for the building, are used by plaintiff solely for the conduct of a hospital, including patients' and operating rooms. The second floor is divided into offices for physicians and surgeons, members of the medical staff of the hospital, who pay rent therefor. The first or ground floor is adapted for and rented for drugstore, shops, and offices. The personal property assessed for taxation consists of hospital beds, equipment and general hospital furnishings.

The funds collected from patients, rentals, endowment and whatever source, are placed in a general fund for use in defraying the cost of operating the hospital, maintaining the building, purchasing new equipment, and making payments on the mortgage indebtedness. The following figures for 1939 illustrate its normal yearly operation. The corporation received as income:

1. From patients, welfare, and hospitalization fund, and miscellaneous sources	$73,841.03
2. Duke Endowment	2,516.00
3. Rental from physicians' rooms	4,579.95
4. Rental from stores	5,220.00
Total income	$86,156.98

The income so received was expended for administration, salaries of nurses and other employees, hospital supplies, insurance, etc., including $7,164.57 paid on mortgage, leaving a "net profit for the year of $1,642.94."

Upon the facts agreed, the trial judge ruled that plaintiff's real and personal property was exempt from taxation, and adjudged that it recover of defendants $797.24, the amount of tax paid under protest. Defendants appealed.

Brooks, McLendon & Holderness for plaintiff, appellee.

D. Newton Farnell, Jr., B. L. Fentress, and H. C. Wilson for defendants, appellants.

DEVIN, J. This case presents the question whether, under the facts agreed, plaintiff's four-story building, in which on the third and fourth floors it maintains a hospital, is exempt from taxation under the Constitution and laws of the State.

The constitutional requirement that taxes on property shall be uniform as to each class of property taxed is subject to two exceptions, the one mandatory, and the other permissive. (1) "Property belonging to the State or to municipal corporations shall be exempt from taxation." (2) "The General Assembly may exempt cemeteries and property held for educational, scientific, literary, charitable or religious purposes." The first is self-executing; the second requires legislative action. But in order that the exemptions which the General Assembly may prescribe may become effective, they must be within the limits fixed by the Constitution. The power to exempt must be limited to property held for one or more of the purposes designated by the Constitution (Art. V,

sec. 5). Statutes exempting property from taxation because of the purposes for which the property is held must be construed strictly against exemption and in favor of taxation. *Hospital v. Rowan County,* 205 N. C., 8, 169 S. E., 805; *Latta v. Jenkins,* 200 N. C., 255, 156 S. E., 857; *Trustees v. Avery County,* 184 N. C., 469, 114 S. E., 696. It was said in *Odd Fellows v. Swain,* 217 N. C., 632, 9 S. E. (2), 365: "Taxation is the rule; exemption the exception."

Pursuant to the permission contained in the second clause of section 5, Art. V, of the Constitution, the General Assembly, at its session of 1939, exempted certain classes of real property from taxation, as set out in sec. 600 of ch. 310, Public Laws 1939. Subsection 7 of sec. 600 of the 1939 Act is relied on by plaintiff as constituting statutory authority for the exemption claimed. The property exempted by this subsection is specifically designated as follows: "Property beneficially belonging to or held for the benefit of churches, religious societies, charitable, educational, literary, benevolent, patriotic or historical institutions or orders, where the rent, interest or income from investment shall be used exclusively for religious, charitable, educational or benevolent purposes, or to pay the principal or interest of the indebtedness of the institutions or orders."

In the same Act of 1939, in sec. 602 (a), a specific provision with reference to private hospitals was enacted as follows: "Private hospitals shall not be exempt from property taxes and other taxes lawfully imposed, but in consideration of the large amount of charity work done by them, the boards of commissioners of the several counties are authorized and directed to accept, as valid claims against the county, the bills of such hospitals for attention and services voluntarily rendered to afflicted or injured residents of the county who are indigent and likely to become public charges, when such bills are duly itemized and sworn to and are approved by the county physician or health officer as necessary or proper; and the same shall be allowed as payments on and credits against all taxes which may be or become due by such hospital on properties strictly used for hospital purposes, but to that extent only will the county be liable for such hospital bills: Provided, that the board of aldermen or other governing boards of cities and towns shall allow similar bills against the municipal taxes for attention and services voluntarily rendered by such hospitals to paupers or other indigent persons resident in any such city or town: Provided further, that the governing board of cities and towns shall require a sworn statement to the effect that such bills have not and will not be presented to any Board of County Commissioners as a debt against that county, or as a credit on taxes due that county. The provisions of this subsection shall not apply to the

counties of Rockingham and Buncombe, nor to the cities and towns in said counties."

From an examination of these provisions of the statute, in connection with the restriction upon the power of the Legislature to exempt property from taxation, we are led to the conclusion that the legislative intent was to fix a separate and distinct classification for private hospitals in sec. 602 (a), rather than that they should be included in the general terms of the 7th subsection of sec. 600. Section 600 contains ten subsections defining the classes of real property exempted from taxation. Construing these provisions strictly, we find the language in none of them broad enough to include private hospitals, with the possible exception of the reference in subsection 7 to churches, religious societies, charitable institutions or orders. Sec. 602 (a) deals specifically with private hospitals, and was apparently intended to embody the only provision relating to that particular class of property, and to afford a means of repayment for charitable services rendered the county's indigent sufferers, without exempting the property from taxation.

From the facts established below, it appears that the plaintiff is a "nonprofit, benevolent and charitable corporation," but it seems clear that, as contradistinguished from a public hospital, in the sense of one supported, maintained and controlled by public authority, the plaintiff corporation maintains a private hospital controlled by a self-perpetuating board of trustees named by the corporators.

In the recent case of *Strauss v. Marlboro County General Hospital*, 185 S. C., 425, 194 S. E., 65, where the question raised was whether the defendant in that case was a public hospital or a private institution, it was held that it was not, in a legal sense, a public hospital. The Court said: "It appears from the statements of record that Marlboro County General Hospital was built by funds donated by individuals at large. It is governed by trustees named by the corporators, it is a public charity, but is a private corporation."

In the opinion in that case was quoted, as applicable, the following language of *Story, J.*, in the celebrated case of *Trustees of Dartmouth College v. Woodward*, 4 Wheat., 518, 4 Law. Ed., 629: "When, then, the argument assumes, that because the charity is public, the corporation is public, it manifestly confounds the popular, with the strictly legal, sense of the terms. . . . When the corporation is said, at the bar, to be public, it is not merely meant, that the whole community may be the proper objects of the bounty, but that the government have the sole right, as trustee of the public interest, to regulate, control and direct the corporation, and its funds and its franchises, at its own will and pleasure. Now, such an authority does not exist in the government, except where the corporation, is in the strictest sense, public; that is, where its whole

interests and franchises are the exclusive property and domain of the government itself."

It may not be out of place to add a further quotation from the opinion of *Justice Story* in the *Dartmouth College case, supra:* "A hospital founded by a private benefactor is, in point of law, a private corporation, although dedicated by its charter to general charity. . . . It was indeed supposed at the argument, that if the uses of an eleemosynary corporation be for general charity, this alone would constitute it a public corporation. But the law is certainly not so."

In the able argument of plaintiff's counsel, in support of the view that under the Act of 1939, construed with reference to the permissive power granted by the Constitution, this property should be held exempt from taxation, our attention was called to the case of *Northwestern University v. People,* 99 U. S., 309, 25 Law Ed., 387. However, in that case the clause of the Constitution of Illinois there considered provided that "the property of the state and counties, both real and personal, and such other property as the General Assembly may deem necessary for school, religious and charitable purposes may be exempt from taxation," and the Act of the General Assembly of that state in amending the charter of the University specifically exempted all its property from taxation. Here the power to exempt is restricted by the Constitution to "property held for charitable purposes," and, we think, by fair interpretation, the General Assembly has declined to exempt plaintiff's property except in the respects hereinbefore pointed out.

The distinction between private nonprofit hospitals operated on the basis of charity, and those operated for gain or profit, as defined in *Green v. Biggs,* 167 N. C., 417, 83 S. E., 553; *Johnson v. Hospital,* 196 N. C., 610, 146 S. E., 573; *Herndon v. Massey,* 217 N. C., 610, 8 S. E. (2), 914, affords us no light on this point. Those cases were concerned with the question of the liability of a hospital for negligence.

It appears from the statement of facts agreed that the third and fourth floors in the building described are exclusively used for the maintenance of the hospital, while the first floor is rented out for stores and shops, and the second floor rented for offices for physicians and surgeons.

As to that portion of the building, on the first and second floors, which is rented out for commercial and business purposes, the rule laid down by this Court in *Odd Fellows v. Swain, supra,* must be held applicable, and determinative of the question of exemption against the plaintiff. *Winston-Salem v. Forsyth County,* 217 N. C., 704, 9 S. E. (2), 381. Anything in ch. 310, Public Laws 1939, which attempts to exempt this portion of the building from taxation must be held in excess of the granted power of the General Assembly. "The grant is limited in its terms, and the power to exempt stops at the boundary of the grant."

Odd Fellows v. Swain, supra. Neither by the permissive terms of the Constitution nor by the Acts of the General Assembly pursuant thereto may the described real property of the plaintiff be held exempt from taxation except in the limited sense prescribed by sec. 602 (a), above quoted. *Davis v. Salisbury,* 161 N. C., 56, 76 S. E., 687; *Trustees v. Avery County, supra.*

As to that portion of the building on the third and fourth floors used as and for a hospital, the provisions of sec. 602 (a) of the 1939 Act are applicable. By this section it was specifically declared that private hospitals shall not be exempt from taxation. The machinery provided in this section for certain payments by the county for charitable services rendered indigent patients of the county presents no question for our decision under the facts agreed.

With respect to the personal property of the plaintiff described in the agreed statement of facts, only so much thereof as is held for and exclusively used for charitable purposes would be exempt from taxation under sec. 601 (5) of the Act of 1939. This section exempts "Personal property belonging to . . . hospitals . . . which are not conducted for profit and entirely and completely used for charitable and benevolent purposes." *Bank v. Comrs. of Yancey County,* 195 N. C., 678, 143 S. E., 252. That portion of the judgment below which held plaintiff's personal property exempt from taxation is modified so as to apply only to property coming within the designation of this section.

That portion of the judgment appealed from, which declared plaintiff's real property exempt from taxation, must be held erroneous, and the judgment ordering refund of the amount paid under protest is

Reversed.

JANE MONTGOMERY v. GRACE M. BLADES, ADMINISTRATRIX OF WILLIAM B. BLADES, DECEASED; SOUTHERN RAILWAY COMPANY AND CITY OF DURHAM.

(Filed 20 December, 1940.)

1. Municipal Corporations § 14: Railroads § 11—

Where as a part of the original construction of a railroad overpass, supports for the overpass rest in the center of a street and create a dangerous condition, both the municipality and the railroad company may be held liable for negligence in so maintaining the supports.

2. Negligence §§ 6, 7—

Intervening negligence becomes the independent and sole proximate cause of injury so as to prevent the original negligence from being actionable when the original negligence does not join with the intervening

negligence in logical sequence in producing the injury, or when the intervening negligence is of such an extraordinary nature that it could not be reasonably foreseen by the author of the original negligence.

3. Same: Municipal Corporations § 14: Railroads § 11—In this action by guest, alleged negligence of driver crashing into supports of railroad overpass held not to insulate alleged negligence of municipality and railroad.

Plaintiff, while riding as a guest in a car, was injured when the car crashed into a support of a railroad overpass. In its original construction the railroad overpass bridge was supported in its middle by concrete pillars having their base in the center of the street, so that the street under the bridge was divided in half. Plaintiff instituted this action against the administratrix of the driver and against the railroad company and the municipality. The complaint alleged that the driver was negligent in failing to keep a proper lookout and in failing to see and avoid the obstruction and in failing to drive on his right side of the street. The allegations of negligence on the part of the corporate defendants was that the construction of the overpass in such manner constituted a dangerous condition and that they were negligent in so maintaining the overpass supports for a number of years and were negligent in failing to keep proper warning signals and lights on the supports. *Held:* The negligence alleged on the part of the corporate defendants continued up to the time of the injury, and the allegation that the driver negligently failed to see the obstruction is not tantamount to an admission that it was adequately lighted, and since it cannot be held as a matter of law upon the allegations of the complaint taken as a whole that the alleged negligence of the corporate defendants did not join with the alleged negligence of the driver in logical sequence in producing the injury in suit, and since the alleged negligence of the driver cannot be held as a matter of law to be of such extraordinary nature as not to have been reasonably foreseeable in the situation created by the alleged negligence of the corporate defendants, the demurrer of the corporate defendants on the ground that the alleged negligence on the part of the driver insulated the negligence of the corporate defendants, was properly overruled.

4. Same: Automobiles § 21—

A guest in a car, being without fault, is entitled to recover from each defendant whose negligence concurs in producing the injury.

APPEAL by plaintiff from *Stevens, J.*, at October Term, 1940, of DURHAM. Reversed.

Victor S. Bryant and John D. McConnell for plaintiff, appellant.
Hedrick & Hall for defendant Southern Railway Company, appellee.
C. V. Jones and S. C. Brawley for defendant city of Durham, appellee.

SEAWELL, J. The plaintiff brought this action to recover damages for an injury which she alleges she sustained as the result of the concurring negligence of William B. Blades, deceased intestate of Grace M. Blades, administratrix, defendant, the Southern Railway Company and

the city of Durham, her codefendants. The alleged negligence of the corporate defendants consisted in maintaining an inadequately lighted obstruction or structure in Chapel Hill Street within the city limits, consisting of the middle concrete piers or pillars supporting the railroad bridge over the underpass of the street at that point, which piers are alleged to be in the center of the street. The negligence of Blades is alleged to have been the careless operation of his automobile, in which plaintiff was a guest, which automobile, it is alleged, was caused to come into violent collision with the aforesaid central pillars of the bridge, to the great injury and damage of the plaintiff. This negligence of Blades is set up in the complaint as follows:

"21. That the defendant's intestate carelessly and negligently failed to keep a lookout for said post or obstruction in the street and negligently and carelessly failed to exercise due and proper precaution in the operation of his automobile in that he negligently failed to keep a lookout for and negligently failed to see said obstruction, and negligently failed to drive his automobile on the right-hand side of the street at said point.

"22. That the plaintiff believes and so alleges that the defendant's intestate, Mr. William Blades, was also careless and negligent, in that he negligently failed to give proper attention to the street and obstructions therein and negligently failed to see the said concrete post or abutment in the center of the street, and negligently failed to drive on his proper side of the street at said point, and negligently and carelessly operated his car at an unlawful, negligent and careless rate of speed, in such manner as to drive into said concrete post, and all of said acts of the defendant's intestate, Mr. Blades, as aforesaid, were careless and negligent."

The negligence charged to the corporate defendants is stated in the complaint, in part, as follows:

"11. That said concrete post or support so erected with the knowledge, consent and approval of the city of Durham constituted an obstruction in said Chapel Hill Street, which was a public highway and thoroughfare, and said obstruction so placed in Chapel Hill Street had existed to the knowledge of the city of Durham for more than 12 years prior to the time of the collision herein complained of.

"12. That it was the duty of the defendants city of Durham and Southern Railway Company to see that any obstructions placed in Chapel Hill Street as supports for said underpass, or permitted to be placed or remain in said street, were properly marked with signals or lights or other warning devices in order that any persons using the highway at nighttime might be warned against such obstruction or defect.

"13. That neither the city of Durham nor the Southern Railway Company placed any light on said westernmost pillar of the underpass constructed at Chapel Hill Street as a warning to those using said street at night.

"14. That the only marker or signal or warning sign of any nature at the point where the collision hereinafter described occurred consisted of a small octagonal piece of wood with a number of glass studs placed on the westernmost post of the underpass; that there was no light or red lantern or red signal of any nature whatsoever placed on said concrete pillar located in the center of the highway at the times hereinafter complained of.

"15. That said piece of wood was too small and was not an adequate signal or warning, and in the nighttime the said studded piece of wood fastened to the post was wholly unable and inadequate to act as a signal or warning of the presence of said concrete post or support which constituted an obstruction in the said highway, and the defendants city of Durham and Southern Railway Company had negligently permitted said octagonal piece of wood and the small studs thereon to become defaced, dirty and broken, and at the times hereinafter complained of said sign was not a proper signal.

"16. That said underpass was negligently and carelessly constructed and maintained by the defendants city of Durham and Southern Railway Company, both knowing and being advised at the time the same was built that the said underpass, if constructed as proposed, and as finally constructed, would create a very dangerous condition and a great and unnecessary hazard, and said defendants were negligent in constructing said underpass in the manner herein set forth.

"17. That the defendants Southern Railway Company and city of Durham were negligent and careless and acted in total disregard of the rights, life and safety of those using the highway in erecting or permitting to be erected in the center of Chapel Hill Street, a much traveled thoroughfare, said concrete post or obstruction, and were particularly negligent and careless in permitting such obstruction to be erected in the center of said street without placing thereon adequate lights, warnings or signals, and were further negligent and careless in permitting said extremely dangerous and hazardous condition to exist for a period of at least 12 years up to and including the time said post was struck by the automobile driven by Mr. Blades."

After the jury had been impaneled the defendants Southern Railway Company and city of Durham demurred *ore tenus* to the complaint as not stating a cause of action. After argument, the trial judge sustained the demurrer, ordered a mistrial, and continued the case as to Grace M. Blades, administratrix. The plaintiff appealed from the order sustain-

ing the demurrer as to each defendant, Southern Railway Company and city of Durham. These defendants filed a joint brief.

There are two main questions presented here. The first is whether the maintenance of the underpass supports, which are alleged to be under the middle of the bridge and in the center of the street, and which are a part of the original construction, admittedly completed many years ago, could now be held to be negligent of itself. But, since the plaintiff in the brief and argument relies upon the allegations of negligence in the failure to keep the structure properly lighted, further consideration of that question is unnecessary—except to say that plaintiff has, in this respect, brought her case within the recognized pale of actionable negligence. *Dillon v. Raleigh,* 124 N. C., 184, 32 S. E., 548; *Speas v. Greensboro,* 204 N. C., 239, 167 S. E., 807.

The other question is whether the plaintiff in her manner of setting up the negligence of the corporate defendants, and in relation thereto that of Blades, has not so stated the case that, taking the complaint as a whole, any negligence alleged against the Railroad Company and the city of Durham is not insulated by the alleged negligence of Blades; or, at least, whether the negligence attributed to Blades is not so related to that alleged against these defendants as to amount to an admission, or averment, or conclusion that the corporate defendants were not negligent.

Covering the conveniences of this discussion, there are two instances, at least, where the intervening negligence of an independent responsible agency would "insulate" the primary negligence charged to a defendant: One is where such intervening negligence has no logical connection by way of causation with the original negligence, and stands, therefore, independently as the sole proximate cause. The other is where the negligence of the intervening agency is of such an extraordinary nature as not to be reasonably foreseeable by the author of the original negligence and must, therefore, be considered the proximate cause—the original or primary negligence under such circumstances being considered too remote. Primary negligence is not relieved by intervening negligence on the principle that the latter is subsequent to, or greater than, the original negligence.

As the pleading stands, plaintiff has sufficiently alleged, and may be able to establish by the evidence, such logical connection between the alleged negligence of the corporate defendants and that of Blades as to remove the case from the first category. As to the second, we are unable to say, as a matter of law, from the complaint, that the negligence of Blades was of such a character as to be unforeseeable, or that it may not, upon the trial, turn out to be the natural and probable result of the failure to properly light or otherwise protect the obstruction or structure described in the pleading as being maintained in the highway, and

with which the Blades car came into collision; or that the conduct of Blades was not a normal reaction to the situation in which he was placed by the negligence of the defendants, assuming that there was such negligence. Restatement of the Law, Torts, Negligence, section 447.

Usually the question of foreseeability is one for the jury. *Williams v. Charles Stores,* 209 N. C., 591, 184 S. E., 496; *Earwood v. R. R.,* 192 N. C., 27, 133 S. E., 180; Rationale of Proximate Cause, Greene, p. 135.

Comparing the allegations of the complaint so as to properly appraise them in their relation to each other, and in their collective significance, it is not now clear how the collision with an unlighted obstruction in the street should be considered such an extraordinary occurrence as to be unforeseeable, even though caused in part by the negligence of the driver, such as is described in the paragraphs above quoted. Restatement of the Law, Torts, *supra;* Shearman and Redfield on Negligence, 6th Ed., Vol. 1, section 38 (a); Harper, Law of Torts, section 123; *Earwood v. R. R., supra; Hinnant v. R. R.,* 202 N. C., 489, 163 S. E., 555; *Gordan v. Bedard,* 265 Mass., 408, 164 N. E., 374; *Beatty v. Dunn,* 103 Vt., 346, 154 Atl., 770; *Engle v. Director General,* 78 Ind. A., 547, 133 N. E., 138, 139.

We should bear in mind that the issue is not between the administratrix of the negligent driver and the corporate defendants, but between the plaintiff, who was without negligence, and all of the defendants, each of whom owed her the duty of due care. *Groome v. Davis,* 215 N. C., 510, 518, 2 S. E. (2d), 771; *Brown v. R. R.,* 208 N. C., 57, 179 S. E., 25. Even if we had the evidence before us, dismissal of the action upon a ground of that nature would be justified only when there is clearly and unmistakably but a single inference from the evidence, and that denoting a want of proximate cause or indicating unforeseeability of the intervening negligence.

Also, at this junction, we cannot see that the allegation to the effect that Blades was negligent in the operation of his car, in that he failed to see the obstruction, is tantamount to an admission that it was adequately lighted; or that the allegations quoted from the complaint with reference to his negligence could, as a matter of law, relieve the defendants from liability. Blades owed the plaintiff the duty of due care under the circumstances in which he was placed. Upon a proper showing, he might be liable for his want of circumspection, even under the conditions brought about by the defendants' negligence, as alleged. The allegations of negligence against him may or may not be established by the evidence, but *non constat* that an adequate lighting of the central pier of the overpass might not have prevented his error or, at least, have revealed to him his plight in time for him to avoid the collision. One

of the allegations of negligence is that he was traveling in the left-hand lane, which brought him nearer the obstruction.

In this connection it is not amiss to note that the negligence with which the corporate defendants are charged is the omission of duty which continued down to the time of the injury. While this may not in all cases repel the doctrine of insulated negligence, it must necessarily restrict the field of its application.

Questions of minor importance not here discussed are not considered of sufficient merit to aid the appellees.

The judgment sustaining the demurrer, as to each of the defendants, is Reversed.

THE RT. REV. EDWIN A. PENICK, JOS. B. CHESHIRE, JR., AND ALFRED L. PURRINGTON, JR., TRUSTEES OF THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF NORTH CAROLINA; AND W. L. MARSHALL, JR., AND CURTIS CAGLE, ADMINISTRATIVE TRUSTEES UNDER ITEM XXII OF THE WILL OF GEN. WM. A. SMITH v. BANK OF WADESBORO, OF WADESBORO, NORTH CAROLINA, AND THE SECURITY NATIONAL BANK OF RALEIGH, NORTH CAROLINA, TRUSTEES UNDER THE WILL OF GEN. WM. A. SMITH.

(Filed 20 December, 1940.)

1. Pleadings § 20—

A demurrer admits the facts alleged but not conclusions of law.

2. Trusts § 11—

Courts of equity have the power to modify the terms of a trust in exceptional cases when necessity or expediency impels, but they should not exercise this power to destroy the trust or defeat the purposes of the donor.

3. Same—Beneficiary held not entitled to modification of provision that property be held for accumulation of income for period of 99 years.

Testator set up two trusts. In one he devised property to the diocese of his church to be used in the erection and maintenance of a school. In the other he devised property to bank trustees with direction that the *corpus* and increment be held, invested and reinvested for a period of ninety-nine years, and that at the end of that period the *corpus* and increment be paid to the diocese of the church for the same purposes. The school was erected in the execution of one of the trusts, and this action was instituted to modify the provision of the other trust that the trustee hold the property for accumulation of the income for a period of ninety-nine years, in order to permit the present use of the net income therefrom to make necessary repairs and purchase necessary machinery and tools for the school. *Held:* The provision for the accumulation of the income for a period of ninety-nine years is not against public policy, nor so unreasonable as to justify interference by a court of equity to

direct disposition of the income in conflict with the clear, unambiguous direction of the donor, and the demurrer of the defendant bank trustees was properly sustained.

4. Wills § 33h—

Charitable trusts are not subject to the rule against perpetuities. Public Laws of 1925, ch. 264.

APPEAL by plaintiff from *Clement, J.*, at June Term, 1940, of ANSON. Affirmed.

Civil action to modify certain provisions of a charitable trust set up in the will of Gen. Wm. A. Smith.

Gen. Wm. A. Smith, of Anson County, died in 1934, leaving a will wherein, after making numerous bequests, he devised property to be held in trust for charitable purposes in the following language:

"XXI. It is my desire to aid the church and education with a part of the worldly goods God had graciously permitted me to accumulate. To this end I direct my executor to place in the Bank of Wadesboro for the Protestant Episcopal Church of the Diocese of North Carolina—should this Diocese be divided, then the fund created by this item is to go to that Diocese which includes the village of Ansonville—The sum of Twenty Five thousand Dollars value in stock of Domestic Corporations—The Bank of Wadesboro will treat this as a special trust. The said Bank is empowered to change these stocks in its discretion, to invest the increment of this fund in good, safe, dividend paying stocks, bonds, choses in action or realty bearing in mind the importance of safeguarding this fund, while increasing it for the following purpose. This fund is committed to said Bank of Wadesboro and its successors for the period of ninety-nine years, it and its accumulations to be paid to the Diocese of North Carolina at the expiration of said 99 years. My purpose is to give said bank the same power in the administration of this fund as I now possess. The Bank of Wadesboro shall receive five per cent of the increment till the fund amounts to Fifty Thousand dollars, four per cent of the increment till it increases to Seventy Five Thousand dollars, and three and one half per cent to One Hundred Thousand dollars—Afterwards three per cent of the increment as compensation for wisely, discreetly and honestly investing and reinvesting this fund. No compensation shall the Bank of Wadesboro or its successors receive for handing over the amount of this fund to the Diocese of North Carolina.

"Should said Bank decline this trust, then it is to be offered to the First National Bank of Wadesboro. Then to the American Trust Company, then to Wachovia Bk. of Winston-Salem. I further instruct my executor to place a like sum in stocks to the value of Twenty Five Thousand dollars approximately and approximating the amount placed

in the Bank of Wadesboro—into the American Trust Company of Charlotte, N. C., for a like period of 99 years to be held by them in trust, with like power of investment and reinvestment, etc., and compensation as given above to the Bank of Wadesboro. The Bank of Wadesboro and The American Trust Co. each for itself are instructed and directed to make annual report to the Diocese at its Annual Conventions—the amount of the principal and increment of this fund—Every three years said reports shall be certified to by an accredited auditor, when desired by the Diocese Convention of N. C.

"I also direct my executor to place in the Bank of Anson, Ansonville, N. C., Five Thousand Dollars in good stocks or cash in said Bank of Anson with the same and like powers changing said stock in its discretion, in investing and reinvesting, compensation and reports to the Annual Conventions of the Diocese of North Carolina—and at the close of the 99 year period to pay the total amt. of this fund to said Diocese. Should either Bank decline this trust and trusteeship, then I direct my Executor to offer it to the Bank of Wachovia in Winston-Salem. This fund when paid to the Diocese of North Carolina is to be used and administered by said Diocese as directed in item XXII of this will."

"XXII. I give to the Diocese of North Carolina as named in item XXI of this Will, the remainder of my estate both real and personal, to be used primarily for the benefit of my race—for purposes as set down below.

"I request and direct the Convention of North Carolina at its first session after I fall on sleep to select and appoint for a term of three years, three honorable, capable and discreet members of the Protestant Episcopal church, residing in Anson County to administer this fund:—Erecting buildings on land in or near the village of Ansonville, to an amount not exceeding in cost Fifty Thousand dollars and setting apart the balance or remainder of the fund given by this item as a permanent fund using only the increment. These three trustees and their successors to be appointed triannually and they and their successors are instructed to use the fund created by this item and by item XXI in schools for both sexes of the white race—Educational and Industrial schools, hospitals, gymnasiums and other purposes in their discretion—mainly and principally I have in mind training youth trades and domestic arts by which they may be enabled to earn their own living and become efficient members of our County and Commonwealth.

"This fund and that created by item XXI when it comes into possession of the Diocese shall be known as the 'Gen. Wm. A. Smith Trust' or other designation the Convention may elect to name it, shall be administered by the three trustees and their successors according to their judgment and discretion, limited only to Ansonville and its near vicinity.

They shall submit an annual report to the Convention of the Diocese of North Carolina setting forth in full, the amounts received and disbursed, the purpose of disbursement, their acts during each year and reasons for said acts, accompanied by an authorized auditor's report."

By this action the Protestant Episcopal Church of the Diocese of North Carolina, and the administrative trustees under Item XXII of the will, ask the court to permit the use of the net income from the trust set up in Item XXI in order to aid and further the objects of the trust declared in item XXII, and to modify the trust provision for the accumulation of income for 99 years as contrary to public policy and adverse to the best interests of the ultimate beneficiary.

Defendants, the trustees of the funds provided in item XXI, demurred to the complaint. The demurrer was sustained and the plaintiffs appealed.

Talliaferro & Clarkson for plaintiffs, appellants.

Paul F. Smith for defendant Security National Bank.

Frank L. Dunlap, Mrs. Lee Smith McKeithen, and R. L. Smith & Son for defendant Bank of Wadesboro.

DEVIN, J. By his will Gen. Wm. A. Smith made provision for the establishment of two trust funds, the ultimate beneficiary in both being the Protestant Episcopal Church of the Diocese of North Carolina. In the first the testator devised the sum of $55,000 to the three named banks, as trustees, to constitute a fund to be safely invested and the income to accumulate for 99 years, at the end of which period "it (the fund) and its accumulations" are to be paid to the Protestant Episcopal Diocese of North Carolina. In the second, a fund derived from sale of real and personal property was devised in trust for the benefit of the Diocese of North Carolina, with specific directions as to its use and purposes. These included the erection of a school building at a cost not exceeding $50,000, the remainder of the devise under this trust to be set up as a permanent fund and the income used for the maintenance of the school or schools. Provision was made for the selection of trustees to carry out the purposes expressed.

It was alleged in the complaint that in carrying out the provisions of the second trust the trustees selected therefor have erected a building and provided for the operation of an agricultural and training school, with assistance from the National Youth Administration, sale of timber, and use of income from the property devised, but are without sufficient funds to make repairs and purchase necessary machinery and tools for teaching agriculture; that from the income from the fund set up under the second trust it was directed in the will that an annuity for the testator's widow

(now 80 years old) and the upkeep of the house must be paid, and that, in order to carry out the expressed purposes of the testator and for the best interest of the ultimate beneficiary, the net income from the trust fund set up in item XXI should be paid over as earned, and that the provision for accumulation of income for 99 years should be modified as inexpedient, unnecessary and contrary to public policy.

The defendants demurred to the complaint, and their demurrer was sustained. By their demurrer the defendants admit the facts alleged, but not the conclusions of law asserted by the pleader. *Leonard v. Maxwell,* 216 N. C., 89, 3 S. E. (2d), 316.

Cases involving the administration of trusts and trust estates are peculiarly within the jurisdiction of courts of equity, and the power of the court, in exceptional cases, to modify the terms of the trust has been generally upheld. But the power of the court should not be used to direct the trustee to depart from the express terms of the trust, except in cases of emergency or to preserve the trust estate. *Seigle v. First Nat'l. Co.,* 338 Mo., 417. The court has power, under certain circumstances, to modify the terms of a trust, but this power should not be exercised to destroy the trust or defeat the purpose of the donor. *Cutter v. Trust Co.,* 213 N. C., 686, 197 S. E., 542.

In *Trust Co. v. Laws,* 217 N. C., 171, 7 S. E. (2d), 470, it was said that a court of equity had power, when necessity or expediency impelled, to close a trust or modify its terms. And in *Bond v. Tarboro,* 217 N. C., 289, 7 S. E. (2d), 617, it was decided that the power of the court could be exercised to the extent of authorizing the execution of a mortgage on the trust estate when necessary for its preservation. In *Reynolds v. Reynolds,* 208 N. C., 578, 182 S. E., 341, upon a showing of changed conditions, by the consent of all concerned, and for the purpose of a family settlement, modification of the terms of the trust was authorized.

In the instant case, the intent of the testator is clearly expressed that the trust fund set up in item XXI of his will shall be invested and reinvested, both as to the *corpus* and the increment, and that at the expiration of 99 years the fund and its accumulations shall be paid to the beneficiary, the Protestant Episcopal Diocese of North Carolina. The trustees are banks, incorporated, and the ultimate beneficiary is a religious body of unlimited duration. The wisdom of extending the duration of the trust for 99 years is not a matter for us to decide. The property was that of the testator, and the law permitted him to dispose of it as he wished. We cannot hold that the disposition under consideration violated any law or contravened any rule restricting the transmission and tenure of property. We cannot undertake to change the disposition he has made of what he owned. It has not been shown wherein public injury would result, or that the terms of the trust are

contrary to any principle of public policy or prejudicial to the public interest. *Woodruff v. Marsh,* 63 Conn., 125, 26 Atl., 846.

Speculations as to what conditions may prevail at the termination of the period, or the possible consequences of attempting to administer a fund for so long a time, are not sufficient to defeat the manifest intent of the donor. Charitable trusts are not subject to the rule against perpetuities. Public Laws 1925, ch. 264; *Williams v. Williams,* 215 N. C., 739, 3 S. E. (2d), 334. Nor are the terms of the trust indefinite, either as to the purpose, the method of administration, or the beneficiary. *Woodcock v. Trust Co.,* 214 N. C., 224, 199 S. E., 20.

It was said in the recent case of *Hills v. Travelers Bank & Trust Co.,* 125 Conn., 640, "The function of the court with reference to trusts is not to remake the trust instrument, reduce or increase the size of the gifts made therein, or accord the beneficiary more advantage than the donor directed that he should enjoy, but rather to ascertain what the donor directed that the donee should receive and to secure to him the enjoyment of that interest only." And in *Paul's Church v. Attorney-General,* 164 Mass., 204, it was said that "to authorize equitable interference with the accumulation directed by the testator, the accumulation should be unreasonable, unnecessary and to the public injury."

In 2 Bogert on Trusts and Trustees, sec. 353, will be found collected a number of cases upholding provisions in charitable trusts for accumulation of income over long periods of time. Cited among them is the case of *Boston v. Doyle,* 184 Mass., 373, relating to the will of Benjamin Franklin, wherein a fund was established to be used for certain charitable purposes at the expiration of one hundred years.

In *Frazier v. Merchants National Bank of Salem,* 296 Mass., 298, 5 N. E. (2d), 550, the provisions in a will setting up a trust fund of $117,000 and requiring that the income therefrom be permitted to accumulate until the principal and interest reached the sum of $1,000,000 and then to be held as a permanent trust fund for a hospital, was upheld as not contrary to public policy.

It will be noted in the case at bar that the accumulation of income is part of the trust. To divert it to other purposes, even if in aid of another trust set up by the testator, would to that extent defeat his intention. It seems that one fund was set up for the present generation; the other for those who should come after. The testator's purpose to postpone enjoyment of a portion of his bounty is in conflict with no principle of public policy, nor is it so unreasonable as to justify interference by a court of equity.

The action of the plaintiffs, in moving to have the terms of the trust modified to the extent of permitting the use of the income of the fund, is prompted by the commendable desire to supply a present need in the

administration of another worthy charity, but we are constrained to follow the manifest intent of the testator and to hold that the terms of the will shall prevail.

The judgment of the court below in sustaining the demurrer is Affirmed.

STATE v. WILLIE F. WEBSTER.

(Filed 20 December, 1940.)

1. Gaming § 5—Evidence of defendant's guilt of operating gambling house and illegal possession of gambling devices held sufficient.

Evidence that defendant sold cigars, soft drinks and magazines in the front part of his shop, and that he had partitioned off a back room furnished so people could sit or lounge, and watch an electrically operated scoreboard, that in repeated raids in hot weather the stove in the back room was hot and contained paper ashes, and that on two occasions slips of paper which had been pulled from tip boards or baseball boards were found on the floor, and that on the last raid, tip boards or baseball boards were found concealed in a secret hiding place in the room, *is held* sufficient to be submitted to the jury on the charge of operating a gambling house and on the charge of illegal possession of gambling devices.

2. Gaming § 6: Criminal Law § 53c—

A reference in the charge to "these gambling devices" will not be held prejudicial as an expression of opinion on the evidence when it is apparent that the charge referred abstractly to the devices mentioned in the warrant and not to those about which evidence had been taken.

3. Same—

A charge that a punchboard and a tip book are the same under the statute and "that if you find this defendant guilty" will not be held for error as an expression of opinion on the evidence when the phrase is immediately followed by an instruction that in order to convict, the jury must find beyond a reasonable doubt that the tip boards were gambling devices and were in defendant's possession.

4. Criminal Law § 78c—

An exception to the charge on the ground that it failed to explain and apply the law to the evidence as required by C. S., 564, may be disregarded as a broadside exception.

5. Gaming § 6—

In a prosecution for maintaining a gambling house and for illegal possession of gambling devices, the failure of the court to define "gambling" or "gambling device" will not be held for error in the absence of a prayer for special instructions, since these terms have a definite and well recognized meaning which is the same in law as well as in common usage.

STATE *v.* WEBSTER.

APPEAL by defendant from *Harris, J.*, at March Criminal Term, 1940, of DURHAM. No error.

The defendant was brought to trial upon the following warrants, consolidated for the purpose of trial:

"NORTH CAROLINA, IN THE RECORDER'S COURT.
DURHAM COUNTY.

THE STATE
v.
WILLIE F. WEBSTER

WARRANT FOR
Illegal Poss. and Operating
a Gambling Device.

WARRANT No. 1

"B. L. LLOYD, being duly sworn on information, says that Willie F. Webster, on or about the 28th day of July, 1939, with force and arms, at and in the County aforesaid, and within Durham County, did willfully, maliciously and unlawfully possess and have for the purpose of operating and did then and there operate and cause to be operated a certain gambling device known as Tip Boards or Base Ball Boards, the same not paying and giving the person playing or operating the same in return in market value each and every time played or operated, against the statute in such cases made and provided, and against the peace and dignity of the State.

B. L. LLOYD, *Complainant.*

"Sworn to and subscribed before me this 28th day of July, 1940.

J. B. COLE (Seal)
Deputy Clerk Recorder's Court."

"NORTH CAROLINA, IN THE RECORDER'S COURT.
DURHAM COUNTY.

THE STATE
v.
WILLIE F. WEBSTER,
JOE JONES AND
RAYMOND WEBSTER.

WARRANT FOR
Operating a Gambling House

WARRANT No. 2

"B. L. LLOYD, being duly sworn on information, says that Willie F. Webster, Joe Jones, and Raymond Webster, on or about the 28th day of July, 1939, with force and arms, at and in the County aforesaid, and within Durham County, did willfully, maliciously, and unlawfully operate a gambling house, a house where persons are accustomed to meet for the purpose of gambling, and did then and there possess devices known

as Tip Board or Base Ball Boards and did then and there operate and cause to be operated the aforesaid gambling device on their premises, in violation of Section 4434 and 4433 Consolidated Statutes, against the statute in such cases made and provided, and against the peace and dignity of the State.

B. L. LLOYD, *Complainant.*

"Sworn to and subscribed before me, this 28th day of July, 1939.

J. B. COLE (Seal)

Deputy Clerk Recorder's Court."

The evidence disclosed that the defendant operated a shop known as the Durham Sport Shop, in the city of Durham, which establishment occupied the ground floor of a store building. In the front room cigars, soft drinks, and magazines were sold. There were two partitions in the back, one of which created a back room furnished so that people could sit, or lounge, and watch an electrically operated scoreboard. The room contained a stove and a short counter, with a cash drawer.

This place was raided a number of times by officers of the law. On 7 June, it was searched by J. L. Whitfield, a member of the Durham police force, under authority of a search warrant and with the assistance of other officers. When the officers entered the building, the defendant went into the back room and locked the door so that the officers were unable to enter without breaking out a panel. After forcing an entry, they found the defendant in the room. Paper and kerosene were burning in the stove, but no gambling devices were found on this occasion. When Mr. Whitfield returned to the smoke shop some days later, the entire door had been covered with heavy metal sheeting.

On 8 July, B. L. Lloyd, another member of the police force, inspected the back room. Again, the door was fastened and the officer experienced difficulty in gaining access to the room. There were a number of people there on this occasion. The stove was hot and contained paper ashes, although it was a hot day and electric fans were running. Mr. Lloyd came back on 13 July and found a number of people in the room and loose tickets from Tip Boards scattered about the floor. The defendant was there, and, as usual, he hurried to the back room and closed the door when he saw Mr. Lloyd coming.

The defendant's establishment was searched again, under warrant, by H. W. Carlton, a member of the police force, on 22 July, 1939. When Mr. Carlton started to enter the back room he saw Joe Jones, an employee, hand the defendant some Tip Boards or Baseball Boards. As Mr. Carlton reached for the boards, Jones forced him outside the room, and the defendant closed the door. When he finally succeeded in entering the room, the defendant and a number of people were there. Although

it was a hot day and the electric fans were in operation, there was a red-hot fire in the stove. On this occasion quite a number of Tip Boards or Baseball Boards were seized. Loose slips of paper which had been pulled from some of the boards were found lying about the room. Fifty cents and a quantity of small change were also found scattered about the premises.

The shop was raided finally on 28 July, 1939, this time by B. L. Lloyd, who acted pursuant to a search warrant, and was assisted by other officers. The defendant and several other people were there. There had been a fire in the stove, which had just gone out, and paper ashes, which were still warm, were found. On this occasion a quantity of Tip Boards or Baseball Boards were discovered hidden in a secret compartment in the bottom of the stove. When they were found, Mr. Lloyd testified, "Mr. Webster said I had been tipped off to his hiding place."

According to the evidence, the boards which were seized from the defendant were boards of a type commonly used in gambling. Slips of paper or tickets could be drawn from a board in much the same manner as numbers are drawn from a punchboard. A board would contain 120 tickets. If used as a baseball board, the person drawing a ticket with the names of the two major league baseball teams making the highest scores that day would win. When played as a Tip Board a seal with a number printed on it would be attached to the board. Another number would be hidden by the seal. The person drawing a ticket containing both numbers would win. According to the evidence, tickets are commonly sold at ten cents each. The winner gets $10.00 and the operator keeps $2.00.

Instructions to the jury pertinent to the decision are set out in the opinion.

The jury returned a verdict of guilty upon both warrants. Judgment followed of eighteen months on the roads in each case, the terms to run concurrently. The defendant appealed, assigning errors.

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

R. P. Reade and Jas. R. Patton, Jr., for defendant, appellant.

SEAWELL, J. Reference to the second warrant shows that probably two offenses are charged—operating a gambling or gaming house and the unlawful possession of gambling devices. A perusal of the judge's charge shows that he elected to present to the jury, in this warrant, only the charge of keeping a gambling house, treating the references to sections 4434 and 4433 as surplusage, or as explanatory of the charge. The defendant took no exception to this treatment of the warrants.

There was plenary evidence to go to the jury as to both offenses submitted for their consideration, and the motions for judgment of nonsuit were properly overruled.

The defendant here relies mainly on exceptions to the instructions to the jury, which we now consider.

It is contended the judge trespassed on the statute—C. S., 564—in expressing an opinion on the evidence in the following bracketed clause of his charge: ". . . as to whether you find him guilty of having these gambling devices in his possession." But the context shows that the judge was referring to the warrants, or charges, and the reference was purely abstract—to the devices mentioned in the warrant, rather than those about which testimony had been taken. He had not yet referred to the evidence. The point is too narrow to support a contention of prejudicial error.

For the same reason—that it is an expression of opinion on the evidence—objection is made to the following:

"The defendant contends that he is charged under the wrong statute. (c) Now, as to that, gentlemen, I charge you as a matter of law that a punchboard under the statute and a tip board would be the same thing under that statute, and I charge you that if you find that this defendant is guilty, are satisfied beyond a reasonable doubt that he had these tip boards in his possession, and that they are gambling devices, I charge you he would be guilty under that statute as a matter of law. (d)"

Obviously the intention was to instruct the jury that under the evidence a tip board would be as much within the statute as a punchboard, as a gambling device. This is clarified by the latter part of the quotation: ". . . if you . . . are satisfied beyond a reasonable doubt that he had these tip boards in his possession, and they are gambling devices." It is the province of the jury to pass on and determine the facts, but when they are determined, whether they describe or define something within the statute, is a matter of law. Taken in its proper connection, the instruction is intended to mean no more. The probability of prejudice from this source is, we think, inconsiderable.

Finally, defendant makes a broadside exception to the charge on the ground that it fails to explain and apply the law to the evidence, as required by C. S., 564. This exception could well be rejected, since no specification of the supposed defect is made in the assignment of error. *Jackson v. Lumber Co.*, 158 N. C., 317, 74 S. E., 354. But in the brief, counsel point to the fact that nowhere in the charge is there given a definition or explanation of "gambling" or "gambling device." As to this, we think the observations of *Montgomery, J.*, speaking for the Court in *S. v. Morgan*, 133 N. C., 743, 745, apply as well here as they did to the indictment in that case: "Where the law uses the word 'gam-

ing' it not only uses a term well defined and known to the law writers, but its meaning is well understood by the citizens of the Commonwealth; and when the words 'gambling house' are used all English speaking people know the meaning of them." Perhaps it may have been the duty of the judge to have defined these terms, as a matter of "subordinate" elaboration, if a special instruction had been asked; but the terms are not technical, or even appropriated to the law, which sometimes gives a legalistic twist to common expressions. They are terms used in common parlance, and it seems to us supererogation to require the court to garb simple words in the starches and ruffles of technicality, which often tends to make them less understandable.

Other exceptions not discussed are not considered as presenting prejudicial error justifying the court in disturbing the result of the trial.

We find

No error.

ROSA MACK, ADMINISTRATRIX OF JOHN HUNTER, v. MARSHALL FIELD & COMPANY, SOUTHEASTERN CONSTRUCTION COMPANY, ET AL.

(Filed 20 December, 1940.)

1. Master and Servant § 12: Negligence § 4a—

The owner of lands letting construction work to an independent contractor who sublets part of the work to an independent subcontractor, cannot be held liable for negligence of the contractor or the subcontractor which causes injury to an employee of the subcontractor, but may be held liable only for negligence of its own which is a proximate cause of the injury.

2. Same—Evidence of owner's negligence proximately causing injury to employee of subcontractor held sufficient for jury, but nonsuit should have been entered as to main contractor.

The owner of land let the contract for construction of an addition to its mill. The addition was to include land then occupied by a power substation, making it necessary to move the substation, and the owner undertook to move the substation and transmission line. The evidence tended to show that the main contractor sublet the steel work, that the walls of the addition were partly erected around the substation, that a temporary transmission line was connected therewith in order to prevent stoppage of work in the mill, and that as an employee of the subcontractor for the steel work was hoisting a steel column by means of steel cables and a winch in the performance of his work, the steel column came in contact with the temporary transmission line, resulting in the electrocution of the employee. The evidence further tended to show that the temporary transmission line carrying a high voltage of electricity was permitted to remain on the premises in an exposed condition at an insufficient elevation and in close proximity to the work, that the current was not turned off and that no warning signs were placed on the wires and no warning

given the employee. *Held:* The evidence is sufficient to be submitted to the jury on the question of negligence of the owner, who exercised dominion over the land and was required to turn it over in a reasonably safe condition to the main contractor, but the motions to nonsuit aptly made by the main contractor, who had no control over the premises or over the manner and method employed by the subcontractor, should have been granted. *Held further:* The evidence does not disclose contributory negligence as a matter of law on the part of the employee.

3. Negligence § 20: Trial § 29b—Court must apply the law to the evidence as substantive part of charge.

A charge defining negligence and proximate cause and stating the contentions of the parties and properly placing the burden of proof, but which fails to apply the law to the evidence, will be held for error as failing to comply with C. S., 564, since the application of the law to the facts as the jury may find them to be from the evidence, is a substantive feature of the charge which must be given even in the absence of a prayer for instruction.

APPEAL by the defendants from *Rousseau, J.,* at April Term, 1940, of GUILFORD.

This is an action for the alleged wrongful death of the plaintiff's intestate. C. S., 160.

Marshall Field & Company contracted with the Southeastern Construction Company to build an addition to its sheeting mill at Draper, N. C., according to plans and specifications prepared by Robert & Company, architects, and the Southeastern Construction Company sublet the construction of the steel work to J. L. Coe, and the plaintiff's intestate, John Hunter, was an employee of J. L. Coe.

The addition to the sheeting mill was to be 150 or 160 feet by 300 feet in area, the construction of which necessitated the removal of a high voltage electric line which carried the current to the substation containing the transformer, which supplied the electric power to operate the mill, as well also as the removal of the substation. At the time involved in this case the transmission line had been removed, but the substation and transformer remained in place and were surrounded by the partially constructed walls of the addition. A newly constructed electric line was connected with the substation and transformer by four temporary wires which ran diagonally across the wall of the addition. These wires enabled the mill to continue operation while the construction of the addition progressed. A new substation outside the walls of the addition was in the course of construction and it was planned to remove the transformer to such substation as soon as it was completed and attach it to the new power line, thereby permitting the old substation to be torn away, an opening being left in the new walls to permit this removal of the transformer.

J. L. Coe had erected a portion of the steel work and was engaged in this operation at the time in question—he was using a hoisting apparatus, consisting of a wooden pole about 35 feet long to which was attached pulley blocks through which ran the steel cables used in hoisting the steel columns, and at the base of this pole there was what was called a winch on which the steel cables were wound in the hoisting operation.

The plaintiff's intestate was winding the windlass of the winch, which was hoisting a steel column about 36 feet long, in order to put the column in place according to specifications. As the column rose from the ground it assumed an almost perpendicular position and the top end thereof came in contact with the temporary high voltage wires leading to the substation and transformer, and the electric current ran from the wires through the steel column and the steel cables to the winch and there came in contact with the intestate, killing him almost instantly.

Robert & Company was named in the summons and the complaint but was never served. A judgment as in case of nonsuit was entered as to the defendant W. F. Humbert at the close of plaintiff's evidence, to which no objection was made.

Predicated on the jury's verdict, his Honor entered judgment in favor of the plaintiff against the defendants Marshall Field & Company and the Southeastern Construction Company. From this judgment these defendants appealed, assigning error.

Lovelace & Kirkman and Frazier & Frazier for plaintiff, appellee.

Junius C. Brown and Sapp & Sapp for Marshall Field & Company, appellant.

Dalton & Myers for Southeastern Construction Company, appellant.

SCHENCK, J. Both of the appealing defendants assign as error the refusal of the court to sustain their motions for judgment as in case of nonsuit made when the plaintiff had introduced her evidence and rested her case and renewed when all of the evidence was in. C. S., 567.

The Southeastern Construction Company was an independent contractor and J. L. Coe was an independent contractor. Hence, Marshall Field & Company was in no wise liable for the negligence of either of them, and was liable only for such of its own negligence, if any, as contributed to the death of the plaintiff's intestate. It is alleged and there is evidence tending to show that the temporary wires connecting the old substation and transformer with the new power line, carrying 2,300 volts of electricity, were permitted to remain on the premises in an exposed condition, and in such a position as was likely to come in contact with those working on the addition to the sheeting mill, that no warning signs were placed on said temporary wires, and that no warning

was given to the intestate of any danger from such wires, that the high voltage current was not cut off while the intestate was working in close proximity thereto, that said high voltage wires were not placed at a sufficient elevation to avoid interfering with those working on said addition, and that the defendant failed to complete the new substation and remove the transformer thereto prior to the commencement of the construction of the addition. While the evidence of the defendant conflicts with that of the plaintiff, we think, and so hold, that the latter was sufficient to support the denial of the motion of the defendant Marshall Field & Company for a judgment as in case of nonsuit.

The plaintiff relies upon practically the same allegations and evidence to support the denial of the motion of the Southeastern Construction Company for judgment as in case of nonsuit. However, the two defendants occupied different relationships to the plaintiff's intestate. Marshall Field & Company was the owner of the land upon which the addition was to be constructed, exercised dominion over it and was required to turn it over in a reasonably safe condition to the Southeastern Construction Company for the construction of the addition, including the removal of the transmission line and substation, and was therefore liable for any negligence in so doing, or negligent failure so to do; but the Southeastern Construction Company did not own the land, did not have any dominion over it except such as arose from being a licensee or an invitee thereon for the purpose of erecting the addition under its contract; it had no control over the transmission line and the substation, and also had no control over the apparatus used by J. L. Coe, or of the manner and way he proceeded under his independent contract to erect the steel structure, and in the absence of any control of the place and of the work there was a corresponding absence of any liability incident thereto. That authority precedes responsibility, or control is a prerequisite of liability, is a well recognized principle of law as well as of ethics. We are of the opinion, and so hold, that his Honor erred in refusing to sustain the motion of the Southeastern Construction Company for judgment as in case of nonsuit.

We cannot concur in the contention that the evidence discloses as a matter of law the plaintiff's intestate was guilty of contributory negligence.

Marshall Field & Company, by exceptions properly preserved to the charge, presents the question of whether his Honor complied with the provisions of C. S., 564. A careful examination of the charge as it relates to the issue addressed to the actionable negligence of Marshall Field & Company (the first issue submitted) discloses that it is made up solely of statements of general principles of law, such as definitions of negligence and of proximate cause, and the contentions of the parties—

with a proper placing of the burden of proof. There is no direct application by the court of the law to the evidence, or to the facts as they may be found to be by the jury from the evidence. This is a noncompliance with the statute, *Spencer v. Brown,* 214 N. C., 114, and cases there cited. While it appears that a recapitulation of the evidence was waived by the parties, this did not waive the right of the defendant to have an application made by the court of the law to the facts as they may have been found to be by the jury from the evidence.

What is said in *Williams v. Coach Co.,* 197 N. C., 12, is peculiarly applicable in the instant case: "*Watson v. Tanning Co.,* 190 N. C., 840, also, is directly in point. There the trial court defined actionable negligence, gave the rule as to the burden of proof, fully stated the contentions of the parties, and instructed the jury to answer the issue of negligence in the affirmative if the plaintiff had satisfied them by the greater weight of the evidence that he had been injured by the negligence of the defendant as alleged, and if not, to return a negative answer. A new trial was granted, the Court saying: 'In several cases recently decided we have stressed the necessity of observing the requirements of section 564 and have reiterated the suggestion that a statement of the contentions accompanied with the bare enunciation of a legal principle is not sufficient; it is imperative that the law be declared, explained and applied to the evidence.'

"A statement of the contentions of the parties is not required as a necessary part of the instructions (*Wilson v. Wilson, supra; S. v. Whaley,* 191 N. C., 387), but when the evidence is susceptible of several interpretations a failure to give instructions which declare and explain the law in its application to the several phases of the evidence is held for reversible error. Such failure is to be considered, not as a subordinate feature of the cause, but as a substantial defect which may be raised by an exception to the charge. *Hauser v. Furniture Co., supra; S. v. Merrick,* 171 N. C., 788."

We are constrained to hold that the omission to apply the law to the evidence or to the facts as they may have been found to be was error prejudicial to Marshall Field & Company.

The result is:

On appeal of Marshall Field & Company a

New trial.

On appeal of the Southeastern Construction Company

Reversed.

GRACE M. BLADES, ADMINISTRATRIX OF THE ESTATE OF W. B. BLADES, DECEASED, v. SOUTHERN RAILWAY COMPANY AND CITY OF DURHAM.

(Filed 20 December, 1940.)

1. Death § 4: Limitation of Actions § 11b—

While the requirement that an action for wrongful death must be instituted within one year, C. S., 160, is a condition annexed to the cause of action rather than a statute of limitations, the provisions of C. S., 415, permitting the institution of an action within one year after nonsuit in an action instituted within the time prescribed, applies to actions for wrongful death.

2. Same—

A nonsuit is the term appropriate to designate the action of the court in ending the case when the complainant fails to proceed to trial or is unable to prove his case. A dismissal denotes the act of putting an end to the proceeding. It means the cause is sent out of court.

3. Same—Where cross action for wrongful death is set up within one year but is dismissed on appeal as not arising out of plaintiff's cause, administratrix may institute another action within one year.

Plaintiff administratrix was a party defendant in an action for negligence. The administratrix set up a cross action therein against her co-defendants for wrongful death prior to the expiration of one year from date of intestate's death. On appeal, the cross action was dismissed because it did not arise out of plaintiff's cause of action. C. S., 602. The administratrix within one year of the dismissal instituted this action for wrongful death against the same defendants upon the same cause. *Held:* Defendants' demurrer to the complaint stating these facts, on the ground that it appeared upon the face of the complaint that the action was not instituted within one year from intestate's death, was properly overruled, since her cross complaint in the first action should be regarded as the origination of the present action. C. S., 415.

APPEAL by defendants from *Grady, Emergency Judge,* at September Term, 1940, of DURHAM. Affirmed.

R. E. Whitehurst and Fuller, Reade, Umstead & Fuller for plaintiff. Hedrick & Hall, Claude V. Jones, and S. C. Brawley for defendants.

DEVIN, J. Plaintiff instituted her action to recover damages for the wrongful death of her intestate, alleging that this was due to the joint and concurrent negligence of the defendants. The death of her intestate occurred 21 February, 1939, and the present action was begun

21 August, 1940, but in order to show compliance with the statutory requirement that an action for wrongful death be brought within one year, and to bring herself within the protection of C. S., 415, the plaintiff added the following allegation:

"That heretofore, to wit, under the 1st day of June, 1939, an action was begun in the Superior Court of Durham County, entitled 'Jane Montgomery *v.* Grace M. Blades, administratrix of the estate of William B. Blades, deceased, Southern Railway Company and the City of Durham,' and in said action the plaintiff herein set up a cross action against the defendants herein, and that upon motion of the defendants herein said cross action was dismissed by the Supreme Court of North Carolina in an opinion filed on June 8th, 1940."

Plaintiff further alleged that the cross action referred to was for the same cause of action as set out in the complaint in the present action, and that before the institution of this action she had paid all costs taxed against her in the former action.

The defendants' demurrer, on the ground that it appeared on the face of the complaint that this action was not instituted within one year from the death of plaintiff's intestate, was overruled, and the defendants excepted and appealed to this Court.

The question presented by the appeal is whether the plaintiff's right to maintain this action for wrongful death, begun more than a year after the death of her intestate, is protected by the provisions of the statute (C. S., 415) permitting a new action within one year after nonsuit. Does the dismissal of a cross action set up against her codefendants in a former suit have the same effect as a nonsuit, and entitle plaintiff to institute a new action against the same defendants, more than twelve months after the death of her intestate and within one year of the date of the dismissal of the cross action?

While the statutory requirement that suit for wrongful death be brought within one year of such death (C. S., 160) is not strictly a statute of limitations, but rather a condition annexed to the plaintiff's cause of action (*Trull v. R. R.*, 151 N. C., 545, 66 S. E., 586; *McGuire v. Lumber Co.*, 190 N. C., 806, 131 S. E., 274; *George v. R. R.*, 210 N. C., 58, 185 S. E., 431), it has been uniformly held that the provisions of C. S., 415, apply equally to actions of this nature as to others. *Meekins v. R. R.*, 131 N. C., 1, 42 S. E., 333; *Distributing Co. v. Ins. Co.*, 214 N. C., 596, 200 S. E., 411.

Section 415 in terms refers to cases of nonsuit, or to those in which the judgment has been reversed or arrested. A nonsuit is the term appropriate to designate the action of the court in ending the case when the complainant fails to proceed to trial, or is unable to prove his case. *Cooper v. Crisco*, 201 N. C., 739, 161 S. E., 310. In the latter instance it is analogous to a demurrer to the evidence. A dismissal denotes the

act of putting an end to the proceeding. It means the cause is sent out of court. 18 C. J., 1145. It was said in *Evans v. Josephine Mills,* 119 Ga., 448, 46 S. E., 674, that a motion to nonsuit is intended to test the sufficiency of the evidence, while a motion to dismiss is aimed at the fatal defects of the pleading.

It is alleged in the plaintiff's complaint in this action that her cross action, set up in the case of *Montgomery v. Blades and others,* and against her codefendants, the Southern Railway Company and the city of Durham, was dismissed by the Supreme Court. It appears from an examination of the Court's opinion in that case (reported in 217 N. C., 654) that the cross action against her codefendants was dismissed as not germane to the plaintiff's action in that case. It was said, "In order that a cross action between defendants may be properly considered as a part of the main action, it must be founded upon or connected with the subject matter in litigation between the plaintiff and the defendants."

In the case of *Montgomery v. Blades and others,* all the parties were in court. Grace M. Blades, administratrix of William B. Blades, one of the defendants, filed a cross action against her codefendants setting up the same cause of action as that stated in her complaint herein. Her action against the defendants originated there. Under the statutes prescribing general rules of pleading and under the decisions of this Court the right of one defendant in an action to set up a cross action against another defendant, in proper case, seems to have been well recognized. C. S., 602; *Hulbert v. Douglas,* 94 N. C., 129; *Baugert v. Blades,* 117 N. C., 221, 23 S. E., 179; *Bobbitt v. Stanton,* 120 N. C., 253, 26 S. E., 817; *Dillon v. Raleigh,* 124 N. C., 184, 32 S. E., 548; *Biggers v. Matthews,* 147 N. C., 299, 61 S. E., 55; *Coulter v. Wilson,* 171 N. C., 537, 88 S. E., 857; *Rose v. Warehouse Co.,* 182 N. C., 107, 108 S. E., 389; *Bowman v. Greensboro,* 190 N. C., 611, 130 S. E., 502; *Bargeon v. Transportation Co.,* 196 N. C., 776, 147 S. E., 299; *Powell v. Smith,* 216 N. C., 242, 4 S. E. (2d), 524.

The necessary requirement is that the cross complaint against a codefendant be founded upon or connected with the plaintiff's cause of action. *Montgomery v. Blades,* 217 N. C., 654, 9 S. E. (2d), 397. The cross complaint of Grace M. Blades, administratrix, against Southern Railway Company and the city of Durham, was dismissed for failure to meet this requirement. Her cross action was not germane to that action, had no proper place there, and was dismissed as not cognizable in that action. But the cause of action set out in her cross action was not disposed of on its merits. Though dismissed, it may not be treated as if it had never had existence. *Gaines v. City of New York,* 215 N. Y., 533.

It seems to have been definitely decided by the decisions of this Court that when the first action has been dismissed for want of jurisdiction,

a new action within time will be protected from the bar of the statute. *Bradshaw v. Bank,* 172 N. C., 632, 90 S. E., 789. In *Straus v. Beardsley,* 79 N. C., 59, the first action was dismissed for want of jurisdiction, and the new action was begun within a year. The Court said, "The judgment dismissing the action is in substance a nonsuit and must be attended with same legal consequences." In *Harris v. Davenport,* 132 N. C., 697, 44 S. E., 406, a special proceeding to sell land for assets was instituted in 1888 by plaintiff, a creditor. In 1893 the proceeding was held irregular and void for the reason that the summons had not been properly served and the proceeding dismissed. Plaintiff, within twelve months, instituted a new proceeding to sell land to pay his debt. This Court held plaintiff's claim was not barred by the statute of limitations, and used this language: "The action was dismissed for want of jurisdiction of the parties, and that has been held as a nonsuit of the plaintiff under sec. 166 of the Code (now C. S., 415)."

The original statutory provision for permitting a new action within twelve months to prevent the bar of the statute, when the judgment has been reversed or arrested, was contained in the Act of 1715. In construing that ancient statute in *Skillington v. Allison,* 9 N. C., 347, in an opinion by *Chief Justice Taylor,* it was held that when an action instituted by a *feme sole* abated by reason of her marriage, as the law then required, she and her husband could bring a new action within a year for the same cause, even though the second action was not strictly a continuance of the first. In *Morrison v. Connelly,* 13 N. C., 237, *Ruffin, J.,* discussing the Act of 1715, and stating the sound reason for extending the terms of that statute to include cases of nonsuit and abatement, said, "The plaintiff, therefore, shall be heard until he can get a trial on the merits, provided he was diligent enough in the first instance to sue before time barred him, and renews his suit in a reasonable time."

Here Grace M. Blades, administratrix, as soon as she was brought into court, together with the Southern Railway Company and the city of Durham, by Jane Montgomery's suit, filed her cross action against her codefendants for damages for the wrongful death of her intestate. That method of presenting her claim was held proper in the court below, but upon appeal by these defendants the cross action was dismissed. As soon as that authoritative ruling was announced, she instituted this action for the same cause against the same parties. *Webb v. Hicks,* 125 N. C., 201, 34 S. E., 395; *Woodcock v. Bostic,* 128 N. C., 243, 38 S. E., 881; *Prevatt v. Harrelson,* 132 N. C., 250, 43 S. E., 800; *Tussey v. Owen,* 147 N. C., 335, 61 S. E., 180; *Lumber Co. v. Harrison,* 148 N. C., 333, 62 S. E., 413; *Cooper v. Crisco,* 201 N. C., 739, 161 S. E., 310; *Gaines v. City of New York,* 215 N. Y., 533.

Applying the reasoning underlying the decisions in the above cited cases, it would seem that under the present statute her cross complaint in the first action should be regarded as the origination of the present action, and that she should be held entitled to invoke the provisions of C. S., 415, to prevent the bar of the statute.

The cases of *Hall v. R. R.*, 146 N. C., 345, 59 S. E., 879; *S. c.*, 149 N. C., 108, 62 S. E., 912; and *Gulledge v. R. R.*, 147 N. C., 234, 60 S. E., 1134, on rehearing, 148 N. C., 567, 62 S. E., 732, cited by defendants, are distinguishable. These cases may not be held to decide the question here presented. In *McIlhenny v. Savings Co.*, 108 N. C., 311, 12 S. E., 1001, it was held that the provisions of Code, 166 (now C. S., 415), did not embrace mere motions in an action, or a motion for execution upon a dormant judgment. But here the dismissal operated upon a cross action against codefendants in an action in the Superior Court.

We have examined the other North Carolina cases cited and do not regard any of them as militating against the conclusion here reached.

Defendants' counsel in their diligence have cited numerous cases from other states, but these chiefly refer to instances where process in the first action was not properly served, and hence do not aid us in the interpretation of the statutes under consideration.

The judgment below is

Affirmed.

S. C. JOHNSTON, LOUISE THOMAS JOHNSTON (WIDOW), MARGARET JOHNSTON GARDINER AND HUSBAND, ROBERT M. GARDINER, JOSEPHINE A. JOHNSTON (MINOR), AND CHARLES W. JOHNSTON, JR. (MINOR), BY THEIR NEXT FRIEND, LOUISE THOMAS JOHNSTON, v. JAMES M. JOHNSTON AND ELIZABETH MORTON PATTERSON, EXECUTORS AND TRUSTEES UNDER THE WILL OF AGNES HUGHES JOHNSTON; JAMES M. JOHNSTON AND WIFE, LOU COLE JOHNSTON; ELIZABETH MORTON PATTERSON AND HUSBAND, DAVID E. PATTERSON; ANNIE J. BARBOUR AND HUSBAND, WILLIAM R. BARBOUR; JOHN T. JOHNSTON (SINGLE); MARY L. JOHNSTON (SINGLE); NELL BOMAR JOHNSTON (WIDOW); AGNES JOHNSTON HENDERSON AND HUSBAND, ROBERT HENDERSON; HELEN JOHNSTON SHEWMAKER AND HUSBAND, STEPHEN SHEWMAKER; CHARLOTTE JOHNSTON BRUNER AND HUSBAND, DAVID KINCAID BRUNER; JAMES M. JOHNSTON, EXECUTOR, TRUSTEE AND GUARDIAN UNDER THE WILL OF THE LATE GEORGE A. JOHNSTON.

(Filed 20 December, 1940.)

1. Wills § 39—

A complaint in an action to determine the rights and titles of the parties in lands by construction of the wills of deceased persons who had title or claimed interests therein, states a cause of action and is not premature.

2. Same: Judgments § 17b—

Where the court dismisses an action to construe wills and determine the rights and titles of the parties thereunder, there is nothing in the pleadings to support the court's further order giving certain rights to certain of the parties and certain directions to other parties in effecting the terms of one of the wills, and such further order will be stricken out on appeal.

APPEAL by plaintiffs and defendants from *Harris, J.,* at May Term, 1940, of ORANGE. Modified and affirmed.

This is an action brought by S. C. Johnston and the widow and children of George A. Johnston to clear the title to certain lands in Orange County, of which they claimed to be the owners by virtue of an item in the will of Charles W. Johnston, and by *mesne* conveyance under the will of George A. Johnston.

The will of Charles W. Johnston, in the respect mentioned, provides as follows:

"ITEM 1. I bequeath to my wife, Agnes Johnston, the sum of eighteen hundred dollars ($1,800.00) in cash to be collected from my notes and mortgages. I, furthermore, will to her during her lifetime the home place and Five Hundred Sixty-four (564) acres situate around in an approximate square and including the home site with the buildings, furniture and equipment of said home place. At her death the Five Hundred Sixty-Four (564) acres of land and buildings thereon are to go to that one of my sons who chooses, or may be chosen to assume the responsibility of running the home place and of providing, free of costs, a home during their lifetime for my wife and my daughter, Mary, and my daughter, Annie, as long as she remains single, and engages through the year in some occupation is to feel that she is welcome at the home place during her vacation.

"I leave my wife free to make whatever arrangements may seem best to her regarding the specific items of this agreement mentioned above. If it seems necessary she may make other plans altogether than the ones suggested above. In which event, the land, buildings and equipment, property may be disposed of also and is not entailed."

Mrs. Johnston was made residuary legatee.

Plaintiffs, other than S. C. Johnston, Robert M. Gardiner, and Louise Thomas Johnston, are children and heirs at law of George A. Johnston. S. C. Johnston is a brother; Robert M. Gardiner is the husband of Margaret Johnston Gardiner, and Louise Thomas Johnston is the widow of George A. Johnston.

The plaintiffs allege that in compliance with the provisions of this part of the will, George A. Johnston was properly chosen "to assume

the responsibility of running the homeplace and of providing, free of cost, a home, during their lifetime," for Mrs. Agnes Hughes Johnston, wife of the testator, his daughter Mary, and daughter Annie as long as she remained single. According to the allegations of the complaint, the said George A. Johnston undertook these duties and carried them out faithfully from the death of his father in 1916 until his own death in 1929. When his health began to fail toward the close of this period, S. C. Johnston was chosen, by agreement of those interested, to come to the home place with George, where he remained and continued to carry out the duties imposed by the will, down to the death of Mrs. Agnes Hughes Johnston, his mother, in 1939.

George A. Johnston died leaving a will, setting up a trust for the benefit of his widow, Mrs. Louise Thomas Johnston, and for his children, Margaret Johnston—now Margaret Johnston Gardiner—Josephine Johnston and Charles W. Johnston, Jr., and naming James M. Johnston, one of the defendants, as trustee, executor, and guardian of the minor children, "for the performance of the duties of any of the offices to which he is appointed under this will," and appointed as alternate executor, in case he should be unable to serve, his wife, Mrs. Louise Thomas Johnston, as trustee, executor, and guardian.

The following paragraph in the will should be noted:

"FIRST: Should the farm which I now occupy and which is owned in fee simple by my mother, Mrs. Agnes Hughes, consisting of approximately one hundred and fifty acres and adjoining other property owned by me, be owned by me at the time of my death, I give, devise and bequeath the same, together with all buildings thereon, to and unto my son, Charles W. Johnston."

After filing an answer to the complaint, the defendants demurred *ore tenus* and asked the dismissal of the action on the ground that the complaint fails to state a cause of action and that the action was instituted prematurely.

The judge refused to dismiss the action upon the ground that the complaint stated no cause of action, but did sustain the demurrer upon the ground that the action was prematurely brought, and signed a judgment dismissing the action.

The judgment further provided that S. C. Johnston should retain exclusive possession and control of the home place, subject to the right of Miss Mary L. Johnston to live at such home place, free of cost, and that John T. Johnston might live at the home place, at his own expense, without any interference with S. C. Johnston. The order contains a provision that S. C. Johnston shall not sell any growing timber off the property, nor commit or permit any waste, and required him to give

$1,000.00 bond, for the benefit "of all other parties to this action," and all the parties to the action, with the exception of Miss Mary L. Johnston, were restrained from interfering with the possession, operation, and management of the premises by S. C. Johnston, that is, the home place referred to in Item 1 of the will.

The plaintiffs appealed from the ruling of his Honor sustaining the demurrer on the ground that the action was brought prematurely, and that portion of the judgment providing that John T. Johnston should be permitted to live at the home place at his own expense without any interference with S. C. Johnston, and to such portion of the order as restrained S. C. Johnston from selling growing timber and requiring of him a bond to prevent his committing waste.

The defendants appealed from the refusal of the judge to sustain the demurrer on the ground that there was no cause of action and solely upon the ground that the action was prematurely brought, and for his refusal to sign a judgment tendered by the defendants and to the signing of the judgment as tender.

Victor S. Bryant, John D. McConnell, and A. H. Graham for plaintiffs.

Bonner D. Sawyer and Hedrick & Hall for defendants.

SEAWELL, J. It is not our purpose to go into a complete analysis of this case, nor do we think it necessary in advance of the trial and upon the hearing of the demurrer to construe all the terms of the wills, which are made a part of the complaint, or to determine their precise legal effect, or their ultimate relation to the succession. In fact, such an attempt might be misleading, as other muniments of title, not appearing in the complaint, are not before us for discussion. It is sufficient to say that in our opinion the plaintiffs have stated a cause of action, and the present action in which it is asserted is not prematurely brought. There was error, therefore, in dismissing the action.

We see nothing in the pleadings upon which the court below, after acting upon the demurrer and dismissing the action, might predicate his order giving certain rights to Miss Mary L. Johnston to live at the home place, free of cost, and to John T. Johnston to live there without expense to S. C. Johnston, or in any way to restrain S. C. Johnston with regard to his use of the land or require him to enter into the bond for $1,000.00 not to commit or permit waste. The order of the court in this respect cannot be sustained upon the facts as now presented and this must be stricken out. This is not to prejudice the rights of Miss Mary L. Johnston, such as she may have, under the will.

That part of the order declining to sustain the demurrer upon the ground that the complaint states no cause of action is affirmed. The dismissal of the action upon the ground that it has been prematurely brought is reversed.

On defendants' appeal

Affirmed.

On plaintiffs' appeal

Modified and affirmed.

THE SCOTTISH BANK, A CORPORATION, v. E. B. DANIEL AND UNITED STATES CASUALTY COMPANY, A CORPORATION.

(Filed 20 December, 1940.)

1. Pleadings § 27—

Where plaintiff files an amended complaint pursuant to the court's order to make the complaint more definite and certain, and the court holds that the amended complaint is sufficient and denies defendant's second motion that the plaintiff be required to make the pleading more definite and certain, the denial of the second motion will not be held for error, the sufficiency of the bill of particulars filed being in the sound discretion of the trial court.

2. Pleadings § 29: Courts § 3—No appeal lies from one Superior Court judge to another.

One Superior Court judge is without power to review or reverse a prior order or judgment of another Superior Court judge, and where the court grants defendants' motion for bill of particulars but denies their motions to strike certain matter from the complaint, and neither defendant excepts or appeals from the denial of the motions to strike, defendants are bound thereby, and a motion made after the filing of the amended complaint to strike like matter therefrom is properly denied, and this conclusion is unaffected by the fact that the amended complaint makes it more clearly appear that the matter sought to be stricken is immaterial to the cause.

3. Pleadings § 26b: Principal and Surety § 17—

Where plaintiff in an action on a fidelity bond, in response to an order to make the pleading more definite and certain, files an amended complaint alleging that the defalcations or misconduct of the principal occurred between certain dates, the amended complaint is in effect a bill of particulars, and plaintiff is confined to proof of defalcations occurring between the dates specified.

APPEAL by defendants from *Stevens, J.*, at May Term, 1940, of ROBESON. Affirmed.

Civil action heard on motion to strike certain allegations in the complaint.

The plaintiff alleges that the defendant E. B. Daniel was cashier of its Pembroke unit from 25 February, 1939, until 31 August, 1939; and that prior thereto he was an employee of the Bank of Pembroke, the assets of which were purchased and the liabilities of which were assumed by the plaintiff. It further alleges that the defendant U. S. Casualty Company became and is the surety upon the fidelity bond of the individual defendant, which bond is in the sum of $50,000.00; that while said bond was in full force and effect plaintiff suffered losses on account of the dishonest acts of the individual defendant in the total sum of $47,933.14; that prior to the time plaintiff acquired the assets of the Bank of Pembroke, to wit, 20 September, 1935, defendant became surety on the fidelity bond of the individual defendant as an employee of the Bank of Pembroke; that said bond was in the sum of $15,000.00 and was cumulative from year to year until the date of the execution of the $50,000.00 bond.

The plaintiff prays judgment in the penal sum of the bond executed 25 February, 1939, to be discharged upon the payment of the losses sustained by the plaintiff through the misconduct of its employee, the individual defendant.

Thereupon, the corporate defendant, before the time for answering expired, appeared and moved the court to strike from the complaint the several allegations in the complaint making reference to the bond in the sum of $15,000.00 executed 20 September, 1935, insuring the Bank of Pembroke against loss on account of the dishonest acts, etc., of its then employee, the defendant E. B. Daniel. It further moved that the plaintiff be required to make its complaint more definite and certain. The latter motion was, in effect, a demand for a bill of particulars. The individual defendant made similar motions.

When the cause came on to be heard on said motions the court below ordered "that the motion of each of defendants to strike allegations from the complaint be, and it is hereby denied." It further ordered that the plaintiff "file an amended complaint herein, setting forth definitely the date and nature of any alleged dishonest acts on the part of defendant E. B. Daniel known to the plaintiff, its agents, servants and employees, and the date, the amount and nature of each alleged loss of plaintiff, on account of any alleged dishonest acts on the part of the defendant E. B. Daniel."

Thereafter, plaintiff filed an amended complaint containing the allegations in the original complaint, together with certain additional allegations in compliance with the order of the court, including the allegation "that it is unable to state further when and on what dates during the said period from February 25, 1939, until August 31, 1939, the said several acts of defalcation on the part of the said defendant E. B. Daniel

occurred. In connection therewith the plaintiff alleges that if the court should find that said shortage occurred prior to March 1, 1939 (which is denied), then this plaintiff says that it suffered the said losses as hereinbefore set out on account of the dishonest act and acts of said E. B. Daniel for which his codefendant surety is also liable to this plaintiff, in that the said E. B. Daniel falsely and dishonestly represented through the entries made by him in the records of the Bank of Pembroke and in the Pembroke unit of the plaintiff, that the affairs of the said bank were as set forth in his said records thereof, and that said records truthfully showed the net worth of the said bank to be in excess of its true net worth, and did by his false and dishonest representations and false entries in the records thereof cause the plaintiff to purchase the same at the value of its net worth as shown in its records and did cause the plaintiff to suffer the said loss on account of said false entries and dishonest acts in representing the affairs of the Bank of Pembroke to be correctly set forth in the records and books of said bank, both as to assets and liabilities." It then alleges that it has acquired all of the rights of the Bank of Pembroke under and by virtue of the cumulative bond in the sum of $15,000.00, executed 20 September, 1935.

Each defendant then moved the court to strike from the amended complaint all allegations in respect to the bond executed 20 September, 1935.

They likewise moved the court that plaintiff be required to make its amended complaint more definite, particularly with reference to its allegations of dishonest acts or fraudulent entries in the books of the plaintiff bank, alleged to have been done or made by defendant Daniel, for the reason that the amended complaint filed by plaintiff fails to comply with the former order of the court.

When the motion came on to be heard the court, being of the opinion that the amended complaint is in accordance with the order theretofore entered, declined to require the plaintiff to make further amendment and denied the motion to strike. Each defendant excepted and appealed.

McLean & Stacy for E. B. Daniel, appellant.

Helms & Mulliss for United States Casualty Company, appellant.

Johnson & Timberlake, Varser, McIntyre & Henry, and McKinnon, Nance & Seawell for appellee.

BARNHILL, J. The defendants do not discuss in their briefs the exception to the judgment below based upon the contention that the amended complaint fails to comply with the order theretofore entered requiring a bill of particulars in respect to the alleged shortage. We may presume

that this contention has been abandoned. In any event, it is apparent that the court below was of the opinion that the plaintiff was acting in good faith in making its allegations that it could not give information more definite than that alleged in the amended complaint and it thereupon adjudged the amended complaint to be a sufficient compliance with the former order. *Townsend v. Williams,* 117 N. C., 330. The judgment below in this respect cannot be disturbed.

When judgment was entered denying the motions of the defendants to strike from the original complaint allegations relating to the bond executed 20 September, 1935, neither defendant excepted thereto. Nor did they appeal therefrom. It thereupon became binding upon the defendants. They could not thereafter appeal to another judge of the Superior Court to review or to reverse the original order denying the motion to strike. *Davis v. Land Bank,* 217 N. C., 145, and cases cited; *In re Adams, ante,* 379.

It is conceded that the amended complaint may make it appear more clearly that, upon the plaintiff's theory of his cause of action, allegations in respect to the $15,000.00 bond are immaterial. But this is not sufficient to overcome the rule which prohibits one Judge from reversing the judgment of another.

As the plaintiff has specifically alleged that the loss sustained by it was occasioned by the misconduct of the defendant Daniel during the period from 25 February, 1939, to 31 August, 1939, and this allegation is made in response to an order for a bill of particulars, the plaintiff is bound thereby and must confine its evidence thereto. Under the amended complaint it may not undertake to show a shortage occurring at some other time. McIntosh P. & P., 361; *Savage v. Currin,* 207 N. C., 222, 176 S. E., 569; *Beck v. Bottling Co.,* 214 N. C., 566, 199 S. E., 924; *Gruber v. Ewbanks,* 199 N. C., 335, 154 S. E., 318.

Even so, the plaintiff asserts that in this type of case, when the surety is unable to refute the existence of a shortage, it undertakes to prove that such shortage did not occur during the period covered by the bond sued upon; and that by its allegations in respect to the $15,000.00 bond it has merely captured the defendants' Maginot Line and barricaded their principal line of retreat. It contends that if such defense is made by the defendants in this case, it will be entitled to recover upon the original bond, not upon evidence offered by it but upon such evidence offered by the defendants. As to this, what rights, if any, the plaintiff may have under the bond executed to the Bank of Pembroke are not now at issue. Nor need we express an opinion as to the right of the plaintiff to make the suggested use of the allegations which the defendants seek to have stricken from the complaint. Suffice it to say that the court

below properly declined to review or to reverse the former order denying the motion to strike these allegations from the complaint.

The judgment below is

Affirmed.

EDITH H. PERRY, GUARDIAN FOR WILLIAM S. PERRY ET AL., AND EDITH H. PERRY, INDIVIDUALLY, v. CITY OF HIGH POINT.

(Filed 20 December, 1940.)

1. Municipal Corporations § 46—

Where a municipality contends that no notice of claim against it had been given its city council as required by its charter as a condition precedent to the right to maintain an action on the claim, testimony that after delivery of claim to its city manager, the mayor and two members of the council had visited the *locus in quo* and discussed the claim, is competent as tending to show that they had been given notice.

2. Same—Evidence that notice of claim addressed to city council was filed in office of manager and that councilmen had notice, held sufficient.

Evidence that notice of claim against defendant municipality, sufficient in form and addressed to the city council, was filed in the office of the city manager, that subsequently at a meeting of the city council, consideration of the claim was denied because it had not been given the city council as required by the charter (sec. 2, ch. 171, Private Laws of 1931), and that subsequent to the filing of the notice the mayor and two city councilmen visited the *locus in quo* and discussed the claim, *is held* sufficient evidence to be submitted to the jury on the question of substantial compliance with the charter provisions requiring notice to be given the city council, and the granting of the city's motion to dismiss is error. *Nevins v. Lexington*, 212 N. C., 616, cited and distinguished.

3. Same—

The provisions of a city charter that notice of a claim against the city be given as a condition precedent to the right to maintain an action on the claim, is in derogation of the common law, and a substantial compliance is sufficient.

APPEAL by plaintiffs from *Sinclair, Emergency Judge,* at September Term, 1940, of GUILFORD.

This is an action to recover damage to the land of the plaintiffs alleged to have been caused by defendant emptying raw sewage into a stream which flows by said land, thereby depreciating the value thereof. The plaintiffs alleged, *inter alia,* that they had served the defendant with written notice of their claim and made demand in writing that same be paid, as by law required, and that the defendant had not paid the damage claimed and demanded. The defendant denied this allegation.

The court entered upon the trial of the plea in bar or the issue raised on the pleadings as to whether the plaintiffs had complied with the requirement of the charter of the city of High Point as a condition precedent to the maintenance of the action.

After counsel for the plaintiffs announced that they had offered all of the evidence they had as to notice to the City Council, the court allowed the motion of the defendant to dismiss the action, and signed judgment accordingly. To this judgment the plaintiffs preserved exception and appealed.

Frazier & Frazier, J. Keith Harrison, and D. H. Parsons for plaintiffs, appellants.

G. H. Jones for defendant, appellee.

SCHENCK, J. The sole question presented on this appeal is: Was there sufficient evidence to be submitted to the jury upon an issue as to whether the plaintiffs had substantially complied with the requirement of the charter of the city of High Point relative to giving notice to the City Council as a condition precedent to the institution of the action?

The pertinent portion of the charter of the city of High Point (sec. 2, ch. 171, Private Laws 1931) reads: "Section Six. No action against the city of High Point of any character whatsoever for damages to either person or property shall be instituted against the said city unless the complainant, his attorney or personal representative, shall have given notice to the City Council of the city of High Point of such injury, in writing, within six months after the occurrence of the cause of complaint, stating in such notice the date and place of happening or infliction of said injury, the manner of such infliction or character of injury and the amount of damage claimed therefor."

On 15 September, 1936, the plaintiffs delivered to E. M. Knox, city manager of the city of High Point, notice in the following words:

"NORTH CAROLINA — IN THE CITY OF HIGH POINT
GUILFORD COUNTY — BEFORE THE COUNCIL.

"Edith H. Perry, Guardian for William S. Perry, Margaret C. Perry and John C. C. Perry, and Edith H. Perry,
v.
City of High Point.
} NOTICE OF CLAIM

"To the Mayor and Council of the City of High Point:

"The hereinabove named claimants hereby give notice to the City Council of the City of High Point of their claim for damages to the

property of the claimants located on Lexington Avenue in the City of High Point at the intersection of Lexington Avenue and Wiltshire Boulevard on the northwest corner, the home place of claimants, by reason and for and on account of the City of High Point emptying sewage and other offensive substances and odors on the said lands of claimants from 15th day of March, 1936, until the present, thereby causing damages to the aforesaid claimants and their said lands, as said claimants allege and demand payment therefor in the amount of $10,000.00.

"This the 15th day of September, 1936.

J. KEITH HARRISON
D. H. PARSONS
Attorneys for Edith H. Perry, Guardian for William S. Perry, Margaret C. Perry and John C. C. Perry; and Edith H. Perry."

On a copy of such notice the said Knox made endorsement in the following words:

"This is a copy, the original of which was filed in the office of the City Manager on this the 15th day of September, 1936.

E. M. KNOX,
City Manager of the City of High Point."

The defendant admits in the record that the above notice was presented to the City Manager, but not the City Council.

The plaintiffs then offered to prove by the witness Henry D. Perry, father of the infant plaintiffs, that after the notice was delivered to Knox, the City Manager, at least two members of the City Council and the Mayor visited the land involved in this action and expressed the opinion that the claim was correct and that the trouble should be corrected. Defendant's objection to this evidence was sustained and exception preserved by plaintiffs. We are of the opinion, and so hold, this exception is well taken, since the evidence tended to show that the Mayor and two members of the City Council had been given notice of the claim.

The plaintiffs introduced excerpt from the minutes of a meeting of the City Council held on 16 September, 1936, reading as follows:

"Upon call of the roll, Mayor Grayson, Councilmen Briggs, Gurley, Lewis, Sechrest and Ward were present. . . . City Manager Knox stated that he understood that Sunset Dairies, Incorporated, Edith H. Perry and Edith H. Perry, Guardian, were claiming damages. Councilman Briggs stated that he understood no Notice of Claim for damages

had been served on or presented to the members of the City Council, as required by the City Charter; therefore, the Council refused to recognize or consider the said claims."

The notice filed with the City Manager and addressed "To the Mayor and Council of the City of High Point," was sufficient in form to meet the requirements of the statute, which leaves for decision only the question whether the delivery thereof to the City Manager, and the evidence that subsequently the City Manager at a meeting of the City Council stated that he understood the plaintiffs were claiming damage, and the Council refused to recognize or consider the claim for the reason that no notice of claim had been given the City Council as required by the charter, and the further evidence that subsequent to the delivery of the notice of claim to the City Manager the Mayor and two members of the City Council visited the *locus in quo* and expressed an opinion that the claim was just and the trouble should be corrected, was sufficient evidence to be submitted to the jury upon an issue addressed to the giving of the notice required by the municipal charter to the City Council. We are of the opinion, and so hold, that such evidence was so sufficient.

This Court has held that statutory provisions that written notice be given to City Councils or Boards of Aldermen of cities or towns as a condition precedent to the institution of certain actions against such cities and towns require only a substantial compliance, without the technical nicety necessary to pleadings, since the provisions are in derogation of the common law. *Graham v. Charlotte,* 186 N. C., 649; *Ivester v. Winston-Salem,* 215 N. C., 1.

"Such statutory requirements being for the benefit of the municipality in order to put its officers in possession of the facts upon which the claim for damages is predicated and the place where the injuries are alleged to have occurred, in order that they may investigate them and adjust the claim without the expense of litigation, a reasonable or substantial compliance with the terms of the statute is all that is required; and where an effort to comply with such requirements has been made and the notice, statement, or presentation when reasonably construed is such as to accomplish the object of the statute, it should be regarded as sufficient." 43 C. J., p. 1192, par. 1962.

"Where the board or committee is not in session at the time of service, it is sufficient to direct the notice to the council or other governing body, and then deliver it to the officer having the care and custody of the records and files of such body, within the time fixed by statute. *Kelly v. Minneapolis,* 77 Minn., 76, 79 N. W., 653." 43 C. J., note p. 1206.

"Delivery of notice in the City Clerk's office, to an assistant clerk, in the absence of the Clerk, is properly served. *McCabe v. Cambridge,* 134 Mass., 484; *Kelly v. Minneapolis,* 77 Minn., 76, 79 N. W., 653." 43 C. J., note p. 1207.

This case is distinguishable from *Nevins v. Lexington,* 212 N. C., 616, in that in the *Nevins case, supra,* the notice was directed to the city manager instead of the proper municipal authorities and there was no allegation that any notice to anyone other than the city manager was intended or attempted. Also the decision in the *Nevins case, supra,* was predicated upon C. S., 1330, which applies only to cases arising out of contract, *Shields v. Durham,* 118 N. C., 450; *Sheldon v. Asheville,* 119 N. C., 606, whereas this action involves an interpretation of the provision in the charter of the city of High Point (Private Laws 1931, *supra*), which applies to actions "of any character whatsoever for damages."

The judgment of the Superior Court is

Reversed.

ROGER W. HARRISON, J. B. STROUD AND J. D. WILKINS, TRUSTEES OF THE FIRST BAPTIST CHURCH OF GREENSBORO, NORTH CAROLINA, v. GUILFORD COUNTY; GEO. L. STANSBURY, CHAIRMAN; J. W. BURKE, R. C. CAUSEY, JOE F. HOFFMAN, FLAKE SHAW, ALL CONSTITUTING THE BOARD OF COMMISSIONERS OF GUILFORD COUNTY; A. C. HUDSON, SUPERVISOR OF TAXATION FOR GUILFORD COUNTY; D. L. DONNELL, TAX COLLECTOR FOR GUILFORD COUNTY; AND W. C. JOHNSON, TREASURER FOR GUILFORD COUNTY, NORTH CAROLINA.

(Filed 20 December, 1940.)

1. Taxation § 20—

A lot purchased by trustees of a church for the purpose of erecting a new church and Sunday school thereon adequate for the needs of the congregation, and, pending the accumulation of sufficient funds to build the new church, used exclusively for open air Sunday school and church meetings, is property held for religious purposes within the meaning of Article V, section 5, of the State Constitution, and the Legislature has power to exempt such property from taxation.

2. Same—

Statutes exempting specific property from taxation because of the purposes for which such property is held and used, must be strictly construed, when there is room for construction, against exemption and in favor of taxation.

3. Statutes § 5a—

The rule that certain statutes must be strictly construed does not require that they be stintingly or even narrowly construed, but only that everything shall be excluded from their operation which does not come within the scope of the language used, taking their words in their natural and ordinary meaning.

4. Taxation § 20—

A lot purchased by trustees of a church for the purpose of erecting a new church, and pending the accumulation of sufficient funds to erect the new church, used exclusively for religious purposes, is property adjacent to the church property and reasonably necessary for the convenient use of the church property within the meaning of ch. 310, sec. 600 (3), Public Laws of 1939, exempting such property from taxation, even though the lot purchased, because of unavailability of adjoining land, is four or five blocks distant from the church, the word "adjacent" meaning lying close together but not necessarily in contact.

APPEAL by defendants from *Nettles, J.*, at 28 October, 1940, Civil Term, of GUILFORD.

Controversy without action duly submitted to the civil division of the municipal-county court of the city of Greensboro, and heard on appeal thereto in the Superior Court upon an agreed statement of facts as provided by sections 626, *et seq.*, of the Consolidated Statutes of North Carolina for determination as to "(1) Whether Guilford County and its officers had legally placed, fixed and assessed real property held by plaintiffs on the tax books of Guilford County" and "(2) Whether the plaintiffs were entitled to recover the amount of taxes assessed against them and which had been paid by them under protest."

Briefly stated, the agreed facts are these:

1. The plaintiffs, who are all of the elected, duly qualified and acting trustees of the First Baptist Church of Greensboro, North Carolina, in whom the legal title to the real estate of said church is vested, hold title to said property solely for the benefit, use and purposes of said church which is solely a religious organization—having existed continuously since 13 March, 1859. As such, said trustees hold the legal title to two tracts of land, upon one of which is located the church and Sunday school building now used and occupied by said church, upon the other of which is located a dwelling house known as the "First Baptist Church Parsonage," neither of which is listed or assessed for taxation. Said trustees also hold title to a third tract, "a vacant lot on the corner of North Mendenhall Street and Madison Avenue, purchased by the said church in 1938, upon which to build a new church and Sunday school building" to which this controversy relates.

2. Acting upon the assumption that said third tract of land is subject to taxation, the defendants have complied with the statutory machinery provided for the listing and assessing same for taxation at the rate of taxes duly levied for the year 1940, pursuant to which tax in the amount of $155.59 has been assessed against said tract. Upon demand for the payment thereof, the plaintiffs paid the amount of the tax on 1 November, 1940, under protest, and within thirty days next thereafter duly

made demand in writing for the return thereof. The demand was refused, and this controversy was submitted on 4 November, 1940.

3. On account of the fact that the present church and Sunday school enrollments of the First Baptist Church of Greensboro exceed the accommodations in the existing church and Sunday school building, and nineteen Sunday school classes, of more than 650 pupils, are meeting in the Masonic Temple, said church, by act of the congregation in April, 1937, started a building fund and began raising money with which to purchase a new site on which to erect a new and larger church and Sunday school building. Additional land adjoining the present church plant not being obtainable, the church, by authority of the congregation, in March, 1938, purchased and acquired the third tract, above described, for said purpose, and decided to build a new church on same, as soon as it could finance the building. At the time of the purchase of the newly acquired lot, the only buildings thereon were an old dwelling and an outhouse. The dwelling was rented for a few months and rent received was used exclusively for religious and church purposes. But because of its dilapidated condition the buildings were torn down and removed from the lot in the spring of 1939. Thereupon, "a portion of said lot was cleared and electric lights were put up under the trees, benches were placed upon it, and the lot prepared for use by Sunday school classes and organizations of the church in outdoor meetings." "On 25 June, 1939, the church held on the lot an open air service, at which service it was announced that the lot had been fully paid for, and the lot was at said time dedicated to God for church purposes." Since then "the lot has been used only by Sunday school classes and organizations of the church as a place for holding outdoor meetings." Pursuant to congregational act "plans are definitely in the making by the First Baptist Church to erect a new church and Sunday school building on said lot by 1944."

The boundaries of the lot embrace about six acres. While definite plans for the location of the new church building on said lot have not been made, "it is the plan of the church to locate the new building back from the streets somewhere near the center of the lot, to have entrances from at least two of the adjoining streets, and to use the land surrounding the church and Sunday school building for a yard, and for recreational purposes in connection with the church's work. . . . This proposed building measures 254 feet in one direction and 236 feet in the other."

The court below, being of opinion that the listing of and assessing tax on the third tract of land, which is the subject of this controversy, are "wholly illegal and invalid," entered judgment in favor of the plaintiffs

and against the defendants for the amount of the tax assessment, paid under protest, with interest and costs. Defendants appeal therefrom and assign error.

York & Boyd, Wm. M. York, and C. T. Boyd for plaintiffs, appellees.

D. Newton Farnell, Jr., B. L. Fentress, and H. C. Wilson for defendants, appellants.

G. H. Jones of counsel for defendants, appellants.

WINBORNE, J. The question here is this: Does the property, which is the subject of this controversy, come within the definition of real property which is exempt from taxation under the statute in effect 1 January, 1940, Public Laws 1939, ch. 310, sec. 600 (3)? The effect of the ruling of the court below is that it does come within the meaning of the statute. Our opinion is accordant with that view.

While in Article V, section 3, of the Constitution of North Carolina, it is required that the power of taxation shall be exercised in a just and equitable manner, and shall not be surrendered, suspended, or contracted away, and that taxes on property shall be uniform as to each class of property, it is provided in section 5 of Article V that "The General Assembly may exempt cemeteries and property held for educational, scientific, literary, charitable or religious purposes . . ."

The General Assembly has provided in section 600 of ch. 310 of Public Laws of 1939 that "The following real property, and no other, shall be exempted from taxation . . . (3) Buildings, with the land upon which they are situated, lawfully owned and held by churches or religious bodies, wholly and exclusively used for religious worship or for the residence of the minister of any such church or religious body together with the addition adjacent land reasonably necessary for the convenient use of any such building . . ."

Upon the agreed facts the lot, which is the subject of this controversy, is, in good faith, held for, dedicated to and used for church purposes. It, therefore, comes within the class of property held for religious purposes which the General Assembly may exempt.

The question then arises: Has the General Assembly exempted it?

Statutes exempting specific property from taxation because of the purposes for which such property is held and used, are and should be construed strictly, when there is room for construction, against exemption and in favor of taxation. *United Brethren v. Comrs.*, 115 N. C., 489, 20 S. E., 626; *Trustees v. Avery County*, 184 N. C., 469, 114 S. E., 696; *Hospital v. Rowan County*, 205 N. C., 8, 169 S. E., 805; *Odd Fellows v. Swain*, 217 N. C., 632, 9 S. E. (2d), 365; *Hospital v. Guilford County, ante*, 673.

"By the rule of strict construction, however, is not meant that the statute shall be stintingly or even narrowly construed, . . . but it means that everything shall be excluded from its operation which does not clearly come within the scope of the language used . . ." *Stacy, C. J.*, in *S. v. Whitehurst,* 212 N. C., 300, 193 S. E., 657.

The words used in the statute must be given their natural or ordinary meaning. 71 C. J., 353; *Borders v. Cline,* 212 N. C., 472, 193 S. E., 826.

Applying these rules, we are of opinion and hold the clause in subsection 3 of section 600, which reads: "together with the addition adjacent land reasonably necessary for the convenient use of any such building" is sufficiently clear and broad enough to include the lot of land which is the subject of this controversy. What is meant by adjacent land? Webster, in defining the word "adjacent," says: "Objects are adjacent when they lie close to each other, but not necessarily in actual contact; as adjacent fields, villages." When given this ordinary meaning, adjacent land which is reasonably necessary for the convenient use of the building wholly and exclusively for religious purposes must lie close to, but not necessarily in contact with the land on which the building is situated.

The lot in question is stated to be four or five blocks away, but other adjoining lands were not available. The agreed facts show that the lot is reasonably necessary for the convenient use of the church, and is wholly and exclusively used for religious worship.

The judgment below is

Affirmed.

MAX FOXMAN v. MISS KATHERINE J. HANES.

(Filed 20 December, 1940.)

1. **Bills and Notes § 22—**

Evidence that the payee of a post-dated check given in part payment of the purchase price of an oil painting, procured its execution by false representations that the painting was by an old master, whereas in fact the painting was by an unknown artist and comparatively worthless, is sufficient to show that the execution of the check was procured by fraud constituting a defense to an action on the check by the payee or by a holder not a holder in due course. C. S., 3030.

2. **Same: Bills and Notes § 9f—**

The holder of a check made payable to order who is not the payee thereon, is merely the equitable owner in the absence of evidence of endorsement by the payee notwithstanding evidence that he paid full value

for it, and the maker's proof that the execution of the check was procured by fraud constitutes a valid defense as against such holder. C. S., 3010.

3. Evidence § 22—

The right to cross-examine an opposing witness is a substantial right, but while the latitude for the purpose of impeachment is wide, it must be confined within the bounds of reason and to the questions rationally tending to effect the credibility of the witness.

4. Appeal and Error § 41—

Where, upon the uncontradicted testimony relating to the merits, defendant is entitled to a peremptory instruction in her favor, plaintiff's exceptions to the latitude allowed in the cross-examination of his witness and to the admission of certain expert testimony relating to a matter not germane to the defense, are immaterial and need not be decided.

APPEAL by plaintiff from *Warlick, J.,* at February Term, 1940, of FORSYTH. No error.

Action to recover on a post-dated check for $2,500, signed by the defendant. Defendant alleged that the execution of the check was procured by fraud.

In October, 1937, defendant purchased from one Victor B. Lonson for $5,000 an oil painting falsely represented to be the work of the celebrated English artist, John Constable. Lonson held himself out to be an expert in matters of art and to represent a New York art gallery. In payment for the painting which she had been thus induced to purchase, defendant signed and gave to Lonson a check for $2,500, post-dated 15 April, 1938. She also gave him a check for $500 which was paid, and a post-dated check for $2,000, payment on which was stopped. This action concerns only the $2,500 check.

Plaintiff Foxman testified that he acquired the $2,500 check 10 November, 1937, from Jacob Tobachnick, and paid the full amount thereof. Payment was evidenced by three checks on Corn Exchange Bank Trust Co., payable to Paul S. Van Baarn. Plaintiff offered in evidence the check in suit, which it was admitted was signed by the defendant. There was no proof of endorsement on the back of the check. The writing thereon appearing was, on objection, excluded by the court. No exception to this ruling was noted by the plaintiff.

Plaintiff's testimony was in the form of a deposition taken before a notary in New York. Plaintiff did not appear in person at the trial. In the deposition it appeared that on cross-examination plaintiff testified that he was a resident of New York, was in the retail laundry business, was born in Russia, though a naturalized citizen since 1925, and was of Jewish race. Exception was noted to this evidence. It was testified that Paul S. Van Baarn was the brother of Victor B. Lonson.

The three checks drawn by plaintiff on the Corn Exchange Bank Trust Co., payable to Paul S. Van Baarn, which plaintiff testified were given in payment for the $2,500 check in suit, were stamped on back "Received payment thru New York Clearing House. Federal Reserve Bank of N. Y." Plaintiff testified these checks were duly paid. Defendant offered a witness, who was admitted by plaintiff to be a banking expert, who testified that in his opinion the endorsements on these three checks, in the absence of cancellation marks, indicated they had not been paid.

Defendant Hanes' testimony set forth in detail the false and fraudulent representations of Victor B. Lonson relative to the painting she was induced to purchase, and she offered as a witness an artist who was admitted to be an expert, particularly with reference to the value and genuineness of old masters. He testified that the painting sold by Lonson to the defendant was not the work of the artist John Constable, but was a sham. "In my opinion," he testified, "an original John Constable of that size would be worth $75,000. In my opinion this dud is worth $150.00." There was no evidence to the contrary.

It was admitted that the check sued on was signed by the defendant and made payable to the order of Victor B. Lonson. Upon issues submitted to the jury there was verdict that the execution of the check was procured by fraud, and that the plaintiff was not a holder in due course. From judgment on the verdict in favor of defendant, the plaintiff appealed.

Vaughn & Graham and Winfield Blackwell for plaintiff, appellant.
Efird & Liipfert and T. O. Moore for defendant, appellee.

DEVIN, J. There was plenary evidence offered by the defendant that the check upon which this suit is founded was procured by the false and fraudulent representations of the payee of the check, Victor B. Lonson. This evidence was uncontradicted and was not impeached in any way. Indeed, it seems to have been conceded on all sides that the evidence showed that a fraud was perpetrated on the defendant in palming off a comparatively worthless painting for the work of the artist John Constable. *Whitehurst v. Ins. Co.*, 149 N. C., 273, 62 S. E., 1067; *Petty v. Ins. Co.*, 210 N. C., 500, 187 S. E., 816; *Cotton Mills v. Mfg. Co., ante*, 560.

The check was made payable to the order of Victor B. Lonson. On the trial the plaintiff Foxman offered the check, but there was no evidence of any endorsement of the check. Therefore, the plaintiff appeared only as the equitable owner of an unendorsed instrument payable to the order of another person. Under these circumstances plaintiff's suit to

recover on the check was subject to all defenses the defendant would have had against Lonson, the payee. C. S., 3030; *Bank v. McEachern,* 163 N. C., 333, 79 S. E., 680. Proof of fraud on the part of Lonson, the payee, would defeat recovery by the plaintiff on the unendorsed instrument, notwithstanding he testified he paid Tobachnick full value for the check.

It is well settled that where fraud in the execution of a negotiable instrument payable to order has been established, the question of good faith in acquiring the instrument does not arise in a suit thereon by one who has taken the instrument without the endorsement of the payee. C. S., 3010; *Bank v. McEachern, supra; Whitman v. York,* 192 N. C., 87, 133 S. E., 427; *Tyson v. Joyner,* 139 N. C., 69, 50 S. E., 803. He holds the instrument subject to any defenses available against the payee. 87 A. L. R., 1183; *Steinhilper v. Basnight,* 153 N. C., 293, 69 S. E., 220; *Critcher v. Ballard,* 180 N. C., 111, 104 S. E., 134; *Bank v. Yelverton,* 185 N. C., 314, 117 S. E., 299; *Keith v. Henderson Co.,* 204 N. C., 21, 167 S. E., 481.

The plaintiff chiefly complains that in his cross-examination defendant's counsel was permitted to elicit the facts relating to his race and place of birth. He contends that under the circumstances, in view of the fact that the defendant was a resident of the county, this examination exceeded the bounds of mere personal identification, that it emphasized unduly these collateral matters, distracted the minds of the jurors, and prejudiced his cause.

The right to cross-examine opposing witnesses is regarded in this jurisdiction as a substantial one, *Bank v. Motor Co.,* 216 N. C., 432, 5 S. E. (2d), 318, and for the purpose of impeachment a wide range is permissible, but this must be confined within the bounds of reason. *S. v. Dickerson,* 189 N. C., 327, 127 S. E., 256. Undue advantage must not be taken of a witness, nor may it be permitted to discredit him by questions tending merely to prejudice him in the eyes of the jury without rational basis as affecting his credibility. *S. v. Beal,* 199 N. C., 278, 154 S. E., 604.

However, it is unnecessary to decide the question here presented, for the reason that the uncontradicted testimony tended to show that the check was procured by fraud, and there was no evidence to show that plaintiff acquired the check by the endorsement of the payee, or any other person, so as to constitute him a holder in due course. These were the determinative issues in the case, and, as to them, there being no contradiction in the evidence, defendant would have been entitled to peremptory instructions to the jury in her favor. This Court will not review a ruling of the court below which the record shows could not have prejudiced the complaining party, even if erroneous. *Balk v.*

Harris, 132 N. C., 10, 43 S. E., 477. "A new trial will not be granted when the action of the trial judge, even if erroneous, could by no possibility injure the appellant." *Rankin v. Oates,* 183 N. C., 517, 112 S. E., 32; *Bank v. McCullers,* 201 N. C., 440, 160 S. E., 494.

For the same reason plaintiff's objection to the opinion evidence of the banking expert becomes immaterial. If it be conceded that plaintiff paid full value for the check upon which he sues, that would not help his case. There was no exception to the judge's charge.

Plaintiff's motion for new trial for newly discovered evidence is denied. The proposed testimony is cumulative and throws no additional light on the issues in the case. *Johnson v. R. R.,* 163 N. C., 431 (453), 79 S. E., 690.

In the trial we find

No error.

E. M. COOKE, ADMINISTRATOR OF THE ESTATE OF GILLIS K. COOKE, DECEASED, v. R. A. GILLIS AND STANDARD OIL COMPANY OF NEW JERSEY.

(Filed 20 December, 1940.)

1. Pleadings § 20—

Upon demurrer, the allegations of the complaint will be taken as true and will be construed with a view to substantial justice.

2. Master and Servant § 49—Where complaint alleges that defendants were not operating under Compensation Act, demurrer on ground that Industrial Commission had exclusive jurisdiction, is bad.

Under the facts alleged, the parties were presumed to have accepted the provisions of the Compensation Act, Michie's Code, 8081 (k), but the complaint further alleged that in respect to the employee's work defendants "were not operating under the Compensation Act." *Held:* The allegation that defendants were not operating under the act involves both law and fact, and the allegation is sufficient to admit of proof of non-acceptance of the provisions of the act, Michie's Code, 8081 (1), and it was error for the court to sustain defendants' demurrer on the ground that the Industrial Commission had exclusive jurisdiction, it being a question of law for the court, when the plaintiff introduces his evidence, whether defendant employer was not operating under the act.

APPEAL by plaintiff from *Grady, J.,* at September Term, 1940, of DURHAM.

Civil action for recovery of damages for alleged wrongful death. C. S., 160-161.

Plaintiff in complaint filed alleges in part that on or about 5 June, 1939, his intestate, Gillis K. Cooke, was, and for about six weeks prior thereto, had been in the employment of the defendants as a painter, and

engaged under the direction of defendant, R. A. Gillis, superintendent or foreman of his codefendant, Standard Oil Company of New Jersey, in painting the equipment owned and maintained by said company at various filling stations in the State of North Carolina; that there were in the employment of these defendants several other persons engaged in similar work and at times these employees were divided into two groups or crews, going from place to place painting the equipment owned and maintained by said company; that on or about said date, "and prior thereto, Standard Oil Company of New Jersey had regularly in service several hundred employees in the same business within this State; and at said time and for some time prior thereto, the defendants had regularly in service five or more employees engaged in painting the property and equipment of Standard Oil Company of New Jersey at various filling stations and bulk plants in the State of North Carolina; that the plaintiff is advised, informed, and believes, and therefore alleges that the defendants at the time of the wrongful death of plaintiff's intestate herein complained of, and for more than a year prior thereto, were not operating under the Workmen's Compensation Act of North Carolina with respect to plaintiff's intestate and other employees engaged in painting the equipment of Standard Oil Company of New Jersey at various stations and bulk plants throughout the State of North Carolina;" and that the death of his intestate on said date was proximately caused by the negligence of defendants in the manner alleged as therein set forth.

Defendant, Standard Oil Company of New Jersey, demurred to complaint and to right of plaintiff to maintain this action upon the ground:

1. That Superior Court does not have jurisdiction of the subject matter, for that it appears upon the face of the complaint that at the time alleged plaintiff's intestate was in the employment of this defendant, who had regularly in service several hundred employees in the same business within this State and that the death of plaintiff's intestate occurred and arose out of and in the course of such employment;

2. That only the Industrial Commission of North Carolina, in the administration of the Workmen's Compensation laws of North Carolina, has exclusive, original jurisdiction of the subject matter of the action.

Before the hearing upon the demurrer plaintiff moved to amend the complaint and renewed and insisted upon his motion during the hearing and after the ruling upon the demurrer.

The court below being of opinion "that the Industrial Commission has the final and exclusive jurisdiction of the cause of action alleged in the complaint," sustained the demurrer, and further being of that opinion, denied the motion of plaintiff for permission to amend, and entered judgment dismissing the action.

Plaintiff appeals therefrom to Supreme Court and assigns error.

Basil M. Watkins for plaintiff, appellant.
Pou & Emanuel for defendant, appellee.

WINBORNE, J. Accepting the allegations in the complaint in this action to be true, and construing them "with a view to substantial justice between the parties," as we must do when testing their sufficiency upon challenge by demurrer, we are of opinion and hold that the allegation that "defendants at time of the wrongful death of plaintiff's intestate . . . were not operating under the Workmen's Compensation Act of North Carolina" is sufficient to admit of proof. *Calahan v. Roberts,* 208 N. C., 768, 182 S. E., 657.

While under the provisions of the Workmen's Compensation Act of North Carolina, it is true that both employer and employee, coming within the definitions therein set forth, are presumed to have accepted the provisions of the Act respectively to pay and accept compensation for personal injury, or death resulting from injury by accident arising out of and in the course of the employment and, nothing else appearing, are bound by its terms, Public Laws 1929, ch. 120, sec. 4; Michie's Code, sec. 8081 (k), *Pilley v. Cotton Mills,* 201 N. C., 426, 160 S. E., 479; *Hanks v. Utilities Co.,* 204 N. C., 155, 167 S. E., 560; *Miller v. Roberts,* 212 N. C., 126, 193 S. E., 286, and that the Industrial Commission of North Carolina has exclusive original jurisdiction to hear and determine matters of compensation for personal injury or death, sec. 11, Michie's Code, 8081 (r), subject to review by appellate courts as to matters of law, the Act provides in sec. 5 a method by which both employer and employee may effect a nonacceptance of the provisions of the Act. Michie's Code, 8081 (l). See *Miller v. Roberts, supra.*

In the *Calahan case, supra,* in opinion by *Schenck, J.,* it is said that "the presumption of acceptance may be rebutted by the proof of nonacceptance, and the plaintiff has laid the foundation for such proof by alleging that the 'defendants . . . were not operating under the Workmen's Compensation Act.'" In the present case the allegation is in substantially the same language.

However, it is earnestly contended in behalf of appellee that here there is no allegation of fact, to wit, notice of nonacceptance as contemplated by the statute and as was alleged in the *Calahan case, supra,* as shown by the record there, and that here the allegation that "defendants . . . were not operating under the Workmen's Compensation Act" is a mere allegation of a conclusion of law. With this, we are unable to agree. Whether "defendants were *not* operating under the Workmen's Compensation Act" involves both law and fact. We think

the allegation is sufficient to admit of proof with regard thereto. Whether plaintiff shall be able to support his allegation with sufficient proof is a matter not now before us. Upon the facts found by the court upon competent evidence, when offered, the question of law as to whether defendant Standard Oil Company of New Jersey was *not* operating under the Act will then arise. *Aycock v. Cooper,* 202 N. C., 500, 163 S. E., 569; *Young v. Mica Co.,* 193 S. E., 285.

For the reasons stated, we hold that the court below erred in ruling that, as a matter of law, upon the face of the complaint, it appears that the Superior Court is without jurisdiction. Hence, it is unnecessary to discuss the question as to whether or not the court, for the reason assigned, properly denied motion to amend.

The judgment below is

Reversed.

THE TOWN OF WADESBORO v. FRED J. COXE AND WIFE, ELIZABETH D. COXE, AND JAMES A. HARDISON AND WIFE, LILLIAN H. HARDISON.

(Filed 20 December, 1940.)

Municipal Corporations § 33—Signing a petition for public improvements by husband and wife held sufficient evidence that husband was wife's agent.

The wife owned the *locus in quo*, and the petition for public improvements was signed by the husband and by the wife. C. S., 2706. *Held:* The signature of the wife as the owner of the property along with the signature of the husband is sufficient evidence to be submitted to the jury on the issue of whether the wife constituted her husband her agent to subsequently act for her in the premises, rendering the listing of the property in his name on the assessment roll, C. S., 2711, and the special assessment book, C. S., 2722, and the giving of the statutory notices to him, sufficient, thus rendering the lien against the property valid and enforceable as against her and as against her subsequent grantee.

APPEAL by plaintiff from *Clement, J.,* at June Term, 1940, of ANSON.

Robinson, Pruette & Caudle for plaintiff, appellant.
B. M. Covington for defendants, appellees.

SCHENCK, J. This is an action to foreclose a lien upon certain real estate of the defendants fronting 235 feet on Lee Avenue in the town of Wadesboro for assessments due for improvement of streets and sidewalks adjacent thereto, instituted under C. S., 7990. When the plaintiff had introduced its evidence and rested its case, the defendants moved to

dismiss the action and for a judgment as in case of nonsuit. C. S., 567. The motion was allowed, and the plaintiff preserved exception and from judgment of dismissal appealed.

The plaintiff alleges that the lien which it seeks to foreclose was created by virtue of chapter 56, Article 9, of the Consolidated Statutes and amendments thereto. The defendants deny that the provisions of the statutes have been met and that any valid lien has been created against their property.

While it is admitted that the real estate against which the alleged lien is sought to be foreclosed, at the time the petition for the improvements was filed and at the time the improvements were actually made, was owned by Elizabeth D. Coxe, it nevertheless appears from the petition presented to the board of commissioners of the town of Wadesboro requesting that such improvements be made (in accord with C. S., 2706 and 2707) that said real estate, fronting 235 lineal feet on Lee Avenue, was represented by their signatures to be owned by Fred J. Coxe and Elizabeth D. Coxe—the pertinent portion of said petition reading: "Signature of property owner: (Signed) Fred J. Coxe, (Signed) Elizabeth D. Coxe. Lineal feet of frontage: Lee Avenue—235 ft."

Although the plaintiff's evidence tended to show that on the assessment roll and on the special assessment book the real estate involved appears in the name of Fred J. Coxe, and that all notices required to be given to the property owners by the various statutes were given to Fred J. Coxe, and that certain installment payments were made by Fred J. Coxe, we are of the opinion that the signature of Elizabeth D. Coxe as a "property owner," owner of the property involved, along with the signature of Fred J. Coxe, was sufficient evidence to be submitted to the jury upon an issue as to whether Elizabeth D. Coxe had constituted Fred J. Coxe her agent to subsequently act for her in the premises, to receive the notices which were served on him and to make the payments made by him, and that in so acting and doing he was acting for her, as the owner of the property. If Fred J. Coxe was so acting, with authority so to do, there was no failure to comply with C. S., 2722, by reason of the fact that the special assessment book failed to show "the name of owner of such property," and there was no failure to include the name of "the persons assessed" as required by C. S., 2711, and no failure to give such owner notice of hearing or an opportunity to be heard upon the question of confirmation of the assessment roll, as required by C. S., 2712 and 2713, since all the entries of the name of the owner and all notices and rights to which the owner of the real estate was entitled were made and given to Fred J. Coxe as the agent of the owner. *Qui facit per alium facit per se.*

The evidence tending to show that the designation of Fred J. Coxe as the owner of the real estate involved, and the giving of the notices required by law to him, and the receiving from him of the installment payments, when considered in connection with the evidence that Elizabeth D. Coxe signed the petition for the improvements, as the owner of the property, along with Fred J. Cox, was sufficient to be submitted to the jury upon an issue as to whether the provisions of the statutes had been met and a valid lien thereby created in favor of the plaintiff town against the real estate owned by Elizabeth D. Coxe; and since this is true as to the real estate formerly owned by Elizabeth D. Coxe it follows it is true as to the same real estate now owned by her codefendant James A. Hardison, her grantee.

The judgment of the Superior Court is

Reversed.

O. D. BARBER v. C. C. EDWARDS AND C. V. CHURCHILL.

(Filed 20 December, 1940.)

1. Pleadings § 10—

When the answer sets up as a counterclaim a judgment against plaintiff which had been purchased by defendant, but fails to allege that defendant was the owner of the judgment at the time of the institution of the action, plaintiff's demurrer *ore tenus* to the answer will be sustained, even in the Supreme Court on appeal, since it is required that a counterclaim not arising out of plaintiff's claim must be one existing at the commencement of the action. C. S., 521 (2).

2. Pleadings § 23—

When a demurrer to the answer is sustained, defendant has the right to amend, if he so elects. C. S., 515, 525.

APPEAL by defendant Edwards from *Williams, J.*, at April Term, 1940, of DURHAM. Remanded.

Hedrick & Hall for plaintiff.

W. H. Hofler and C. S. Hammond for defendants.

DEVIN, J. Plaintiff instituted action 16 August, 1939, to recover on a note for $246.00, executed by defendant C. C. Edwards. Defendant Edwards, on 7 September, 1939, answered admitting the execution of the note and his indebtedness thereon to the plaintiff as alleged, but pleaded as a counterclaim a judgment against the plaintiff O. D. Barber in the sum of $1,805.81. Defendant's allegation with respect to the judgment

was "that the defendant is now the owner and holder of a judgment against the plaintiff." On the trial the defendant testified he bought the judgment 19 May, 1939, but the entry on the judgment docket showed assignment to defendant Edwards 29 August, 1939. The court held that defendant had acquired the judgment subsequent to the institution of the action, and that therefore it could not avail him in this action. Peremptory instructions were given the jury for the amount of the note. From verdict and judgment in accord with this ruling, the defendant Edwards appealed.

In this Court plaintiff demurred *ore tenus* to the counterclaim alleged in the answer. By C. S., 521 (2), it is required that a counterclaim not arising out of plaintiff's claim must be one existing at the commencement of the action. The action was begun 16 August, 1939. Defendant filed his answer 7 September, 1939. It speaks as of that date. The allegation therein that he is now the owner of the judgment against the plaintiff fails to state that he was the owner of the judgment at the time of the commencement of the action. It is insufficient to show that he had a right to set up the judgment as a counterclaim existing at that time. The demurrer to the defendant's counterclaim must be sustained. *Reynolds v. Smathers,* 87 N. C., 24; *Bank v. Northcutt,* 169 N. C., 219, 85 S. E., 210; *Cody v. Hovey,* 216 N. C., 391, 5 S. E. (2d), 165.

However, the defendant, under the provisions of C. S., 515, and C. S., 525, has a right to amend his allegation of set-off or counterclaim if he so elects. *Cody v. Hovey,* 217 N. C., 407, 8 S. E. (2d), 479. For that reason the cause is remanded to the end that he may have opportunity to do so. *Rayburn v. Rayburn, ante,* 514. The defendant's admission of the debt set out in the complaint would entitle plaintiff to judgment for the amount sued for, unless the defendant can properly allege and prove a valid set-off or counterclaim existing at the time of the commencement of the action, the burden being upon him to do so.

Remanded.

SALLIE P. PRATT v. THE GREAT ATLANTIC AND PACIFIC TEA COMPANY.

(Filed 20 December, 1940.)

1. Negligence § 4d—

A store proprietor is not an insurer of the safety of its customers, and the doctrine of *res ipso laquitur* does not apply to an injury sustained by a customer in a fall on the aisle of the store, but the customer must prove

negligence in construction or maintenance, resulting in a condition from which injury is reasonably foreseeable, and that the proprietor had express or implied notice thereof.

2. Same—

Evidence that plaintiff slipped on a greasy, dusty substance on the aisle of defendant's store, and fell to her injury, without evidence that defendant's employees had put the substance on the floor, and without evidence that defendant had express or implied notice thereof, is insufficient to overrule defendant's motion to nonsuit.

CLARKSON, J., concurs in result.

APPEAL by plaintiff from *Nettles, J.*, at June Term, 1940, of FORSYTH. Affirmed.

Civil action to recover damages for personal injuries.

The plaintiff, while a customer in the mercantile establishment of the defendant, slipped and fell, sustaining personal injuries. She instituted this action for damages alleging that her fall resulted from the negligence of the defendant in that it permitted a greasy, oily substance to be and remain on the floor at or near the meat market department thereof.

At the conclusion of the evidence for the plaintiff, on motion of the defendant, the action was dismissed as of nonsuit and judgment was entered accordingly. The plaintiff excepted and appealed.

Ingle, Rucker & Ingle for plaintiff, appellant.

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

BARNHILL, J. The defendant was not an insurer of the safety of those who entered its store for the purpose of making purchases, and the doctrine of *res ipsa loquitur* is not applicable. *Cooke v. Tea Co.*, 204 N. C., 495, 168 S. E., 679; *Fox v. Tea Co.*, 209 N. C., 115, 182 S. E., 662; *Brown v. Montgomery Ward & Co.*, 217 N. C., 368, 8 S. E. (2d), 199; *Winders v. Powers*, 217 N. C., 580, 9 S. E. (2d), 131.

When claim is made on account of injuries caused by some substance on the floor along and upon which customers will 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. Thus, before plaintiff can be permitted to recover she must first offer evidence tending to show (1) negligent construction or maintenance resulting in a condition which would cause a person of ordinary care to foresee that some injury was likely to result therefrom; and (2) express or implied notice of such condition. *Cooke v. Tea Co.*,

supra; King v. Thackers, Inc., 207 N. C., 869, 178 S. E., 95; *Fox v. Tea Co., supra; Brown v. Montgomery Ward & Co., supra.*

Measured by this standard, which is the accepted law in this State, the judgment of nonsuit must be sustained.

The plaintiff testified that after her fall she observed the place where she fell. The area covered by the foreign substance was about 10 inches long and 7 or 8 inches wide. There was a mark across it made by her shoe. She further testified that "it looked greasy and dusty and dirty. . . . It looked dusty and dirty like it had been swept over—dusty and dirty. . . . It looked dark and dusty. . . . It looked greasy and dusty. . . . It looked like it was dust over a dirty spot. . . . It looked greasy." This testimony is merely descriptive. She does not say, nor did she undertake to show, what the substance on the floor was, who put it there, or how long it had been there. No attempt is made to show how nor by whom the oily spot was created, nor as to how long it had existed.

Anderson v. Amusement Co., 213 N. C., 130, 195 S. E., 386, cited and relied on by plaintiff, is distinguishable. In that case there was evidence tending to show that defendant's servants had put liquid wax on the rubberized linoleum in such manner as to create an unsafe condition and that such condition had existed for several days.

Conceding that plaintiff's testimony is sufficient to show a defective condition which was likely to cause injury, the fact remains that there is no evidence which tends to prove either that defendant's employees put the substance on the floor or that it had been there for such length of time as to charge defendant with implied notice thereof.

There being a failure of proof of notice, either express or implied, the judgment below is

Affirmed.

CLARKSON, J., concurs in result.

STATE v. E. R. JONES.

(Filed 20 December, 1940.)

1. Criminal Law §§ 56, 78b—

A motion in arrest of judgment for insufficiency of the indictment may be made in the Supreme Court on appeal, and it is not necessary that the question be presented by exception taken in the trial court. Rule of Practice in the Supreme Court, No. 21.

2. Criminal Law § 56: Gaming § 3—

An indictment charging possession of gambling devices, but failing to charge that defendant operated the devices or had them in his possession for the purpose of being operated, is fatally defective, C. S., 4437 (b), and defendant's motion in arrest of judgment will be allowed.

APPEAL by defendant from *Harris, J.*, at March Term, 1940, of DURHAM.

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

James R. Patton, Jr., for defendant, appellant.

SCHENCK, J. Although no motion to arrest judgment was lodged below, and therefore no exception addressed to such motion appears in the record, the defendant by virtue of the exception to the general rule laid down in Rule 21, Rules of Practice in the Supreme Court, 213 N. C., 821, lodges motion in this Court in arrest for the insufficiency of the indictment. We are constrained to hold that the motion is well founded and should be allowed.

The pertinent portion of the statute under which the defendant was tried, C. S., 4437 (b), reads: "It shall be unlawful for any person, firm or corporation to operate or keep in his possession, or the possession of any other person, firm or corporation, for the purpose of being operated, any punchboard, machine for vending merchandise, or other gambling device, by whatsoever name known or called, . . ."

The affidavit upon which is based the warrant upon which the defendant was tried charges that the defendant and others "did willfully, maliciously and unlawfully have in their possession certain gambling devices known as tip boards or baseball pool, against the statute, etc." There is no charge that the defendant operated the gambling devices, or that he kept such devices in his own or the possession of other persons for the purpose of being operated. The omission of such charge was a fatal defect in the indictment, since an essential element of the offense created by the statute is the operation of the gambling device or the keeping in possession of such device for the purpose of being operated, the mere having in possession of gambling devices, and nothing more, is not made a criminal offense. Where an indictment fails to charge an essential element of the offense, the defect may be taken advantage of by a motion in arrest of judgment, *S. v. Bradley,* 210 N. C., 290, and cases there cited, and such motion may be lodged in the Supreme Court. *S. v. Julian,* 214 N. C., 574.

Judgment arrested.

H. J. HAYWOOD v. THE HOME INSURANCE COMPANY.

(Filed 20 December, 1940.)

1. **Trial § 27b: Insurance § 25c—Directed verdict may not be given in favor of party upon whom rests the burden of proof.**

In an action on a policy of fire insurance on an automobile, the burden is on plaintiff to prove insurance, loss by fire and damage; and therefore a direction that the jury answer the issues of insurance and loss by fire in favor of plaintiff is error, since the credibility of the evidence is for the jury; and it is also error for the court to fail to place the burden of proof on the issue of damages on plaintiff.

2. **Trial § 29c: Evidence § 6—**

The burden of proof is a substantial right, and the failure of the charge to properly place the burden of proof is reversible error.

APPEAL by defendant from *Sinclair, Emergency Judge,* at May Term, 1940, of CUMBERLAND. New trial.

Action to recover on a fire insurance policy on an automobile. Plaintiff alleged the execution of the policy and the loss of the automobile by fire. Defendant denied the loss by fire as alleged. Issues addressed to the questions of (1) insurance, (2) loss by fire, and (3) amount of loss were submitted to the jury and answered in favor of the plaintiff. From judgment on the verdict, defendant appealed.

John H. Cook and Henry L. Anderson for plaintiff, appellee.

Helms & Mulliss, Oates & Quillen, and Robert H. Dye for defendant, appellant.

DEVIN, J. Defendant's principal assignment of error relates to the judge's charge. With reference to the first and second issues the court instructed the jury as follows: "I direct you to answer the first issue 'Yes,' and the second issue 'Yes.'" The exception to this instruction must be sustained. The defendant's denial placed the burden on the plaintiff to prove his case by the greater weight of the evidence, and it was error for the trial judge to direct a verdict in favor of the plaintiff without leaving it to the jury to determine the credibility of the testimony. McIntosh Practice & Pro., 632.

"A familiar principle of practice forbids a directed instruction in favor of the party upon whom rests the burden of proof." *Yarn Mills v. Armstrong,* 191 N. C., 125, 131 S. E., 416; *Evans v. Ins. Co.,* 213 N. C., 539, 196 S. E., 814; *House v. R. R.,* 131 N. C., 103, 42 S. E., 553; *Cox v. R. R.,* 123 N. C., 604, 31 S. E., 848.

Defendant complains also of the trial judge's failure in his charge to put the burden of proof on the third issue on the plaintiff. The proper placing of the burden of proof is regarded as a substantial right. *Arnold v. Trust Co., ante,* 433.

For the errors pointed out there must be a

New trial.

CHARLES P. LINEBERRY v. TOWN OF MEBANE.

(Filed 20 December, 1940.)

1. Master and Servant § 47—

The requirement that an injured employee file notice of his claim within twelve months from the date of injury, sec. 24, ch. 120, Public Laws of 1929, is not a statute of limitations, but a condition precedent to the right to compensation.

2. Same—

The time within which notice of injury must be filed is not tolled because of the infancy of the employee, the only provision for the tolling of time being in favor of mental incompetents and minor dependents, sec. 49, ch. 120, Public Laws of 1929. In this case, whether the provision should be extended to include injured employees under 18 years of age is not presented, since more than twelve months expired after claimant became 18 years of age before claim was filed.

3. Master and Servant § 52a—

A proceeding before the Industrial Commission for compensation is not a lawsuit in the strict sense, and many of the prerequisites of an action at law are not required. Thus, an infant employee may prosecute his claim directly without the appointment of a next friend or guardian.

APPEAL by plaintiff from *Stevens, J.,* at September Term, 1940, of ALAMANCE. Affirmed.

Claim for compensation by injured employee under the Workmen's Compensation Act.

The claimant, an infant over 18 years of age, an employee of the defendant, non-insurer, on 24 July, 1939, filed with the North Carolina Industrial Commission a report of an injury alleged to have been sustained by him on 31 May, 1938, while working for the defendant. The defendant pleaded sec. 24 of ch. 120, Public Laws 1929, in bar of plaintiff's right to recover.

It appearing to the Industrial Commission and the Commission having found as a fact that claim for compensation was not filed by the plaintiff within one year after the alleged accident, it denied compensation. On appeal to the Superior Court the order of the Industrial Commis-

sion denying compensation for failure of the plaintiff to file his claim within twelve months after the accident was affirmed. The plaintiff excepted and appealed.

Long, Long & Barrett for plaintiff, appellant.
Thos. C. Carter and June A. Crumpler for defendant, appellee.

BARNHILL, J. The provisions of sec. 24, ch. 120, Public Laws 1929, constitute a condition precedent to the right to compensation, and is not a statute of limitations. *Winslow v. Carolina Conference Assn.*, 211 N. C., 571, 191 S. E., 403. If an injured employee fails to file notice of his claim within twelve months after the date he sustains an injury by accident arising out of and in the course of his employment, he has no right to compensation under the express terms of the statute.

The infancy of the plaintiff does not toll this provision of the statute. This has been the consistent holding of the Industrial Commission and is, in our opinion, a correct interpretation of the law. 71 C. J., 1024, sec. 799; *Okla. Pipe Line Co. v. Farrell,* 160 Okla., 58, 15 P. (2d), 599; *Decker v. Pouvailsmith Corp.*, 252 N. Y., 1, 168 N. E., 442.

A proceeding before the Industrial Commission for compensation is not, strictly speaking, an action. Many of the prerequisites of a lawsuit are not required in a proceeding before the Commission. Thus it is that an infant may prosecute his claim directly without the appointment of a next friend or guardian, as claimant is here undertaking to do.

The limitations of time provided in the Workmen's Compensation Act for the giving of notice or for making claim thereunder is tolled only in behalf of a person who is mentally incompetent or is a minor dependent, sec. 49, ch. 120, Public Laws 1929; unless the tolling of time is extended to include injured employees under 18 years of age. As more than twelve months expired after claimant became 18 years of age before claim was filed, this question is not presented for decision.

The judgment below is

Affirmed.

IN RE PETITION OF MRS. J. THOMAS LEONARD FOR APPOINTMENT AS EXECUTRIX UNDER THE WILL OF FLORENCE SICELOFF LEONARD.

(Filed 20 December, 1940.)

1. Executors and Administrators § 1—

On the first page of the holographic will in question, testatrix made testamentary disposition of her property, and on the second page, labeled "all I have is this," she listed her property and those having same in

their possession, and included in the body of the list the words "Mrs. J. Thom Leonard have this in charge." *Held:* The phrase quoted does not designate the person named therein to administer the estate nor commit the execution of the will to her, and she is not entitled to be appointed executrix.

2. Wills § 31—

The rule that a will should be interpreted from its four corners to carry out the intent of testatrix as gathered therefrom does not permit the writing into the will by the court essential words not appearing therein.

APPEAL by respondents from *Nettles, J.*, at September Term, 1940, of DAVIDSON.

The clerk of the Superior Court of Davidson County on 5 September, 1940, admitted to probate the holograph will of the late Florence Siceloff Leonard, who died 24 August, 1940, consisting of two pages, the first of which reads:

"MY REQUEST

"I want after all my expences is paid
One Thousand Dollars ($1,000) be given to Nazareth Orphans Home.
One Thousand dollars ($1,000) be given Bethany Reform Church.
The rest be equaly divided between my nephews and neices just a like.
My personel property be divided as you see best.

FLORENCE SICELOFF LEONARD

"May 20, 1935."

And the second page of which reads:

"ALL I HAVE IS THIS.

"One bon of $225. dollars in Kinston Bank.
Small amount of money in Winston-Salem Bank.
Sister Mary has my bank book.
Lexington Bank & Mortgages have rest of money.
Mrs. J. Thom Leonard have this in charge
Mrs. J. Thomas Leonard have few of my things such as quilts feather bed pillows carpet & few dishes
Pennie have few things be longs to me.
Do away with them as you see best.

FLORENCE SICELOFF LEONARD

"May 20, 1935."

On the day the will was filed for probate Mrs. J. Thomas Leonard filed a petition asking that she be appointed executrix, which petition

the clerk of the Superior Court denied, adjudging as a matter of law that there was no appointment of an executrix made in said will.

From this judgment the petitioner appealed to the judge of the Superior Court, who reversed the judgment of the clerk and remanded the case with the direction that the clerk appoint Mrs. J. Thomas Leonard executrix of the last will and testament of Florence Siceloff Leonard. To this judgment the respondents preserved exception and appealed to the Supreme Court.

Don A. Walser and Paul R. Raper for petitioner, appellee.
P. V. Critcher and W. F. Brinkley for respondents, appellants.

SCHENCK, J. The sole question presented on this appeal is:

"Does the will of the late Florence Siceloff Leonard name an executrix?" We are constrained to answer in the negative.

The only mention made of Mrs. J. Thomas Leonard is in the second page of the holograph will labeled "All I have is this." The mention of the name of the petitioner, we think, is made simply to designate or locate certain property of the testatrix which the petitioner had in charge or in her possession. We do not see in these words any commitment of the execution of her will to Mrs. J. Thomas Leonard or any designation of her as the person whom the testatrix desired to administer her estate. An executor is "One to whom another man commits by his last will the execution of that will and testament." 2 Bl. Comm., 503.

While it is our duty to interpret the will from its four corners, and to carry out the intent of the testatrix as gathered therefrom, we are not permitted to write into the will that which the testatrix failed so to do.

The judgment of the Superior Court is

Reversed.

W. P. SINEATH AND A. G. HEARON, PARTNERS, TRADING AS GOLDSBORO DRY CLEANERS & HATTERS, AND W. P. SINEATH AND A. G. HEARON, INDIVIDUALLY, *v.* NICK J. KATZIS, LETHA WHITE, WHITE'S LAUNDRY & CLEANERS, INC., BANK OF WAYNE, TRUSTEE, MECHANICS & FARMERS BANK, AND R. L. McDOUGALD, TRUSTEE.

(Filed 8 January, 1941.)

1. Contracts § 7a—

A contract not to engage in a particular business or trade is valid provided the restraint is reasonable as to both time and space and is reasonably necessary to protect the interest of the covenantee.

2. Same—

Ordinarily, a covenant not to engage in the same business within a specified time in a particular locality is incidental to the main contract under which the covenantee purchases the business and acquires the interest sought to be protected by the covenant, but it is not required that the covenantor should be the vendor in the contract for the sale of the business, it being sufficient if the covenantor was prominent in the business at the place in question.

3. Same—Covenantor was prominent in business at place in question, and covenantee was entitled to enforce covenant against him.

Plaintiffs purchased the dry cleaning business of a corporation. The president of the corporation owned 98 per cent of its stock and was active in its management. As a part of the recited consideration for the sale of the business, the president of the corporation covenanted not to engage in any manner or capacity in the same occupation for a period of fifteen years within the territory specified. *Held:* The covenant was incidental to the contract of purchase and was executed to protect the interest acquired thereunder, and although the covenantor was not the vendor therein, he was prominent in the business at the place in question, and the covenant may be enforced against him.

4. Contracts § 23—Evidence of breach of noncompetitive agreement held sufficient for jury.

Plaintiffs purchased the laundry business of a corporation, and incidental to the contract of sale, the president of the corporation, who owned 98 per cent of its stock and who was active in its management, executed an ancillary agreement not to engage in the laundry business for fifteen years within the specified locality. Plaintiffs' evidence tended to show that the secretary of the corporation had knowledge of the noncompetitive agreement, and that within the time specified a laundry business was started under the name of the secretary, and that the president of the corporation not only furnished capital for the new business but was active in its management. *Held:* While the lending of money or furnishing of capital for a new business, standing alone, does not constitute a breach of a noncompetitive covenant, aid in the organization or the management of the new business or the engaging in the new business under the name of another is a breach of such covenant, and the evidence is sufficient to be submitted to the jury on the question of breach of the covenant by the president, and, upon an affirmative finding by the jury, entitles plaintiffs to nominal damages at least, and supports the court's judgment enjoining the president from further violation of the contract and enjoining the secretary from engaging, employing or inducing the president to violate same.

5. Contracts § 7a—

While a person not a party to a noncompetitive covenant cannot be enjoined from engaging in the business, a stranger to the covenant may be enjoined from aiding the covenantor in violating his covenant or from receiving any benefit from its violation.

6. Same—

While the covenantor may be restrained from organizing or taking stock in a corporation projected into a business in violation of a non-

competitive agreement, the corporation itself may not be restrained unless it is made to appear that it is substantially the *alter ego* of the covenantor, and in the absence of evidence as to who the stockholders of the new corporation are or what interest any particular person has in it, the covenantee is not entitled to restrain the corporation itself.

7. Damages § 12—

In order to recover substantial damage, plaintiff must prove by the greater weight of the evidence the fact of such damage and that it naturally and proximately resulted from the wrong complained of, and evidence which leaves the causal connection between the wrong and the damage in speculation and conjecture is insufficient.

8. Contracts § 25b—Evidence held insufficient to support recovery of substantial damage resulting from breach of noncompetitive agreement.

In this action to recover damages resulting from the breach of a noncompetitive agreement, plaintiffs' evidence tended to show that the dry cleaning business purchased by them suffered a substantial reduction in receipts after the projection of the business constituting a violation of the restrictive covenant. The evidence also tended to show that plaintiff had purchased new equipment to compete with the new business, that during the competitive period dry cleaning prices had been reduced, that plaintiffs had let one of their employees go, that she was employed by the competing corporation, and that naturally she took some of the business with her. *Held:* The purchase of new equipment is not of probative value as an element of damage, and the evidence fails to show a causal connection between the projection of the new business in violation of the covenant and the loss in receipts of plaintiffs' business, but leaves the matter in mere speculation and conjecture, and therefore the evidence is insufficient to entitle plaintiffs to substantial damage.

9. Bills and Notes § 22—Defense of failure of consideration held not available to makers upon record in this case.

Plaintiffs bought the business of a corporation and executed to the corporation notes for part of the purchase price. The president of the corporation, as a part of the consideration in the sale of its assets, covenanted not to engage in the same business in that locality for a specified number of years. The corporation assigned the notes to its president, and he assigned same as security for a loan made to him by a bank. This action was instituted for breach of the noncompetitive covenant. Plaintiffs contended that the breach of the covenant rendered the notes void for want of consideration. *Held:* Plaintiffs' remedy is properly based on claim for damages, and upon evidence of breach of the contract without proof of substantial damage, so that plaintiffs are entitled to recover nominal damages only, the defense of failure of consideration need not be considered.

APPEAL by plaintiffs and by defendants, Nick J. Katzis and Letha White, from *Grady, Emergency Judge,* at March Term, 1940, of WAYNE.

Civil action (a) to restrain defendant Katzis from violating a noncompetitive agreement; (b) to restrain defendants, Letha White and White's Laundry & Cleaners, Inc., from conspiring or participating with Katzis in breach of said agreement; (c) to cancel, because of failure of consideration and breach of contract, certain notes executed by plain-

tiffs, in which defendants, Banks and Trustee, claim an interest; and (d) to recover of defendants, Katzis, White and White's Laundry & Cleaners, Inc., damage for breach of contract.

The action was originally instituted by the plaintiffs against Nick J. Katzis, Letha White, White's Laundry & Cleaners, Inc., and Bank of Wayne, Trustee. Later the Mechanics & Farmers Bank and R. L. McDougald, Trustee, were made parties defendant.

The uncontroverted facts pertinent to both appeals are these:

On 5 February, 1937, Goldsboro Dry Cleaners & Hatters, Inc., a corporation of which defendant Katzis was president, and defendant Letha White was secretary, for the recited consideration of $30,200, by deed and bill of sale combined, duly recorded, conveyed and transferred to W. P. Sineath and A. G. Hearon, plaintiffs herein, all of its assets, real, personal and mixed, owned and used by it in connection with the operation of its dry cleaning and laundry business theretofore conducted in the city of Goldsboro, North Carolina, together with its trade name and good will. Of the purchase price $10,000 was paid in cash and the balance of $20,200 was evidenced by a series of notes of W. P. Sineath and A. G. Hearon in the sum of $300 each, except the last, which was for $400, payable one each month until September, 1942, and secured by deed of trust, duly recorded, as lien on property so conveyed and transferred.

Cotemporaneously with the transfer and conveyance above described, Goldsboro Dry Cleaners and Hatters, Inc., a corporation, and Nick J. Katzis, who owned 98 per cent of the capital stock of the corporation, on the one hand, and W. P. Sineath and A. G. Hearon on the other, with the written approval of Letha White and H. B. Parker, minority stockholders of said corporation, entered into a trust agreement, in which it was agreed, briefly stated, that all debts of the corporation, a list of which was attached thereto, except a mortgage indebtedness of $15,000 to Nick J. Katzis individually, should be paid, in the manner prescribed, out of the $10,000 cash payment, and the balance paid to Katzis in cash; that Katzis would accept the purchasers' notes in settlement of the notes and security held by him and cancel the lien of record; that the notes evidencing the balance of purchase price should be executed and delivered by W. P. Sineath and A. G. Hearon to the corporation and immediately endorsed by it and transferred to Nick J. Katzis, who should thereupon immediately deliver same, and deed of trust securing same, to the Bank of Wayne, as Trustee, which should proceed to collect the notes, with interest thereon, as and when each became due, and, after deducting commissions therefrom, to remit to Nick J. Katzis, subject to a provision for paying out of proceeds of notes any other debts of the corporation not known and listed; that the trust agreement should remain in

full force and effect for a period of three years from the date thereof, unless terminated by written consent as provided; and that at the end of said three-year period said Bank of Wayne should surrender and deliver to Nick J. Katzis, or his legal representative, any and all of said notes then remaining unpaid.

The Bank of Wayne, upon conditions and agreements, *inter alia,* "that all duties and liabilities of said bank shall cease and terminate upon the expiration of three years from the date of this agreement," accepted the trust.

Pursuant to this trust agreement, W. P. Sineath and A. G. Hearon paid the sum of ten thousand ($10,000) dollars cash and executed and delivered the promissory notes and deed of trust securing same, as they agreed to do, and in accordance with the agreement the cash and the notes, endorsed as required, and the deed of trust were turned over to the Bank of Wayne, as trustee.

When this action was instituted, 21 September, 1939, the bank held uncollected $10,900 in face value of said notes, consisting of thirty-five in the sum of $300 each, due monthly beginning with 1 October, 1939, and one in the sum of $400, 1 September, 1942, interest on all of which had been paid through 5 February, 1939.

It is also not controverted by any of the parties hereto, except Mechanics & Farmers Bank, and R. L. McDougald, Trustee, that contemporaneously with the said transfer and conveyance by the Goldsboro Dry Cleaners & Hatters, Inc., defendant, Nick J. Katzis, as party of the first part, entered into an agreement with the plaintiffs, W. P. Sineath and A. G. Hearon, as parties of the second part, in which after reciting:

"That Whereas, the said party of the first part, who is the owner of the majority of the outstanding capital stock of Goldsboro Dry Cleaners & Hatters, Inc., and which said corporation has this day sold and conveyed to the said parties of the second part all of its real and personal property; and whereas, in the purchase of the said real and personal property belonging to the said Goldsboro Dry Cleaners & Hatters, Inc., it was part of the consideration and was agreed between the parties to this agreement that the said Nick J. Katzis would retire for the period of fifteen years from the dry cleaning, pressing, dyeing, cleaning and laundering and/or towel and linen supply business in Wayne County, North Carolina, and not be connected for said period of time with any such business; and whereas, the said parties of the first and second parts desire to reduce said agreement to writing," it was agreed, "in consideration of the premises and in further consideration of the mutual covenants, agreements and promises herein contained," among others, "That the said Nick J. Katzis will not at any time hereafter, for the period of fifteen years, engage, directly or indirectly, or concern himself in

carrying on or conducting the business of pressing, dyeing, laundering, cleaning or dry cleaning, and/or towel and linen supply, in Wayne County, North Carolina, for the period of fifteen years from the date of this instrument; nor will the said Nick J. Katzis conduct, maintain or carry on or engage in, for said period of time, in Wayne County, North Carolina, any cleaning, pressing, dyeing, laundering or dry cleaning and/or towel and linen supply of any kind or nature whatsoever, either as owner, manager or agent for any such designated business, or as a partner in any such designated business, or as a shareholder in any corporation engaged in any such business, nor will he be employed in any capacity whatsoever for any such business for said period of time in Wayne County, North Carolina."

This agreement was not recorded in the public records.

Plaintiffs in their complaint allege the agreement of defendant Katzis that he would not for a period of fifteen years from 1 February, 1937, "engage, directly or indirectly, in Wayne County . . . in the business of pressing, dyeing, laundering, cleaning or dry cleaning, either as owner, manager, agent . . . or as a partner in any such designated business, or as a shareholder in any corporation engaged in any such business, nor will he be employed in any capacity whatsoever in any such business."

Plaintiffs further allege as against the original defendants that about March or April, 1939, defendant Katzis "fraudulently connived and conspired with the defendant, Letha White, and the defendant, White's Laundry, to organize a corporation by which the defendant, Katzis, could indirectly engage in the business of pressing, dyeing, laundering, cleaning or dry cleaning . . . in Wayne County"; that the defendants White and White's Laundry "are merely a sham and subterfuge used by the defendant Katzis to enable him in a fraudulent and surreptitious manner to breach his contract"; that defendant Katzis "through the defendants, White's Laundry and Letha White, started the operation" in Wayne County of the designated business and "carried on the same actively up to the date of the filing of the complaint; that defendant Katzis has been "the owner, manager and agent of the White's Laundry, and has been actively conducting the business of said laundry, . . . has made contract for the equipment of the laundry, has supervised its operations, has controlled its employees, has dealt with its customers and has collected and applied money for said White's Laundry "and has engaged in the designated businesses," "both as owner, manager and agent, and also as partner and a real shareholder" in White's Laundry; that the defendants, White and White's Laundry, "acting pursuant to a common purpose and design and a fraudulent conspiracy between themselves and the defendant Katzis, have deliber-

ately and purposely interfered with the contract rights of the plaintiffs and have encouraged and aided and assisted in the violation of said contract on the part of the defendant, Nick J. Katzis; and that by reason thereof plaintiffs have been damaged."

The defendant, Nick J. Katzis, while admitting in answer filed, that the White's Laundry & Cleaners, Inc., started operation in the city of Goldsboro, engaging in the business of pressing, dyeing, laundering, cleaning and dry cleaning, denies the material allegations of the complaint. And by way of cross action, defendant, Nick J. Katzis, avers in substance that, by reason of the failure of plaintiffs, Sineath and Hearon, to pay the notes due 1 October and 1 November, 1939, the payment of all unpaid notes aggregating $10,900 is accelerated, and the entire indebtedness, with interest, is now due and payable, and that he, the answering defendant, is entitled to have the property described in the deed of trust, by which said notes are secured, sold under order of the court and the proceeds applied to the payment of said indebtedness.

The plaintiffs, in reply, allege that said notes were given in "large portion of the consideration" for the agreement by said defendant not to engage, directly or indirectly, in business as alleged, and that the breach of said agreement by said defendant operates as a total lack of consideration "for said notes and deed of trust and renders the same absolutely void, and further that plaintiffs claim for damages for breach of contract exceeds the face of said notes, and that, hence, said defendant's cross action should be dismissed."

The defendants, Letha White and White's Laundry & Cleaners, Inc., in joint answer filed, deny the material allegations of the complaint, above set forth. They admit that the White's Laundry & Cleaners, Inc., started the operation of a business of pressing, dyeing, laundry, cleaning and dry cleaning in the city of Goldsboro, and is still engaged in such operation, but "These defendants specifically deny that either directly or indirectly through these answering defendants, or either of them, Nick J. Katzis has violated the terms of any contract not to engage in that certain business in the city of Goldsboro."

The plaintiffs, in complaint, against Mechanics & Farmers Bank of Durham, North Carolina, and R. L. McDougald, Trustee, by order of court, reiterate all the allegations of the original complaint, and further allege, upon information and belief, that said bank and said trustee are asserting a claim against plaintiffs, Sineath and Hearon, on the notes in the sum of $10,900 described in the original complaint; that, such rights, if any, they have in and to said notes were derived from Nick J. Katzis and are subject to the same defenses as the said plaintiffs have against him; that by reason of the facts alleged in the original complaint the said plaintiffs are not indebted to Nick J. Katzis or to

any other person in any amount whatsoever on said notes, and, in particular, are not indebted to the defendants Mechanics & Farmers Bank and R. L. McDougald, Trustee; that by reason of the asserted claim made by said bank and said trustee they have been made parties in this action to the end that an adjudication herein may be final and binding upon them as well as upon the other parties hereto; and that plaintiffs are entitled to have the court order, declare and determine that said bank and said trustee have no right or claim against plaintiffs by reason of the said note hereinabove described.

The Mechanics & Farmers Bank of Durham and R. L. McDougald, Trustee, answering the complaint of plaintiffs, filed against them, admit that they are asserting a claim to said notes and that they were made parties hereto to the end that final judgment rendered in this action may adjudicate the rights of all the parties interested in the subject matter of the controversy; but deny all other material allegations. And, by way of further answer and defense, and for affirmative relief, these defendants aver and say: That upon application of Nick J. Katzis therefor and after making investigation of the public records of Wayne County and after having a representative call upon the Bank of Wayne, Trustee, and examine the notes and deed of trust, which said trustee has in its possession, and the trust agreement, the Mechanics & Farmers Bank made certain loans to the said Katzis and took an assignment of all of the notes referred to in the complaint as security, said assignment and transfer of the notes being evidenced by a deed of trust, dated 24 November, 1937, given and executed by Nick J. Katzis to R. L. McDougald, Trustee, for benefit of Mechanics & Farmers Bank, and promptly filed for registration and recorded in the office of the Register of Deeds of Wayne County, and was notice to all parties interested, and an exact copy of same was also promptly delivered to the Bank of Wayne, Trustee, and notice of receipt of same accepted, and the plaintiffs, Sineath and Hearon, were given due notice of this assignment. These defendants further aver that defendant, Nick J. Katzis, is now indebted to the Mechanics & Farmers Bank in the sum of $2,463.07, with interest from 1 January, 1940, until paid, which sum was and is secured by the deed of trust to R. L. McDougald, Trustee, and that by virtue of the deed of trust whereby the indebtedness of Nick J. Katzis is secured, the Mechanics & Farmers Bank and R. L. McDougald, Trustee, are now the owners of and entitled to the notes referred to in the complaint, or the proceeds therefrom, as security for said indebtedness, until same is paid in full.

These defendants further aver that with full knowledge of the assignment by defendant Katzis referred to above, the plaintiffs Sineath and Hearon continued to make payments on their notes from and after

November, 1937, as they matured, until some time in the year 1939, even for several months after the date on which they allege Nick J. Katzis violated his agreement with them, notwithstanding any breach that they allege may have occurred, and with full knowledge thereof, and for these reasons the said plaintiffs are now estopped to deny their liability, and such estoppel is pleaded in bar of the plaintiffs' right to recover. These defendants pray appropriate relief.

Plaintiffs in reply deny the material averments of defendants, The Mechanics & Farmers Bank and R. L. McDougald, Trustee, and reassert their contention that said defendants acquired no rights in and to said notes. Plaintiffs made certain further allegations, which upon motion were later stricken out. Exception.

In the trial court plaintiffs introduced evidence tending to show the uncontroverted facts as above stated and as shown in the judgment as hereinafter stated.

Plaintiffs further offered evidence tending to show these facts with respect to second and third issues: That after the Goldsboro Dry Cleaners and Hatters, Inc., sold out to plaintiffs, Sineath and Hearon, defendant Nick J. Katzis went on a trip to Greece, returned the latter part of 1937, bought and operated and sold a dry cleaning plant in Durham and then operated another in Chapel Hill; that before leaving for Greece, Katzis, in negotiating for purchase of other property in Goldsboro, inquired as to zoning restrictions with respect to operation of a laundry there, and later purchased other property where the White's Laundry and Cleaners, Inc., opened for operation on 5 June, 1939; that when the purchase by Sineath and Hearon was consummated, defendant Letha White was present and knew of the noncompetitive agreement which Katzis made with the purchasers; that after said purchase Letha White continued in the employment of Goldsboro Dry Cleaners and Hatters, Inc., until February, 1939, when she was let out, as testified by Sineath "at that time for a particular reason we felt that we did not need her"; that soon thereafter Katzis began the work of remodeling and remodeled, especially for a laundry, the building in which White's Laundry and Cleaners, Inc., operated; that a smokestack with a laundry sign on it and a water tank for a laundry were constructed; that Katzis interested himself in the purchase and approval of equipment, truck, pump and fire-fighting equipment for the laundry; that he conferred with Letha White and was present with her when the equipment was installed, and gave orders as to the placing of it; that he gave orders as to painting the sign, and sent the painter to Letha White for his pay; that he stated he would see that party, who sold a stoker for the laundry, got his pay right away; that he brought down hat blocking equipment from Chapel Hill; that he negotiated for purchase of pump, as to which

Letha White said "she knew absolutely nothing about the pump and whatever he (Katzis) said would be all right"; that when asked about insurance at the laundry he "promised a part of the business"; that when the plant was operating he was there and "gave orders to every one"; that he "was in the place an average of four days out of each week"; that "Miss White saw the public and customers most of the time"; that once he took from a customer a suit of clothes to be cleaned and pressed, and when the customer returned the suit was cleaned and pressed; that both Katzis and Letha White gave to drivers "pointers on how to get business," both complimenting one driver on his work; that Katzis brought down a man who instructed drivers in operations, and "in finishing and folding shirts"; that Katzis showed and explained the equipment to others and "said it was the most modern equipment out" and told what it cost; that he told one person "to give him my new shirts and he would guarantee them a year without collars wearing out"; that, as one witness testified: On Saturday nights at the close of business Miss White would take the money, daily or weekly receipts, over to Katzis' house, next door to plant, and they would leave together; and that when asked to sign an order for equipment, Katzis made statement that the laundry was to be operated in name of White's Laundry & Cleaners; that he "said he couldn't sign it, that he was subject to an injunction"; that he told the witness Lupton that "he could not operate under his name on account of some injunction"; that when Letha White sent a salesman to Katzis in Chapel Hill for payment on certain equipment, Katzis gave his check but that he was a little stirred up because she didn't give the check herself; that he told the salesman "about selling the laundry to competitors in Goldsboro and that he had given a ten-year contract not to enter business and couldn't afford to have his name used."

With respect to damages, plaintiffs offered in the main testimony of W. P. Sineath and C. L. Bridgers, an expert accountant. W. P. Sineath testified that of the $30,200 paid, the market value of the physical properties purchased of Goldsboro Dry Cleaners and Hatters, Inc., was "around ten to twelve thousand dollars" and that the balance of the $30,200 was for the value of its good will; and that the taking of the agreement from Katzis was to preserve the benefits of that good will. Then, continuing, he said: "After the operation of White's Laundry started we lost some business. I don't know how much. I have had an audit by Mr. Bridgers of the loss of business as compared with the preceding year. We lost about thirty or forty per cent of our gross volume, I think. We also incurred additional expense to meet the competition of White's Laundry. When we bought the place we had some old model presses and took them out and replaced them with new speed

presses. We spent about $3,000 or $4,000 on new equipment, I don't remember. In loss of business and added expense we lost about $15,000." Then on cross-examination, he testified: "I arrived at the value of the good will, because there wasn't enough property and equipment to amount to what we paid for it, the name of the business is one thing that made it so valuable. We still have the name. . . . No one has attempted to use it. We still have most of the property we bought. . . . Mr. Katzis hasn't interfered with that. But the good will consisted of a certain amount of his agreement to stay out of business, out of competition for fifteen years. . . . We have got the phone number, the location and everything connected with the corporation, and still have it. . . . Mr. Katzis . . . had a following here, a certain number of friends, the same as anyone else. Anyone who opened up a laundry would have interfered to some extent; . . . White's Laundry & Cleaners opened around the first of June, 1939, and the laundry started about the 5th of June. I started the suit in September. I swore in 90 days he damaged me $15,000. Damaged the laundry I only paid $30,000 for. I guess this was $133.00 a day. This consisted of loss of business, the amount which will appear from the books, and also consisted of equipment purchased. I am not sure I purchased the equipment within the 90 days, it was about that time. I would have to get the books to tell what equipment I bought between June 5 and September 23 . . . I don't know whether I bought any equipment from the time the dry cleaners opened—I think I bought some. Loss of business was some of the $12,000 that went into that item. I don't know how much business I lost. Mr. Bridgers, our auditor, will show exactly how much business we lost. I lost around thirty or forty per cent. You will have to take the books to tell that. That is all that I know of that went into my $12,000 to $15,000.

"Before I bought the Goldsboro Laundry we operated only the Goldwayne in Goldsboro. Later we bought the Whiteway Laundry. That was before the White's Laundry & Cleaners was started. . . .After we bought the laundry we reduced the price of dry cleaning from fifty cents to thirty-five cents. I think this had a little something to do with the decrease in volume. . . . The Goldsboro Dry Cleaners and Hatters, Inc., did some washing, but there was no revenue shown at the Goldsboro for it. I wouldn't be surprised if the books would show that some of the work was done at the Goldsboro Dry Cleaners and Hatters, and the payment for it was credited to some of the other plants. You will have to ask the bookkeeper . . . I don't know about the times in this section from June to September being about as bad as we have had. I don't think that was responsible. . . . Miss White had been in the laundry a long time and had a great many friends. We let

her go in February. She would have got some of our business if Nick Katzis had not gone in with her. . . . When she went she naturally carried some of our business with her. Some of the people who had been working with us went with White's Laundry. It is natural that her friends would go with her. . . . I never personally knew Nick Katzis to solicit any business for White's Laundry, but after it started I saw him there practically every time I passed."

C. L. Bridgers, expert accountant, testified: That he was familiar with the real property and tangible personal property of the Goldsboro Dry Cleaners and Hatters as of February, 1937; that the value of it was $8,463.06, and the balance of purchase allocable to good will, including the noncompetitive agreement, was $21,736.94. He further testified: "I have made an examination of the books and records of the Goldsboro Dry Cleaners to ascertain their earnings during the period from January 1, 1939, to the last part of May, 1939. Their earnings during that period was $4,580.23. . . .

"I have also investigated the books and accounts of the company, determining the profit or loss for the period from the first part of June, 1939, until the entry of this suit in September, 1939. There was a loss during that period.

"I have also made a computation of the difference in revenue during that period in 1939 (which is the period White's Laundry was in operation) as compared with exactly the same period in 1938. . . . The total decrease in the laundry income during that entire period as compared with the same period of the preceding year was $1,776.74. The decrease in dry cleaning revenue between the two periods was $1,629.33. The total decrease was $3,406.07. This is based on the actual results in the two periods.

"Up until the time the White's Laundry opened in June, 1939, the revenue of Goldsboro Dry Cleaners & Hatters was increasing. For the sixteen weeks immediately before White's Laundry opened there was an increase in the laundry business of $1,279.44, or 14.3 per cent over the corresponding period of the preceding year, and a similar increase in the dry cleaning business of $129.10, or 2.8 per cent.

"At the same rate of increase the laundry income for the sixteen weeks ending September 23, 1939, would have increased $1,446.21 and the dry cleaning would have increased $153.24, or a total of $1,600.05. Giving effect to an increase at this percentage during the sixteen weeks ending September 23, 1939, this means a loss of $5,006.12 for the sixteen weeks period prior to the institution of this action. . . .

"I am familiar with the generally accepted practice in the laundry business of computing the value of the good will. This is a well established principle applicable to a laundry business of any particular date.

The principle is a capitalization of monthly gross revenue. It is approved and one of the most generally used methods.

"As of June 4, 1939, prior to the opening of the White's Laundry & Cleaners, it is my opinion that the value of the good will of Goldsboro Dry Cleaners & Hatters was $24,995.20. This is arrived at by taking the business done for the preceding sixteen weeks period, plus the reasonably expected increase for that period, and reducing this to a monthly average. This average is $3,124.40, which is what the plaintiffs could reasonably be expected to do during the sixteen weeks beginning June 4, 1939. This is an eight-to-one basis. . . . As applied to laundries this ratio is dependent upon the population of the town and the number of laundries, as this shows the trade potentialities of that town. . . . Using the same basis the value of the good will on September 23, 1939, was $13,518.78, a decrease in the value of the good will between June 4 and September 23 of $11,476.42. . . .

"I have an opinion satisfactory to myself as to the value of the good will of this business on June 4, 1939, and on September 23, 1939. In my opinion the value on the first date was $24,995.20, and on the latter date $13,518.78. This is in addition to the actual loss of revenue for the four months period which I have previously testified to. . . . The computations, summaries and figures I have testified about are my accounting results from voluminous and bulky records. They involve the examination of practically all the books of the corporation."

At the conclusion of evidence for plaintiffs, motions of White's Laundry and Cleaners, Incorporated, and of Mechanics & Farmers Bank and R. L. McDougald, Trustee, respectively, for judgments as in case of nonsuit, C. S., 567, on the causes of action alleged in the complaint against them, respectively, were allowed, and, in accordance therewith judgments were entered in the cause. Exceptions by plaintiffs.

Like motions, duly made, by defendants, Nick J. Katzis and Letha White, respectively, were denied, and each of them excepted thereto.

These issues were submitted to and answered by the jury as shown:

"1. Did the defendant, Nick J. Katzis, enter into and execute a contract with the plaintiffs, the same being Exhibit 'A' attached to the complaint, as alleged in said complaint? Answer: 'Yes' (by consent).

"2. If so, did the said defendant, Nick J. Katzis, breach said contract, as alleged in the complaint? Answer: 'Yes.'

"3. If so, did the defendant, Letha White, induce and participate in said breach of contract, as alleged in the complaint? Answer: 'Yes.'

"4. What damage, if any, are the plaintiffs entitled to recover for said breach of contract? Answer: 'Five cents.'

"5. In what amount, if any, are plaintiffs indebted on the notes referred to in the complaint? Answer: '$10,900.00 and interest.'"

Plaintiffs moved the court to set aside the verdict on the 4th and 5th issues. Denied. Exception.

Motions of defendants, Nick J. Katzis and Letha White, to set aside verdict on 2nd, 3rd, and 4th issues were denied. Exception.

Thereupon the court entered judgments, among other things, on the verdict (1) in favor of plaintiffs and against defendants Nick J. Katzis and Letha White for amount of damage shown and certain costs: (2) in favor of Nick J. Katzis and against plaintiffs for $10,900 and interest, subject to assignment to R. L. McDougald, Trustee, as thereinafter adjudged; (3) restraining defendant Nick J. Katzis to 1 February, 1952, from violating the provisions of his noncompetitive agreement of 5 February, 1937; (4) and restraining defendant Letha White "from engaging, employing or inducing the said Nick J. Katzis in and to the violating of his contract of February 5, 1937."

Further, during the progress of the trial and in open court, defendants, Nick J. Katzis, Mechanics & Farmers Bank and R. L. McDougald, Trustee, filed a stipulation in which it is agreed (1) that said Katzis is indebted to Mechanics & Farmers Bank in the sum of $2,463.07, with interest, which is secured, as alleged in its further answer for affirmative relief; and (2) that the three years having expired since the date of the trust agreement whereby the Bank of Wayne took possession of the notes, defendants, Mechanics & Farmers Bank and R. L. McDougald, Trustee, are entitled to the custody and possession of the notes of plaintiffs for $10,900 and the deed of trust securing same, and that Bank of Wayne shall be authorized and directed by the court to turn same over to said defendants. And the court finding in connection with said stipulation that during the trial it was admitted by plaintiff W. P. Sineath "that the plaintiffs had notice of the transfer and assignment to R. L. McDougald, Trustee, and the Mechanics & Farmers Bank of the notes described in the complaint in 1937, soon after the 24th day of November, 1937, which is the date of the deed of trust to R. L. McDougald, Trustee, whereby they were assigned and transferred, and there being no evidence that said defendants, Mechanics & Farmers Bank, and R. L. McDougald, Trustee, had any notice of the contract between Nick J. Katzis, W. P. Sineath and A. G. Hearon, which the said defendant, Nick J. Katzis, is alleged to have breached, and which is admitted was not recorded, and the court being of opinion upon the facts agreed upon in the stipulation, and upon all the evidence in the case, that the defendants, Mechanics & Farmers Bank and R. L. McDougald, Trustee, are the owners of the thirty-six notes referred to in the complaint, by virtue of the deed of trust given by Nick J. Katzis to R. L. McDougald, Trustee . . . as collateral security for the note of Nick J. Katzis to the Mechanics & Farmers Bank, in the sum of $2,463.07, with interest . . . entered

judgment in accordance therewith. Plaintiffs object and except thereto.

Both the plaintiffs and the defendants, Nick J. Katzis and Letha White, appeal to Supreme Court and assign error.

Royall, Gosney & Smith, Paul B. Edmundson, and James Glenn for plaintiffs, appellants.

J. Faison Thomson, J. A. Jones, and C. G. Best for defendants, Nick J. Katzis and Letha White, appellants.

Claude V. Jones for appellees, Mechanics & Farmers Bank and R. L. McDougald, Trustee.

APPEAL OF DEFENDANTS, KATZIS AND WHITE.

WINBORNE, J. The questions raised by the appealing defendants pertain to the refusal of the court to grant their respective motions for judgment as in case of nonsuit and to set aside the verdict on the second, third and fourth issues. The rulings below in regard thereto are consonant with our views.

These appellants base their challenge upon two grounds:

1. That as the good will sold by the Goldsboro Dry Cleaners and Hatters, Inc., to plaintiffs Sineath and Hearon was not the property of defendant Katzis, the sale of it constituted no sufficient valuable consideration to support the execution by him of the noncompetitive agreement sued on in this action.

The principle prevails that where in a noncompetitive covenant the restraint is limited as to both time and space the agreement is ordinarily valid. *Beam v. Rutledge,* 217 N. C., 670, 9 S. E. (2d), 476; *Spring Corp. v. Burroughs,* 217 N. C., 658, 9 S. E. (2d), 473. Also, as a general proposition a covenant by which the restraint is imposed must be incidental to or in support of another lawful contract by which the covenantee acquires some interest needing protection, that is, the covenant must be ancillary to the main transaction, necessary to the reasonable protection of the business sold and reasonable in its scope under all the circumstances of the case. See Annotations 94 A. L. R., 341. There, at p. 342, it is said: "The main problem in reference to the peculiar question as to the validity of a covenant not to compete entered into by one having no interest in the business, or property sold, are two, namely: (1) Whether it is necessary that the covenantor should have had an interest as vendor in the business or property sold; and (2) assuming such an interest is not necessary, upon what persons may the restraint be validly imposed? With reference to the first problem, the cases which may be regarded as distinct authorities upon the point have followed the view that it is not necessary to the validity of the covenant as against a particular covenantor, that he should have had an interest

in the property or business sold . . . (*Arctic Dairy Co. v. Winans,* 267 Mich., 80, 255 N. W., 290, 94 A. L. R., 334.) With reference to the second problem . . . it has . . . been regarded as sufficient to the validity of a covenant, against a particular covenantor, that he was prominent in the business at the place in question."

Applying these principles to the factual situation in the case in hand, defendant Katzis bore such relation of prominence to the business of the Goldsboro Dry Cleaners and Hatters, Inc., as to make his covenant ancillary. The agreement shows, on its face, that he was the majority stockholder, and the evidence shows that he owned 98 per cent of the stock. His promise not to compete is recited by the parties to be a part of the consideration for the sale. They must have deemed that the interest acquired by the purchasers needed protection. Certainly at the time the parties considered his promise to be incidental to the main transaction.

2. That the record fails to disclose evidence of any act or conduct on the part of either Nick J. Katzis or Letha White which, as a matter of law, is sufficient to rise to the dignity of a breach of the noncompetitive covenant in the agreement upon which the action is based.

In this State, while it is held that a covenant not to engage in a competing business is not violated by lending money or giving credit to a person engaged in or about to engage in such business, *Reeves v. Sprague,* 114 N. C., 647, 19 S. E., 707; *Finch v. Michael,* 167 N. C., 322, 83 S. E., 458, it is generally held that the seller of a business who has covenanted not to engage in a competing business cannot lawfully take stock in, help to organize or manage a corporation formed to compete with the purchaser. *Kramer v. Old,* 119 N. C., 1, 25 S. E., 813; 34 L. R. A., 389, 56 Am. St. Rep., 650.

Too, it is a breach of a covenant not to engage in a competing business for the covenantor to engage in such business in the name of another who has in fact no interest therein. *King v. Fountain,* 126 N. C., 196, 35 S. E., 427.

The majority, and the better considered cases, support the proposition that one who is in no sense a party to a covenant not to engage in a competing business cannot properly be enjoined from engaging in such business. However, a stranger to the covenant may properly be enjoined from aiding the covenantor in violating his covenant or receiving any benefit therefrom. Hence, a stranger to the covenant may well be enjoined from, in conjunction with the covenantor, or with his assistance, conducting a business in competition with the covenantee. Annotations 94 A. L. R., 341.

Applying these principles to the present case, the evidence shows a factual situation from which the jury may fairly infer that defendant

Katzis was connected with the White's Laundry and Cleaners, Inc., in some respect prohibited by his agreement not to compete. The evidence shows that defendant Letha White knew of the noncompetitive agreement which Katzis had made. Knowledge of the contract, of course, is a condition of liability. *Haskins v. Royster,* 70 N. C., 601; *Morgan v. Smith,* 77 N. C., 37. The evidence is such also as to afford reasonable inference that she participated with Katzis in the breach of his contract as alleged. *Elvington v. Shingle Co.,* 191 N. C., 515, 132 S. E., 274.

When plaintiff proves breach of contract he is entitled at least to nominal damages. *Bowen v. Bank,* 209 N. C., 140, 183 S. E., 266.

APPEAL OF PLAINTIFFS.

In the light of the factual situation presented in the record on this appeal, the determinative questions raised by plaintiffs are these:

Did the court err: (1) In granting motion for judgment as of nonsuit as to White's Laundry and Cleaners, Inc.? (2) In holding that plaintiffs are entitled only to nominal damages? (3) In refusing to set aside verdict on fifth issue?

1. The better view of the authorities seems to be that, so far as concerns a corporation organized and supported by the covenantor, or with his assistance, except when it appears that the corporation is substantially the *alter ego* of the covenantor, it ought not to be enjoined from competing with the covenantee. Annotations 94 A. L. R., 341; *Kramer v. Old, supra.*

While holding in the *Kramer case, supra,* that the sellers' noncompetitive agreement is violated by their assisting in the organization of, or taking stock in a corporation projected into a business competing with that sold, and that they might be restrained, it is held also that the corporation itself, or others interested in its business, should not be restrained from engaging therein.

In the present case there is no evidence with respect to White's Laundry and Cleaners as to who the stockholders are, or what interest any particular person had in it, or that defendant Katzis was an officer of it. Under these circumstances, plaintiffs have failed to bring the case within the exception to the better view expressed by the authorities.

2. The competency of the testimony of the acccuntant, given as an expert, and based upon a personal examination of the books and records of the corporation, may be conceded. *LaVecchia v. Land Bank, ante,* 35, 9 S. E. (2d), 489, where the authorities in this State are assembled. Even so, sufficient definite evidence is lacking to show a causal relation between the condition reflected by the books and the breach of the noncompetitive agreement of the defendant Katzis.

While, as stated with regard to defendants' appeal, proof of breach of contract entitles plaintiffs to nominal damages at least, in order to be entitled to recover more, plaintiffs must not only allege but offer evidence sufficient to satisfy the jury by the greater weight thereof that they have sustained substantial damage, naturally and proximately caused by the breach. *Bowen v. Bank, supra.* As applied to breaches of noncompetitive agreements, see Annotations, 127 A. L. R., 1152. As stated in *Campbell v. Everhart,* 139 N. C., 503, 52 S. E., 201, *Walker, J.,* "The sufficiency of 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 past event, when he assumes the burden of establishing such event as a proposition of fact and as a basis for the judgment of a court, he must adduce evidence 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." *Finch v. Michael, supra.* Again, as stated in the *Finch case, supra,* "We cannot jump to a conclusion, but the proof must be of such character as to show with at least some degree of certainty that the alleged wrongs produced an injury. . . . Both wrong and damage must be shown and it must appear that the latter was the effect and the former the cause."

In the present case the court below was of opinion that the evidence offered by plaintiffs is too vague, too speculative and too conjectural to support a verdict for substantial damages. We are of like opinion, and so hold. While the witness Sineath testified "that in loss of business and added expense we lost about $15,000," he frankly states he does not know how much business plaintiffs lost. He says the auditor will show exactly how much was lost. However, all that the testimony of the auditor shows is the condition of the business as reflected by the books, and that condition is connected with the breach of the noncompetitive agreement only in point of time. Whether the depreciated condition in the financial statement, as shown by the books, was caused by reduction in price of dry cleaning, or by credits to some other plant for washing done at the Goldsboro Dry Cleaners and Hatters, or by friends of Miss White following her when she was let out by the Goldsboro plant, or by business conditions, is left in the realm of possibility, and even probability. If so, to what extent? The evidence fails to show.

Further, the evidence as to purchase of new equipment is not of probative value as an element of damages. If there were other expenses, such are not shown.

3. Having held that there is no error with respect to the issue of damages, we deem it unnecessary to enter into a discussion of failure of

consideration proffered by plaintiffs. It is sufficient to say that, on the facts presented, plaintiffs' remedy is properly based on claim for damage.

In the judgment below

On defendants' appeal—No error.

On plaintiffs' appeal—No error.

BETTY JEAN SMITH, BY HER NEXT FRIEND, P. K. SMITH, v. JIM KAPPAS, TRADING AND DOING BUSINESS UNDER THE STYLE AND FIRM NAME OF JIM'S LUNCH, AND THE STRAUS COMPANY, INC.

(Filed 8 January, 1941.)

1. Trial § 22b—

Upon motion to nonsuit, the evidence tending to support plaintiff's cause of action is to be considered in the light most favorable to her, and she is entitled to every reasonable intendment thereon and every reasonable inference therefrom. C. S., 567.

2. Principal and Agent § 10a—

The principal is liable to a third person injured by the negligence of the agent while the agent is engaged in the performance of duties actually conferred on him under express authority, or while performing acts usual or incidental to the proper performance of the duties actually conferred, which are within the agent's implied authority.

3. Same—Evidence held for jury on question of whether negligent injury was inflicted by agent while acting within express or implied authority.

Plaintiff's evidence tended to show that defendant cafe proprietor ordered new fixtures from defendant equipment company, that the equipment company contracted to install the new fixtures, that in order to install the new fixtures the old fixtures had to be removed, that in the performance of the contract the old fixtures and debris were piled on the sidewalk, that an old counter which was placed on top of this pile fell over as plaintiff was passing, and hit and injured plaintiff's foot, that the mechanic for the equipment company who installed the new fixtures paid the laborers who actually took out the old fixtures and piled them on the sidewalk. *Held:* The evidence is sufficient to be submitted to the jury on the question of whether the negligent acts resulting in the injury in suit occurred while the agent of the equipment company was acting within the scope of his authority, express or implied.

4. Principal and Agent § 7: Evidence § 57—

Where a witness points out a person in the courtroom and identifies him as defendant's agent, the failure of the alleged agent to testify in contradiction is a circumstance to be considered by the jury, since a party's failure to disprove a charge by testimony within his control is some evidence that he cannot refute the charge.

5. Principal and Agent § 7—

A business card with the name of a certain person thereon as agent of the defendant company is some evidence that the person named was

defendant's agent, and although it is not competent unless evidence of agency *aliunde* is offered, the order of proof is largely in the discretion of the trial court.

6. Same—

A wide latitude is allowed in proving the fact of agency and, as a general rule, any evidence logically tending to establish the fact in issue is competent.

7. Torts § 6: Trial § 25—Upon defendant's demand of contribution against codefendant, plaintiff may not take voluntary nonsuit as to codefendant.

Plaintiff sued defendants as joint tort-feasors. Appealing defendant in its amended answer denied negligence but also alleged that if appealing defendant were negligent, its negligence concurred with the negligence of its codefendant, and asked for such relief against its codefendant as it was entitled to under C. S., 618. *Held:* It was error for the court, over appealing defendant's objection, to permit plaintiff to take a voluntary nonsuit as to the codefendant before the close of plaintiff's evidence, since under the pleadings, appealing defendant requested affirmative relief against its codefendant and is entitled to hold the codefendant as a party under the statute.

APPEAL by defendant Straus Company, Inc., from *Rousseau, J.,* and a jury, at 18 March, 1940, Civil Term, of GUILFORD. New trial.

This is an action for actionable negligence, brought by plaintiff, by her next friend, against defendants, alleging damages. The defendants denied negligence.

The evidence was to the effect that Betty Jean Smith, the plaintiff, a child 3 years old, was seriously and permanently injured on 18 April, 1939, in the city of Greensboro.

Henry Burke testified, in part: "Between 3 and 4 o'clock on that day I was traveling east along West Edwards' Place on the north side of Edwards' Place. At that time I saw Betty Jean Smith. She was with some lady and they were traveling on the west or north sidewalk of Edwards' Place. Just before or about the time I saw the child and the lady with her I saw an old lunch counter brought out of Jim's Lunch. I would say it was approximately 15 or 20 feet long. I could not say how tall it was but I can show you (illustrating). About that high. I don't know how many feet that is. I would say around 5 or 6 feet high. The counter was placed between the two doors on Edwards' Place (indicating). It was placed right in here. It was sitting longways just like it would in a place of business. I don't recall what kind of base or bottom the counter had. I was walking along the plate glass window there when they brought it out and I stepped aside for them to get it out. *It was brought out by a colored fellow and a white fellow.* I know the colored fellow. His name was John Sellars. I did not know the white fellow. The colored fellow came out of the building

first with the counter. About the time they set the counter up Betty Jean and the lady passed Bob's Shoe Shine Stand just back west of that. There is a hotel entrance between this place and Bob's Place. *Just as the child got about middleways of the counter with the lady, the counter tilted over and fell, striking her foot.* I stood there and looked. The child hollered and screamed. Her left foot was struck by the counter. I was going west towards Greene Street and they were going east. When I passed the counter it was just sitting there. It was sitting upright. The top part was where it was supposed to be, just like it was sitting in the lunchroom, and that was sitting against the side of the building. (The Court) Q. You mean just like that table as if it would have been in the lunchroom? Ans.: Yes, sir. I would not say the counter had been placed on the walk over a minute at the time the child passed the counter. I did not know this child prior to that time. . . . After this counter that I testified about this morning was placed out on the sidewalk, it was not out of my sight. No one other than the persons placing the counter there touched the counter. The weather on that day was very windy. I saw the counter fall."

J. O. May testified, in part: "I am an electrical contractor. I was in Jim's Lunch on the 18th day of April, 1939, at the time the child was alleged to have been hurt, I think some time between 2 and 3 o'clock. Prior to this time I had been doing some work for Jim's Lunch. They were taking out equipment. The equipment was being taken out and taken loose from the wall and I sat down there and was sitting there watching them and *I saw them remove the old equipment and put up the new. I saw Jim there with a mop, mopping* the floor, and I saw a fellow with brown clothes on. Q. What did you hear him say? Ans.: *I heard him tell a Negro and a white man to move the counter out, take it out on the sidewalk, that hurt this child.* . . . I saw the counters and equipment taken out back up by the side of the house. I did not see the child hurt. Q. After you went out there where did you see it? Ans.: I said, I saw it laying down on the sidewalk where it had fallen there."

Frank Kivett testified, in part: "I know where Jim's Lunch is located. I was there on the afternoon of the 18th of April, 1939, around 2 o'clock or a little after 2 o'clock. I was in the building and on the outside too. There was moving and transferring and putting up new fixtures, doing wiring and different things, you know, changing the fixtures in there. On that occasion I saw an old counter there being moved. I say it was about 12 feet long, maybe longer, and the counter part was not but around 30 or 36 inches high. It was moved out on the sidewalk and placed two doors on the south side of the building. There was several pieces out there—you know, it was just throwed up—it

looked like to me in moving they had just picked it up and throwed it on top of each other. I reckon the pile was about six feet high or something like that and about half, maybe over half, of the sidewalk there was taken up by it. I saw something happen to the counter after this stuff was placed out there. I saw it—I was standing in the front of the building looking kind of like this (illustrating) out through the glass and I saw it had done started. I could see about that far or maybe a little bit further, and I could see the counter going over, falling south. I did not see whether or not it hit anyone at that time."

J. G. Caldwell signed the contract between Straus Company, Inc., and Jim Kappas.

C. C. Robinson, police officer of the city of Greensboro, testified that the sidewalk along the side of Jim's Lunch is 6 or 7 feet wide; that three-fourths of the sidewalk was taken up by the equipment he saw there; that he saw a man there talking to the fellows moving the fixtures. There were both old and new equipment. It was on the north side of West Edwards' Place, on the sidewalk.

Ed Leigh testified, in part: "I am a carpenter and I was working at that trade on the 18th day of April, 1939, at Jim's Lunch on the northwest corner of the intersection of Edwards' Place and Elm Street. . . . (Mr. Duke) I take the position that here is the man Caldwell that they admit is their agent. They admit that they are to install those fixtures. Now, here at the time— (The Court): I will admit it now but I may strike it out later. Q. Will you read this card, Mr. Leigh? Ans.: (Reading) 'The largest Equipment and Fixture House in the South. The Straus Company, Incorporated. 1004-6-8 East Cary Street, Richmond, Virginia. Manufacturers of Hotel—Restaurant—Institutional Equipment—Store Fixtures—Soda Fountains—China—Glass—Silver. John G. Caldwell, 2214 Circle Drive, Raleigh, N. C. Phone 311.' (Mr. Duke) Q. Who directed you as to what work you were to do in that cafe? Ans.: The same gentleman I pointed out a while ago. (The Court): You say the same gentleman you pointed out a while ago? Ans.: Yes, sir. (Mr. Duke) Q. *Was that the same gentleman who handed you that card?* Ans.: Yes, sir. Q. What work did you do in Jim's Lunch, Mr. Leigh? Ans.: The back case or cabinet as you would call it, I suppose, I had to cut that plumb down from the top to the floor to allow the new section to come in. I cut it just according to his marking off . . . Q. Who paid you for the work that you did there? Ans.: (Indicating): *This gentleman over there.* Q. *Is that the same man who gave you the card?* Ans.: *Yes, sir.*"

Plaintiff introduced a "Universal Conditional Sales Contract" Order to defendant, Straus Company, Inc., dated 10 March, 1939, duly recorded in which is the following: "Please ship to Jim Kappas—Jim's Lunch,

348 S. Elm Street, City of Greensboro, State N. C., the articles of personal property which are listed herein under the caption of 'Description of Equipment, Etc.' . . . Above equipment delivered and installed at Jim's Lunch, Greensboro, N. C., with the exception of installation of gas equipment which will be done by others."

Plaintiff offered in evidence, in the complaint against Straus Company, Inc., among other things, a portion of paragraph 2 of the Amended Complaint, reading as follows: "That on the 18th day of April, 1939, the said equipment purchased by the defendant Jim Kappas, for Jim's Lunch as aforesaid, was delivered by the defendant, The Straus Company, Inc., acting through its employees, servants and agents, to Jim's Lunch to be installed," and a portion of paragraph 1 of the Answer of The Straus Company, Inc., to the Amended Complaint, reading as follows: "Answering the allegations of paragraph 2 of said Amended Complaint wherein the same amends paragraph 7 of the original complaint, it is admitted that on the 18th day of April, 1939, the said equipment purchased by the defendant Jim Kappas for Jim's Lunch as aforesaid was delivered by an employee of this defendant at Jim's Lunch to be installed."

The plaintiff also offered in evidence certified copy of an Ordinance of the city of Greensboro, North Carolina, marked "Exhibit P-1," which is as follows: "Chapter 50, Article 1, Sec. 1.—Not to Block Streets and Sidewalks. Section 1—(a)—'No person, firm or corporation shall obstruct or block any street or sidewalk in the city without a written permit therefor from the superintendent of the division of maintenance.' 'I hereby certify that the foregoing ordinance is a true and correct copy of said city ordinance as amended of the City of Greensboro, North Carolina, in force on April 18, 1939. This the 21st day of March, 1940. Elizabeth R. Wall, Deputy Clerk of City of Greensboro.' "

The plaintiff took a voluntary nonsuit as to the defendant Jim Kappas, trading and doing business as Jim's Lunch. This was allowed by the court below.

Jim Kappas testified, in part: "I own and operate Jim's Lunch. The Straus Company, Inc., installed that equipment in my place of business. I know what new equipment I purchased from The Straus Company, Inc. Q. Could the new fixtures be placed in there without removing the old ones? Ans.: No, they could not. Q. *Who paid for labor for removing the old ones?* Ans.: *The Straus Company, Inc.* Q. Did you have anything at all to do with the removal of the old fixtures and installing the new ones? Ans.: No, sir. Q. *State whether or not you employed anyone to remove any of the old fixtures?* Ans.: *No, sir.* Q. State whether or not, Mr. Kappas, you have paid anyone for any of that work? Ans.: No, sir. Q. Do you know who paid for

the labor there in the removal of that equipment? (The Court): If he knows of his own knowledge. Q. Do you know of your own knowledge who paid the labor? Ans.: No, I did not pay anything. Q. Do you know of your own knowledge who did pay? Ans.: I think that fellow (indicating). (The Court) Of your own knowledge? Ans.: (Continuing) that fellow—he is over there. Q. *Do you know who he is over there?* Ans.: *Mr. Patterson, the mechanic for the Straus Company, Inc.* Q. Who is he? Ans.: He is over there. Q. *What does he do?* Ans.: *He was installing fixtures, the stuff. . . .* (Cross-examination) Yes, an electrician disconnected it. I paid the electrician. I did not pay anyone except this one. I did not pay anyone else about that old equipment. The old equipment was mine. He took it out. . . . (Recross-examination) *They had a colored fellow and a carpenter there to move it.* Here is the counter and the carpenter, he helped move it out."

The child, on the day of the injury, was with Mrs. Hazel Potter. A subpœna was issued for Mrs. Potter and "After diligent search Mrs. Hazel Potter not to be found in Guilford County, Joe S. Phipps, Sheriff."

The defendant introduced no evidence. The issues submitted to the jury and their answers there, were as follows:

"1. Was the plaintiff injured by the negligence of agents or servants of the defendant, The Straus Company, Inc., while acting in the course and scope of their employment in delivering and installing the equipment described in the complaint? Ans.: 'Yes.'

"2. What damage, if any, is the plaintiff entitled to recover? Ans.: '$9,500.00.' "

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.

O. W. Duke and E. D. Kuykendall, Sr., for plaintiff.
R. M. Robinson for defendant, Straus Company, Inc.

CLARKSON, J. At the close of plaintiff's evidence, the defendant, the Straus Company, Inc., made a motion in the court below for judgment as in case of nonsuit. C. S., 567. The court below overruled this motion and in this we can see no error.

It is well settled that on motion of nonsuit the evidence which makes for plaintiff's claim, or tends to support her cause of action, is to be taken in the light most favorable to the plaintiff, and she is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom.

In stating the facts we did not set forth the exceptions and assignments of error or motions to strike made by defendant. They were timely and fully made by defendant to reserve every right it had. Straus Company, Inc., denied that it was liable and alleged that there was no evidence that the injury was caused by it.

In *Jones v. Bank,* 214 N. C., 794 (798), we find: *"Hoke, J.,* in *Powell v. Lumber Co.,* 168 N. C., 632, at p. 635, speaking to the question, says: 'The general agent is one who is authorized to act for his principal in all matters concerning a particular business or employment of a particular nature. Tiffany on Agency, p. 191. And it is the recognized rule that such an agent may usually bind his principal as to all acts within the scope of his agency, including not only the authority actually conferred, but such as is usually "confided to an agent employed to transact the business which is given him to do," and it is held that, as to third persons, this real and apparent authority is one and the same, and may not be restricted by special or private instructions of the principal unless the limitations sought to be placed upon it are known to such persons or the act or power in question is of such an unusual character as to put a man of reasonable business prudence upon inquiry as to the existence of the particular authority claimed (citing authorities). The power of an agent, then, to bind his principal may include not only the authority actually conferred, but the authority implied as usual and necessary to the proper performance of the work entrusted to him, and it may be further extended by reason of acts indicating authority which the principal has approved or knowingly or, at times, even negligently permitted the agent to do in the course of his employment,' citing authorities. *Bobbitt Co. v. Land Co.,* 191 N. C., 323 (328); *Maxwell v. Distributing Co.,* 204 N. C., 309 (317-18); *Dixson v. Realty Co.,* 204 N. C., 521; *R. R. v. Lassiter & Co.,* 207 N. C., 408; *Belk's Dept. Store v. Ins. Co.,* 208 N. C., 267 (271); *Grubb v. Motor Co.,* 209 N. C., 88." *Dickerson v. Refining Co.,* 201 N. C., 90; *West v. Woolworth Co.,* 215 N. C., 211 (214); *Warehouse v. Bank,* 216 N. C., 246 (253-4).

Where the seller of a range, who has agreed to deliver it, with the necessary piping, and set it up ready for use, sends it by an agent, who sets it up in a defective and dangerous manner, the jury are authorized to infer that in so doing he was acting within the scope of his agency. *Wrought-Iron Range Co. v. Graham,* 80 Federal, 474, 25 C. C. A., 570.

The evidence was to the effect that in the contract between Jim Kappas (Jim's Lunch) and the defendant, Straus Company, Inc., is the following: *"Above equipment delivered and installed* at Jim's Lunch, Greensboro, N. C." In Webster's Dictionary, "installed" is defined as follows: "To set or fix, as a lighting system, for use or service." Before the new equipment could be "installed," the old equipment had to be

removed. Jim Kappas testified that Straus Company, Inc., installed the equipment that he purchased from it; that this new equipment could not be installed without the removal of the old fixtures. He did not pay for the labor, but, of his own knowledge, it was Mr. Patterson, the mechanic for Straus Company, Inc., who installed it. Patterson was pointed out "He was installing fixtures, the stuff." "They had a colored fellow and a carpenter there to move it. The carpenter helped move it. . . . The old equipment was mine, he took it out." The defendant introduced no evidence and Mr. Patterson was not put on the stand to deny what Kappas said. Kappas in his testimony pointed out Patterson, sitting in the court, as the mechanic for Straus Company, Inc., who was installing the fixtures. Patterson was never put on the stand.

In *In re Hinton,* 180 N. C., 206 (213), *Walker, J.,* said: "Evidence of this kind was competent for the jury to consider, for when one can easily disprove a charge by testimony within his control, and which he can then produce, and fails to do it, it is some proof that he cannot refute the charge." In *York v. York,* 212 N. C., 695 (702), the above is quoted and it is there said: "The rule of the *Hinton case, supra,* has been repeatedly approved and followed in recent cases decided by this Court. See *Walker v. Walker,* 201 N. C., 183 (184); *Puckett v. Dyer,* 203 N. C., 684 (690); *Maxwell v. Distributing Co.,* 204 N. C., 309 (316)."

John G. Caldwell signed the contract between Straus Company, Inc., and Kappas. He was in the court and pointed out by Ed Leigh as the man who gave him employment and paid him for taking down some of the old fixtures to put in the new. We think the card competent to identify the man who employed him and whose name was on the card. The advertising portion is not important. There was no request that it be limited.

In *Realty Co. v. Rumbough,* 172 N. C., 741 (748-9), quoting from 1 Mechem on Agency, sec. 261, p. 185, it is written: " 'The existence of agency is a fact, and, like other facts, may be proved by any evidence traceable to the alleged principal and having a legal tendency to establish it. Informal writings of the alleged principal, his letters, telegrams, book entries, and the like are clearly admissible. But it need not be proved by written instruments (except in the cases already mentioned) or by express or formal oral language. The agency may be shown by conduct, by the relations and situation of the parties, by acts and declarations, by matters of omission as well as of commission, and, generally, by any fact or circumstance with which the alleged principal can be connected and having a legitimate tendency to establish that the person in question was his agent for the performance of the act in controversy,'

etc. 'Agency, like any other controvertible fact, may be proved by circumstances. It may be inferred from previous employment in similar acts or transactions, or from acts of such nature and so continuous as to furnish a reasonable basis of inference that they were known to the principal, and that he would not have allowed the agent so to act unless authorized. In such cases the acts or transactions are admissible to prove agency. But in order to be relevant the alleged principal must in some way directly or indirectly be connected with the circumstances. The agent must have assumed to represent the principal, and to have performed the acts in his name and on his behalf.' *Hill v. Helton,* 80 Ala., 528 (533). Mr. Mechem further says that for the purpose of proving agency a wide range may often be properly given to the testimony, provided that which is offered has a real probative tendency toward the main question in issue, or, in other words, legitimately tends to prove the fact of agency so that the jury may reasonably deduce from it that such agency existed. 2 Mechem, sec. 261, p. 187."

In *Hunsucker v. Corbitt,* 187 N. C., 496 (503), quoting Lockhart's Handbook on Evidence, sec. 154, and citing a wealth of authorities, we find: "'Admissions by agents, made while doing acts within the scope of the agency, and relating to the business in hand, are admissible against the principal when such admissions may be deemed a part of the *res gestæ,* but such admissions are not admissible to prove agency; the agency must be shown *aliunde* before the agent's admissions will be received.'"

It was in the sound discretion of the court below to allow evidence of admissions of facts and circumstances to show agency before the fact of the agency was established *aliunde.*

The defendant contends that "The court erred in permitting a voluntary nonsuit as to the defendant, Jim Kappas, before the close of plaintiff's evidence; in overruling appellant's motion for mistrial, after such voluntary nonsuit, in order to permit appellant an opportunity to avail itself of its rights under C. S., 618, to have said Kappas made a party defendant, as a joint tort-feasor; in signing judgment of voluntary nonsuit as to said Kappas; in thereafter denying motion of appellant, under C. S., 618, before judgment, to make said Kappas a party defendant, and in refusing to sign an order tendered by appellant, before judgment, to make said Kappas a party defendant herein."

The plaintiff sued Kappas and the Straus Company, Inc., as joint tort-feasors. The complaint, Article 13, alleges: "That the joint and several negligence and carelessness of the defendants Jim Kappas and the Straus Company, Inc., was the direct, proximate and sole cause of the injury and damage to the plaintiff, as aforesaid." In the answer of

Straus Company, Inc., is the following: "That the allegations of Article 13 of the complaint are denied."

The amendment to answer of defendant Straus Company, Inc., alleges: "That this defendant denies that the plaintiff was injured through its negligence, as alleged in the pleadings of the plaintiff, and alleges that if the plaintiff received any injuries by reason of the falling of any counter or other restaurant equipment, such injuries were either unavoidable or were caused by the negligence of Jim Kappas, trading and doing business under the style and firm name of Jim's Lunch; but if this defendant was negligent, as alleged in the pleadings of the plaintiff, such negligence on its part concurred with the negligence of said Jim Kappas, and such negligence on the part of both of them was the proximate cause of the injuries of the plaintiff. . . . And prays also that the said Jim Kappas, trading and doing business under the style and firm name of Jim's Lunch, be made a party defendant in this action in the manner and for the purposes set forth in section 618 of the North Carolina Code, 1939, and for such other and further relief as to the court may seem just and proper."

In *Bargeon v. Transportation Co.,* 196 N. C., 776 (777), is the following: "Can one defendant, sued alone for personal injury, file an answer denying negligence and liability, and then proceed to allege that the injury was due to the specific acts of negligence of a third party, and thereupon, without asking relief against such third party, have such party brought into the suit? It is well settled under our system of procedure that in order to hold a party in court a cause of action must be alleged against him. If a defendant against whom a cause of action exists alleges a cause of action against a codefendant, growing out of the same matter, then all the parties are in court and the causes must be tried upon their merits. *Bowman v. Greensboro,* 190 N. C., 611, 130 S. E., 502; *Ballinger v. Thomas,* 195 N. C., 517, 142 S. E., 761." See *Montgomery v. Blades,* 217 N. C., 654.

In *Perry v. Sykes,* 215 N. C., 39 (43), we find: "The defendant does not contend that, ordinarily, a nonsuit cannot be had at the close of plaintiff's evidence, when it is insufficient to go to the jury. A defendant cannot be kept in the case in the mere capacity of a scapegoat, performing no other useful function. But the appealing defendant insists that it had the right to keep Sykes in the case as a joint tortfeasor, from whom it would be entitled to contribution under C. S., 618 (Michie's 1935 Code). The answer simply denies negligence on the part of the Blue Bird Cab Company, and alleges that the negligence of Sykes was the sole proximate cause of the injury. The answer makes no demand for affirmative relief, and is insufficient to support the exception. *Walker v. Loyall,* 210 N. C., 466, 187 S. E., 565; *Ballinger v. Thomas,* 195 N. C., 517, 142 S. E., 761."

In the present case we think the voluntary nonsuit was improperly granted. In the *Perry case, supra,* "the answer made no demand for affirmative relief." In the original answer in the present action no demand was made for affirmative relief, but before the trial an amended answer was filed by the Straus Company, Inc., which we think sufficient to have Kappas held as a party defendant under N. C. Code, 1939 (Michie), sec. 618, which, in part, is as follows: "In all cases in the courts of this state wherein judgment has been, or may hereafter be, rendered against two or more persons or corporations, who are jointly and severally liable for its payment either as joint obligors or joint tort-feasors, and the same has not been paid by all the judgment debtors by each paying his proportionate part thereof; if one of the judgment debtors shall pay the judgment creditor, either before or after execution has been issued, the amount due on said judgment, and shall, at the time of paying the same, demand that said judgment be transferred to a trustee for his benefit, it shall be the duty of the judgment creditor or his attorney to transfer without recourse such judgment to a trustee for the benefit of the judgment debtor paying the same; and a transfer of such judgment as herein contemplated shall have the effect of preserving the lien of the judgment and of keeping the same in full force as against any judgment debtor who does not pay his proportionate part thereof to the extent of his liability thereunder in law and in equity, and in the event the judgment was obtained in an action arising out of a joint tort, and only one, or not all of the joint tort-feasors were made parties defendant, those tort-feasors made parties defendant and against whom judgment was obtained, may, in an action therefor, enforce contribution from the other joint tort-feasors; or at any time before judgment is obtained, the joint tort-feasors made parties defendant may, upon motion, have the other joint tort-feasors made parties defendant."

In *Mangum v. R. R.,* 210 N. C., 134 (137), it is said: "In accordance with this section (618), the defendants Southern Railway Company and North Carolina Railroad Company (original parties) prayed that the receivers of Seaboard Air Line Railway Company, residents of Virginia, be made parties defendant, and allege that they are not guilty of negligence; but further allege, in substance, that if they are guilty of negligence they are liable only as joint tort-feasors with the receivers. We think that this procedure is permissible under the section, *supra.* The plaintiff, from her allegations in the complaint against the original defendants, cannot be affected by this procedure of the original defendants under the statute bringing in the receivers as joint tort-feasors." *Freeman v. Thompson,* 216 N. C., 484.

It goes without saying that at the close of plaintiff's evidence or at the close of all the evidence, if there was no sufficient evidence to be sub-

mitted to the jury under N. C. Code, *supra,* sec. 567, against the defendant Jim Kappas, the court below could have, on proper motion made by him, granted a nonsuit.

The painstaking and careful judge in the court below had no direct authority from this Court to guide him in the procedure under this statute. We think defendant Straus Company, Inc., alleged enough in its amended answer to hold Jim Kappas in the action so that the rights of both could be determined in the present action, and that there was error in granting the motion for nonsuit complained of.

For the reasons given, there must be a

New trial.

STATE v. C. D. WILSON, JR.

(Filed 8 January, 1941.)

1. Automobiles § 31—Warrant held sufficient to charge reckless driving under Michie's Code, 2621 (287).

A warrant charging that defendant "did unlawfully and willfully operate a motor vehicle on a State Highway in a careless and reckless manner and without due regard for the rights and safety of others and their property in violation" of municipal ordinances and contrary to the form of the statute, *is held* sufficient to charge defendant with reckless driving under Michie's Code, 2621 (287), since although the warrant fails to follow the language of the statute in accordance with the better practice, it does charge facts sufficient to enable the court to proceed to judgment, and the charge of violating the municipal ordinances may be treated as surplusage.

2. Indictment and Warrant § 9—

A warrant or indictment charging the violation of a statute should follow the language of the statute, but its failure to do so is not a vitiating defect if it charges facts sufficient to enable the court to proceed to judgment.

3. Indictment and Warrant § 17—

The office of a bill of particulars is to furnish, for the better defense of the accused, relevant information not required to be set out in the warrant or indictment, but a bill of particulars cannot supply matter required to be charged as an ingredient of the offense.

4. Indictment and Warrant § 11—

An indictment or warrant will not be quashed for technical objections which do not affect the merits. Michie's Code, 4623.

5. Automobiles § 31—Evidence of defendant's guilt of reckless driving held for jury.

The State's evidence tending to show that defendant, driving 60 miles an hour, crashed into the rear of a car driven in the same direction on

its right-hand side of the highway at 20 or 25 miles an hour, that the driver of the other car saw in his rear-view mirror defendant approaching at an excessive speed but that defendant struck the car before its driver could get on the shoulders of the road, together with physical evidence showing that defendant's car struck the other car with terrific force, *is held* sufficient to be submitted to the jury upon a warrant charging defendant with reckless driving under Michie's Code, 2621 (287).

6. Criminal Law § 77c—

Where the charge of the court is not in the record it will be presumed that the court charged every aspect of the law applicable to the facts.

7. Criminal Law § 56—

Where the warrant or indictment is not fatally defective, a motion in arrest of judgment cannot be allowed.

8. Automobiles § 31—

Upon conviction of reckless driving, sentence of defendant to six months in the county jail to be assigned to work the roads under the direction of the State Highway and Public Works Commission is within the limitations prescribed by Michie's Code, 2621 (326), and therefore cannot be held excessive.

9. Criminal Law § 61a: Constitutional Law § 32—

Where a statute prescribing the punishment for a statutory offense fixes limitations upon the severity of the punishment, the court has discretionary power to fix the punishment within the limitations prescribed, and a sentence of imprisonment for the maximum period allowed by the statute cannot be held excessive or in violation of the constitutional rights of defendant.

APPEAL by defendant from *Stevens, J.*, and a jury, at August Term, 1940, of ORANGE. No error.

This is a criminal action brought against the defendant under the following warrant: "L. H. Norwood, being duly sworn, complains and says, that at and in the said County of Orange, Chapel Hill Township, on or about the 4th day of July, 1939, C. D. Wilson, Jr., did unlawfully and willfully operate a motor vehicle on a State Highway in a careless and reckless manner and without due regard for the rights and safety of others and their property in violation of the ordinances of the City of Chapel Hill, and contrary to the form of the statute and against the peace and dignity of the State. Subscribed and sworn to before me, this 5th day of July, 1939. M. W. Durham, Clerk of the Recorder's Court. L. H. Norwood."

The defendant entered a plea of "Not guilty." The defendant was convicted in the recorder's court and a fine imposed, from which he appealed to the Superior Court.

The evidence on the part of the State was to the effect that I. H. Browning, on 4 July, 1939, was driving his 1937 Chevrolet coach automobile, his wife being with him, on his way to Durham, on the Durham

hard-surfaced highway. He was driving on the right-hand side of the highway, approximately 20 to 25 miles an hour. He saw through his rear-view mirror defendant, driving at a fast rate of speed. "He tried to pull his car off of the hard-surfaced road but before he could get off the hard-surfaced part of the highway, Wilson's car struck his car in the back and turned it over and reversed the position. . . . That he only glimpsed in his rear-view mirror the Wilson car which ran into the back of his car; and that he gave no signal that he was changing the course of his car."

L. K. Landrus testified, in part: "That he did not see the Browning car when it passed; that he did see the Wilson car when it passed and, in his opinion, the Wilson car was being driven at approximately 60 miles per hour; that he did not see the wreck but heard the collision and saw the cars coming to rest after the collision, which occurred at a point approximately 300 feet from the Barbecue stand. (Landrus was at the McFarland Barbecue stand.) . . . That he measured skid marks on the right-hand side of the highway at the point of the collision and they measured 15 to 20 inches; that the Wilson car rolled approximately 20 feet up the highway and off of the highway on the right-hand behind the Browning car."

Bill Boone testified, in part: "He saw the Browning car pass and it was traveling at a speed of between 20 and 25 miles per hour; that he saw the Wilson car and it was traveling at approximately 60 miles per hour; that he did not see the collision."

L. H. Norwood, police officer of the town of Chapel Hill, testified, in part: "On July 4, 1939, at approximately 7 p.m. he was called to the scene of a wreck on the Durham road between the car of C. D. Wilson, Jr., and the car of I. H. Browning; that he saw skid marks on the right-hand side of the highway approximately 15 inches long; that the Browning car was on the right-hand side of the highway turned over in a ditch with the front headed toward Chapel Hill and bore marks of a collision in the rear; that the Wilson car was in the ditch behind the Browning car and showed that it had been struck in front and more to the right-hand side."

The defendant denied the material part of the State's evidence, and on cross-examination testified, in part: "That he had been indicted for speeding about two years prior to the accident; that since the accident he had entered a plea to a charge of larceny of some overcoats and had been placed on probation and had been on probation since the March Term of Orange County Superior Court; that under the supervision of Mr. Bruce White, Probation Officer, he had been working regularly on the stadium at Wake Forest; that he did everything he could to stop and prevent the collision after he saw that the Browning car had changed

its speed and without any signal having been given but could not avoid the accident."

The verdict of the jury was "That the said C. D. Wilson, Jr., is guilty of reckless driving." The judgment rendered was as follows: "And thereupon the defendant, C. D. Wilson, being commanded to stand up the Court pronounced the following Judgment: Let the defendant be confined in the common jail of Orange County for six (6) months, to be assigned to work the roads under the direction of the State Highway & Public Works Commission."

The defendant made several exceptions and assignments of error and appealed to the Supreme Court. The material ones will be considered in the opinion.

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

L. J. Phipps for defendant.

CLARKSON, J. The first contention made by defendant: Does the warrant charge a crime under the statute? We think so.

The defendant was indicted under the provisions of N. C. Code, 1939 (Michie), section 2621 (287): "Any person who drives any vehicle upon a highway carelessly and heedlessly in willful or wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property, shall be guilty of reckless driving, and upon conviction shall be punished as provided in section 2621 (326)."

In a warrant or indictment the better rule is to follow the language of the statute. *S. v. Abbott, ante,* 470 (476). If the warrant or indictment charges substantially the crime it is sufficient—as we think it does in this case.

Section 4613: "In all indictments when further information not required to be set out therein is desirable for the better defense of the accused, the court, upon motion, may, in its discretion, require the solicitor to furnish a bill of particulars of such matters." A bill of particulars will not supply any matter required to be charged in the indictment, as an ingredient of the offense. *S. v. Stephens,* 170 N. C., 745 (747), 87 S. E., 131.

Section 4623: "Every criminal proceeding by warrant, indictment, information or impeachment is sufficient in form for all intents and purposes if it express the charge against the defendant in a plain, intelligible, and explicit manner; and the same shall not be quashed, nor the judgment thereon stayed, by reason of any informality or refinement, if

in the bill or proceeding, sufficient matter appears to enable the court to proceed to judgment." See section 4625.

In *S. v. Samia, ante,* 307, we find: "In this Court defendant entered a motion in arrest of the judgment on the ground that the case was transferred from the Craven County recorder's court to the Superior Court for trial, and that defendant was there tried upon the original warrant without a bill of indictment. This procedure was authorized by statute, Public Laws 1929, ch. 115, sec. 2, and has been upheld by this Court in *S. v. Publishing Co.,* 179 N. C., 720, 102 S. E., 318; *S. v. Saleeby,* 183 N. C., 740, 110 S. E., 844. See, also, *S. v. Boykin,* 211 N. C., 407, 191 S. E., 18."

The modern tendency is against technical objections which do not affect the merits of the case. Hence, judgments are not to be stayed or reversed for nonessential or minor defects. *S. v. Anderson,* 208 N. C., 771 (782).

In 22 C. J. S., part sec. 575, p. 549, is the following: "A complaint which charges the violation of the statutes of the state, and states an offense under a particular statute, has been upheld notwithstanding it also charges a violation of a specific municipal ordinance which is void. It has even been held that, if the acts alleged constitute an offense, under a particular law, an allegation that they are a violation of another law may be disregarded as immaterial."

The second contention made by defendant is: That the court below was in error when it overruled defendant's motion made (N. C. Code, 1939 [Michie], sec. 4643) for judgment of nonsuit at the close of plaintiff's evidence and at the close of all the evidence. We cannot so hold.

The evidence on the part of the State is to the effect that Browning was driving his automobile on the right-hand side of the road at 20 to 25 miles an hour, and defendant struck his car, running 60 miles an hour, in the rear, before Browning could get on the shoulders, he having seen defendant coming at a fast rate of speed through his rear-view mirror. The impact was so great that the Browning car "was turned over in a ditch with the front headed toward Chapel Hill," and the collision was heard 300 feet away.

We think the evidence shows, and it was a question for the jury to determine under the statute, that the automobile was being operated by the defendant upon the highway "carelessly and heedlessly in willful or wanton disregard of the rights and safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property." *S. v. Huggins,* 214 N. C., 568.

The charge of the court below is not in the record and the presumption is that the charge covered every aspect of the law applicable to the

facts. The record discloses that "The court stated in a plain and correct manner the evidence in the case, the contentions of the State and the defendant arising thereon, and declared and explained the law arising thereon." The jury, under the charge of the court below, which the record presumes contained every ingredient of the crime, convicted defendant of "Reckless driving."

The defendant contends that arrest of judgment should be allowed. We cannot so hold. In *S. v. Epps,* 213 N. C., 709 (717), it is said: "The indictment is not fatally defective and defendant's motion for arrest of judgment is without merit. *S. v. Efird,* 186 N. C., 482; *S. v. Callett,* 211 N. C., 563."

The last contention made by defendant: "That the sentence imposed was excessive in violation of the constitutional rights of the defendant." We cannot so hold.

Section 2621 (287) of N. C. Code, 1939 (Michie), provides that a person convicted of reckless driving shall be punished as provided in section 2621 (326). This section is as follows: "Every person convicted of reckless driving under section 2621 (287) shall be punished by imprisonment in the county or municipal jail for a period of not more than six months or by fine of not more than five hundred ($500) dollars, or by both such fine and imprisonment, and on a second or subsequent conviction of such offense shall be punished by imprisonment for not more than one year or by fine of not less than fifty ($50) dollars nor more than one thousand ($1,000) dollars, or by both such fine and imprisonment."

The court below did not exceed the limit of the statute. Within the limit of the statute the court is given the discretion to fix the punishment. We see no abuse of the discretion. As said in *S. v. Swindell,* 189 N. C., 151 (155): "Though the punishment is great, the protection due to society is greater. The hope is to amend the offender, to deprive him of the opportunity to do future mischief, and, above all, an example to deter others."

For the reasons given, we find

No error.

MARY WEBSTER SMITH v. GEORGE A. MEARS ET AL.

(Filed 8 January, 1941.)

Appeal and Error § 43—

Petition to rehear allowed in this case in order to modify the former opinion.

PETITION to rehear this case, reported *ante,* 193, 10 S. E. (2d), 659.

Jordan & Horner for petitioner.
Sanford W. Brown and J. W. Haynes for respondent.

STACY, C. J. The plaintiff's petition to rehear was allowed in part in order that the Court might reconsider the following paragraph in the original opinion:

"It is stated in appellant's brief that Martha Webster McLeod, under the will of her brother, Jay J. Mears, acquired a one-fourth interest in all the property which he received from his father, and that this is erroneously stated in the judgment to be a one-sixteenth interest. The inadvertence is apparently conceded as the matter is not mentioned in the other briefs."

Martha Webster McLeod now concedes that in view of the interpretation placed upon the will of G. Augustus Mears, she takes no additional interest in the several properties under the will of Jay J. Mears. Hence, the paragraph above quoted will be deleted from the opinion.

Petition allowed in part.

MARIE BARRETT v. JOHN T. WILLIAMS ET AL.

(Filed 18 September, 1940.)

APPEAL by defendants from *Burney, J.,* at June Term, 1940, of PASQUOTANK.

Civil action in ejectment and for redemption and accounting.

From verdict and judgment in favor of plaintiff, the defendants appeal, assigning errors.

McMullan & McMullan for plaintiff, appellee.
M. B. Simpson and John H. Hall for defendants, appellants.

PER CURIAM. 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, and again on plaintiff's appeal at the Spring Term, 1940, reported in 217 N. C., 175, 7 S. E. (2d), 383, new trials having been granted on the two former appeals, and is now before us on plaintiff's second appeal.

A careful perusal of the record engenders the conclusion that the controverted matters have been tried in substantial conformity to the opinions heretofore rendered in the case. No sufficient reason has been advanced for disturbing the result appearing on the present record.

The verdict and judgment will be upheld.

No error.

S. P. JESSUP v. SALLIE J. KIRBY AND HUSBAND, S. F. KIRBY; HOME OWNERS LOAN CORP., AND JOHN H. HALL, TRUSTEE (ORIGINAL PARTIES DEFENDANT), AND THOMAS L. JESSUP, ANNIE JESSUP BRITE AND HUSBAND, MILES BRITE; J. C. JESSUP, JR., CATHERINE L. JESSUP AND W. G. WRIGHT, GUARDIAN OF J. C. JESSUP, JR., AND CATHERINE L. JESSUP (ADDITIONAL PARTIES DEFENDANT).

(Filed 18 September, 1940.)

APPEAL by certain of defendants from *Burney, J.*, at April Term, 1940, of PERQUIMANS. Affirmed.

This is an action brought by the plaintiff against John H. Hall, Trustee, to restrain the sale of certain property and an accounting had so that plaintiff's indebtedness to Sallie J. Kirby, or her assigns, may be accurately determined.

Plaintiff alleges: "That, as plaintiff is informed, believes and avers, the defendant Home Owners Loan Corporation claims to be the owner of those two certain notes, each in the sum of $3,000.00, executed by the plaintiff to the said Sallie J. Kirby on January 15, 1936, and secured by the deed of trust to John H. Hall, Trustee, who, at the direction of said defendant, and with the (approval) of the said Sallie J. Kirby, has advertised the lands described in said deed of trust for sale on October 29, 1938. That, as plaintiff is informed, believes and avers, the said Home Owners Loan Corporation is not a holder in due course of said notes, or either of them," etc.

Various pleadings were filed and order was entered making additional parties defendants. The plaintiff demurred to the answers filed.

The cause came on to be heard upon said demurrers at April Term,

1940, at which time the following orders were entered: "In this cause it is ordered that the demurrer of S. P. Jessup to the answer of J. C. Jessup, Jr., Catherine Jessup by her guardian *ad litem,* T. B. Sumner, in so far as it sets up a counterclaim be sustained and said J. C. Jessup, Jr., and Catherine Jessup by her Guardian *ad litem,* T. B. Sumner, are hereby allowed 90 days in which to file an amended answer. John J. Burney, Judge Presiding."

To the foregoing order the defendants, J. C. Jessup, Jr., and Catherine Jessup by her guardian *ad litem,* T. B. Sumner, excepted, assigned error and appealed to the Supreme Court.

"*Order.* In this cause, it is ordered that the demurrer of S. P. Jessup to the answer of Miles Brite and Annie Jessup Brite in so far as it sets up a counterclaim be sustained and said Miles Brite and Annie Jessup Brite are hereby allowed 90 days in which to file an amended answer. John J. Burney, Judge Presiding."

The judgment was as follows: "This cause coming on now to be heard, and being heard, upon plaintiff's demurrer to the further answer and defense of the above entitled defendants in so far as same purports, for and on behalf of the defendant, Sallie J. Kirby, alone, to set out a counterclaim, and to seek affirmative relief, in that, in the event the covenant of seizin and/or the covenant against encumbrances in the deed from Sallie J. Kirby and husband to the plaintiff are found to have been breached, as alleged in the complaint, said further answer and defense seeks to have the said Sallie J. Kirby adjudged to be the owner of an undivided interest in, or entitled to a lien upon, all the lands owned by W. L. Jessup at the time of his death, and, particularly, that certain portion of said lands alleged to have been allotted to the plaintiff upon petition; And the Court being of the opinion that, for reasons therein assigned, the demurrer should be sustained: Now, Therefore, upon motion of McMullan & McMullan, attorneys for the plaintiff, it is Ordered, Decreed and Adjudged that the demurrer be, and the same is hereby sustained. It is further ordered that the original defendants be, and they hereby are, allowed 90 days from this date in which to amend their answer, if they so desire. John J. Burney, Judge Presiding."

To the foregoing judgment the defendants, Sallie J. Kirby and husband, S. F. Kirby, Home Owners Loan Corporation, and John H. Hall, Trustee, excepted, assigned error and appealed to the Supreme Court.

McMullan & McMullan for plaintiff.

J. Kenyon Wilson for defendants, Sallie J. Kirby, Home Owners Loan Corporation, and John H. Hall, Trustee.

Whedbee & Whedbee for defendants, Julian C. Jessup, Jr., and Catherine L. Jessup.

SHERLIN *v.* R. R.

PER CURIAM. Sallie J. Kirby conveyed certain land to plaintiff, who in turn made a deed of trust on same to John H. Hall, Trustee, who advertised same for sale under the deed of trust. The plaintiff brought an action to restrain the sale, alleging that the trustee had notice of his equities against Sallie J. Kirby.

The pleadings will disclose that this is an action to recover damages for breach of covenants of seizin and against encumbrances, incorporated in a deed from the defendants, Sallie J. Kirby and husband, to the plaintiff. The transaction constituting the foundation of plaintiff's claim is the incorporation of the covenants of seizin and against encumbrances in the deed aforesaid. The subject of his action is the breach of those covenants.

It is contended by plaintiff the defenses and counterclaim asserted by defendants do not comply with the statute, as follows: N. C. Code, 1939 (Michie), sec. 521: "The counterclaim mentioned in this article must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of one of the following causes of action: 1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action. 2. In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action."

The court below sustained the demurrers of plaintiff. Without going into the controversy in detail, we are of the opinion that the order and judgment of the court below appealed from must be sustained.

Affirmed.

MATTIE SHERLIN, ADMINISTRATRIX OF THE ESTATE OF C. C. SHERLIN, DECEASED, v. SOUTHERN RAILWAY COMPANY AND W. H. McLAIN.

(Filed 25 September, 1940.)

APPEAL by plaintiff from *Warlick, J.*, at January Term, 1940, of BUNCOMBE. Affirmed.

W. Harold Sams for plaintiff, appellant.
W. T. Joyner and Jones, Ward & Jones for defendants, appellees.

PER CURIAM. Plaintiff instituted her action in the general county court of Buncombe County for damages for the wrongful death of her intestate alleged to have been caused by the negligence of the defendants.

At the close of plaintiff's evidence motion for judgment of nonsuit was allowed and the action dismissed. Upon appeal to the Superior Court, the rulings of the county court were affirmed, and plaintiff appealed to this Court.

This case was here at Fall Term, 1938, and is reported in 214 N. C., 222, 198 S. E., 640, where the facts are stated. It was there held that upon the evidence then presented judgment of nonsuit was properly entered.

From an examination of the record in the present action, it appears that the plaintiff's evidence is substantially the same as in the former case, and that there is no new element to take it out of the rule therein laid down.

The judgment below is

Affirmed.

L. P. MANNING v. HARVEY C. HINES COMPANY.

(Filed 9 October, 1940.)

APPEAL by plaintiff from *Hamilton, Special Judge,* at April Term, 1940, of WAYNE.

Civil action by ultimate consumer to recover of manufacturer or bottler damages resulting from drinking bottled beverage containing noxious substance.

On 25 June, 1938, the plaintiff purchased a bottle of Coca-Cola from a filling station in Lenoir County. It is in evidence that upon drinking the Coca-Cola the plaintiff found glass in the bottle, and was seriously injured as a result thereof.

Plaintiff sought to show that the defendant placed the Coca-Cola on the market and was negligent in bottling it.

From judgment of nonsuit entered at the close of plaintiff's evidence, he appeals, assigning errors.

George E. Hood and J. Faison Thomson for plaintiff, appellant.
Royall, Gosney & Smith for defendant, appellee.

PER CURIAM. Upon the record as presented, we cannot say there was error in dismissing the action as in case of nonsuit. The judgment will be upheld. *Enloe v. Bottling Co.,* 208 N. C., 305, 180 S. E., 582.

Affirmed.

STATE OF NORTH CAROLINA, EX REL. WILBERT WOODARD, v. JACK L. HUNTER AND GREAT AMERICAN INDEMNITY COMPANY, A CORPORATION.

(Filed 9 October, 1940.)

APPEAL by defendant, Great American Indemnity Company, a corporation, from *Thompson, J.*, at April Civil Term, 1940, of JOHNSTON.

Civil action to recover of defendant, Jack L. Hunter, a North Carolina State Highway patrolman, and surety on his bond, damages for tort committed by him under color of his office, heard upon demurrer of surety. From judgment overruling demurrer, surety appeals to Supreme Court and assigns error.

E. J. Wellons for plaintiff, appellee.

Smith, Leach & Anderson and John E. Lawrence for defendant, appellant.

PER CURIAM. The bond, under which plaintiff seeks to hold the defendant, Great American Indemnity Company, a corporation, as surety, for alleged tortious acts of defendant, Jack L. Hunter, a State Highway patrolman, and sued upon in this action, copy of which is attached to the complaint, is identical in number, terms and conditions with that considered in the case of *Midgett v. Nelson,* 214 N. C., 396, 199 S. E., 393. The same question is involved here. By authority of the decision there, the judgment in the present case is

Reversed.

JOHN E. STAPLES, BY HIS NEXT FRIEND, MRS. E. P. WHITAKER, v. G. D. BRUNS.

(Filed 20 November, 1940.)

APPEAL by defendant from *Johnston, Special Judge,* at September Extra Term, 1940, of MECKLENBURG. Reversed.

Civil action to recover damages for personal injuries.

G. D. Bruns, Jr., infant son of defendant, while riding a bicycle belonging to him on a sidewalk in the city of Charlotte, in violation of a city ordinance, struck and injured plaintiff.

Defendant demurred to the complaint. The demurrer was overruled and defendant excepted and appealed.

G. T. Carswell and Joe W. Ervin for plaintiff, appellee.

John Newitt for defendant, appellant.

PER CURIAM. The allegations contained in the complaint are not sufficient to take plaintiff's cause of action out of the general rule that a parent is not liable for the torts of his minor child. *Bowen v. Mewborn, ante,* 423, is in point and is controlling. As the complaint fails to state a cause of action the judgment below overruling the demurrer is

Reversed.

ASHEVILLE SAFE DEPOSIT COMPANY, A CORPORATION, TRUSTEE, v. RUSSELL C. BOYCE.

(Filed 27 November, 1940.)

Appeal and Error § 38—

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

APPEAL by defendant from *Sink, J.,* at June Term, 1940, of MECKLENBURG. Affirmed.

The plaintiff complained that the defendant and his wife executed to the plaintiff a sealed promissory note, payable to bearer, in the principal sum of $12,941.89, upon which there now remains due $11,658.00, and that there has heretofore existed and now exists a default in payment of the note according to its tenor.

It is further alleged that the defendant and his wife, simultaneously with the execution and delivery of the said note, executed and delivered a deed of trust to the plaintiff, conveying the title to certain lands in trust, to secure the payment of the said note, which said deed of trust contained the following provision: "In order to further secure the payment of the indebtedness described in this deed of trust, the grantor has simultaneously herewith executed and delivered to the trustee an assignment of the rents from the above described property and of the grantor's interest in any and all leases of such property or any part thereof."

The defendant and his wife, it is alleged, further executed and delivered to the plaintiff an assignment of rents, income, and profits from the property described, authorizing amongst other things the possession of the property covered by the deed of trust, the cancellation of existing leases, and the making of new leases, the making of collections and the institution and maintenance of possessory proceedings with respect to any or all of the property in the same manner as if plaintiff were the absolute owner; and making the trustee attorney in fact for all these purposes. The assignment contained the following provision: "4. The

Trustee shall have the right to appoint and employ such agents and attorneys, including either or both of the undersigned, as it may deem desirable in connection with the foregoing and neither the Trustee nor any successor in the trust shall be answerable for the fault or misconduct of any agent or attorney so appointed, provided that such agent or attorney shall have been selected with reasonable care."

Thereafter, upon an allegation that defendant had proceeded in violation of the contract to collect the assigned rents, the plaintiff brought an action for injunction, which proceeded to judgment. In this action the plaintiff incurred certain costs and became obligated to the attorneys employed by it in connection therewith in the sum of $250.00. Upon notice to the defendant, the plaintiff trustee filed a motion in the cause praying that the court would authorize and direct it, as trustee, to pay the attorneys' fees and court costs involved in the action out of the trust funds in its hands.

This motion was allowed and the defendant appealed from the allowance of counsel fees.

Taliaferro & Clarkson for plaintiff, appellee.
David J. Craig, Jr., for defendant, appellant.

PER CURIAM. The Court being evenly divided, three to three, upon the decision of this case, under our practice the judgment of the court below is affirmed. This constitutes no precedent for the decision of other cases.

Affirmed.

WINBORNE, J., did not sit on the hearing of this appeal.

L. T. PAFFORD v. J. A. JONES CONSTRUCTION COMPANY AND D. DRADDY.

(Filed 27 November, 1940.)

Appeal and Error § 38—

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

APPEAL by plaintiff from *Johnston, Special Judge,* at September Term, 1940, of MECKLENBURG.

PAFFORD *v.* CONSTRUCTION CO.

Action for damages for personal injuries alleged to have been caused by the negligence of defendants. Defendants demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action. From judgment sustaining the demurrer, plaintiff appealed.

G. T. Carswell and Joe W. Ervin for plaintiff, appellant.
J. Laurence Jones and Stewart & Moore for defendant, appellee.

PER CURIAM. One member of the Court, *Winborne, J.*, not sitting, and the remaining six being evenly divided in opinion, the judgment of the Superior Court is affirmed in accord with the usual practice in such cases, and stands as the decision in this case without becoming a precedent. *Howard v. Coach Co.*, 216 N. C., 799.

Affirmed.

DISPOSITION OF APPEALS FROM THE SUPREME COURT OF NORTH CAROLINA TO THE SUPREME COURT OF THE UNITED STATES

Best & Co. v. Maxwell, Comr. of Revenue, 216 N. C., 114; *S. c.,* 217 N. C., 134. Reversed.

Monfils v. Hazlewood, 218 N. C., 215. Petition for *certiorari* denied.

ACKNOWLEDGMENT OF CONNOR PORTRAIT, FROM THE BENCH, TUESDAY MORNING, 3 SEPTEMBER, 1940, CHIEF JUSTICE STACY SPEAKING FOR THE COURT.

The Court wishes to acknowledge, with appreciation, the receipt of a splendid portrait of the late Justice George W. Connor, which has been presented by his family and friends, and will be placed beside the one of his father. Thus father and son again rest side by side. For them the journey ends; for us another chapter closes. The State is immeasurably richer that they both lived and sat upon this Bench. They gave their best and from them we have received a rich inheritance. The father was here six years; the son fourteen. Both had seen service on the Superior Court before coming to the Supreme Court, just as both had been members of the General Assembly and both Speakers of the House. The only other instance of father and son being members of this Court is that of the two Ruffins.

The opinions of Connor the younger, always forceful and to the point, are to be found in 26 volumes of our Reports, beginning with the 188th and ending with the 213th. They reveal his quality of mind, his breadth of vision, his wisdom, and his charity of judgment. He needs no other monument. Our thanks for the portrait.

ADDRESS OF HIS EXCELLENCY, CLYDE R. HOEY, AT THE DEDICATION OF THE JUSTICE BUILDING, WEDNESDAY MORNING, 4 SEPTEMBER, 1940.

Chief Justice Stacy, Associate Justices of the Supreme Court of North Carolina, Ladies and Gentlemen:

I am very happy to be privileged to participate this morning in the dedication of this building of superior adornment and rare magnificence. This building represents the joint contribution of the State of North Carolina and the Federal Government. The State contributed fifty-five per cent of the cost and the Federal Government contributed forty-five per cent. The building is constructed of granite, emblematic and symbolic of the sturdy character and enduring strength of North Carolina citizenship.

This building will house the agencies engaged in the administration of justice in North Carolina. The Adjutant General's office, embodying as it does the strong right arm of the State as directing head of the National Guard and the ultimate expression of the State's power in the maintenance of law. The Bureau of Investigation, engaged in the apprehension of those who violate the law and rendering its assistance to the subsidiary agencies of law enforcement throughout the State. The Probation Commission, which deals with those who have pleaded guilty to offenses or have been convicted for the first time, and such others as may have been extended clemency by the court and saved from confinement in prison. The Parole Commission, which deals with those who have been convicted and are engaged in serving their sentences, with the purpose of reclaiming them to good citizenship. Then we have the office of the Clerk of this Court, containing the files, records and proceedings of the Supreme Court. Also the Attorney-General's office, with its agencies for the administration of justice and with the responsible task of representing the State in civil and criminal matters. Then, as a climax to the whole, the Supreme Court—the highest tribunal in our land, the capstone of our whole judicial system.

It is fitting and proper that we inscribe on this building the words "Law and Justice." There is no conflict between those words. There is no antagonism in those terms. The law represents the customs, habits and practices of the people for a thousand years, which have ripened into the common law and then been enacted into statutes by our General Assembly for North Carolina and by the Congress of the United States for the whole nation. The Constitution of the United States and the

Constitution of North Carolina mark the lines of procedure and the boundaries under which the legislative authority must be exercised and provides for the government of the citizenship of the State as well as its manifold officials. Justice is the interpretation of the law, the application of it to the problems of this complex civilization. Justice becomes a living, vital thing. Disraeli said that "justice is truth in action." We have the law embodied in our statutes and we have justice as it is interpreted by the Court and its principles applied to the problems of life.

This Supreme Court is the crowning glory of the judicial system of North Carolina. I would here record my high appreciation to this Court—of its past high traditions, of its ability, of its learning, of its scholarship, but, above all, of its high integrity and its dedication to the cause of the administration of justice.

I rejoice in the fact that we have a Court in North Carolina that does not respond to public clamor—one that is unmoved by any wave of popular opinion. We glory in a court against which the waves of prejudice and winds of favoritism beat ineffectually. I am glad that we have a court in which every citizen of the State has supreme confidence and one that has justified that faith through a long period of unblemished public service. For each member of this Court I entertain a very genuine affection, as I do high admiration. Compositely, it represents the finest fruition and development of the whole judicial system of our great commonwealth.

However high the sentiment may run or however strong prejudice may be, and no matter what favoritism or partisan bias may manifest itself on the outside, here is a place where all citizens of this State and those who have interest in North Carolina may come feeling with absolute confidence and assurance that they will have their cause heard and that justice will be impartially administered.

I believe in the right of the Court to be a separate, distinct and independent branch of our government. Some people complain of the power of the Court to declare unconstitutional acts of the Congress and of the acts of the General Assembly. I have always believed that the Court should have that inherent right. The Constitution safeguards our liberty, it preserves our rights, it sets the limits beyond which the legislative branch of the government cannot go in the invasion of even our rights of person or property. In ordinary times it is not so necessary to have these constitutional provisions for our protection and for the preservation of our rights. However, in periods of stress and storm, when popular feeling runs high and when the public wishes to achieve its end without regard to the barrier of the law and the Constitution, then this great document becomes our Rock of Gibraltar.

The Constitution performs a service for the people similar to the great dikes erected along the mighty Mississippi River, the purpose of which is to keep the waters within the channel and to prevent devastating floods from overflowing and destroying cities, villages and countryside along this watercourse. The Constitution, like the dikes, is not very greatly needed in times of quiet and calm, but when the storms gather and prejudices run high and the public mind becomes inflamed, then the Constitution stands to prevent the legislative authority from getting out of the channel and in response to the impulse of the moment take away the liberties and the rights of the citizen.

But for the power inherent in the courts to declare unconstitutional acts of the Assembly and of Congress constitutions would be of no avail and the Bill of Rights could be ignored. Therefore, the courts stand as a mighty bulwark of defense and protection to every citizen and every interest. The Constitution and the courts stand as a mighty barrier against injustice and oppression and of the destruction of individual rights.

In common with all the citizenship of North Carolina, I have profound respect for this Court and complete confidence in its membership. It is good to know that the humblest citizen or the mightiest man, the largest corporation or the weakest man may come before this Court with full assurance that each will receive equal and exact justice. Any government incapable of administering justice to all classes and groups of its people without distinction, without partiality, and without favoritism does not deserve and cannot hope for the respect or confidence of the public. It is just as important to do justice to the strong as it is to protect the weak and the test is the ability of the Court to see clearly the issues involved and to do justice to every litigant or claimant, without fear and without favor. This Court meets that high responsibility and discharges with becoming fitness its full duty in the premises. This Court knows no distinction to those who enter its portals. The powerful lose their authority, the humble arise to the level of the mass, all rank and distinction is obliterated and the individual and the corporation stand upon a common level. In the presence of this exalted tribunal the cause is measured and weighed in the balance of justice.

I am very happy to have this Court housed in this splendid building. I am glad that it is substantially built. I am glad that it is attractive in the interior. It represents in its strength and majesty the people of this State and in adornment the beauty of our Commonwealth. It represents the thoughts and spirit of the people of this great State. I love North Carolina. I love her great traditions. I love her glorious past. I am content with her present and I look forward, even in these troubled times, to a glorious future. But, above it all, there must abide

absolute assurance of the continued administration of justice as the running of a pure stream, untroubled and uncontaminated in its constant flow toward the ocean level. The administration of justice represents the supreme exercise of sovereignty by a government and the highest expression of the aspirations of a free people.

I am very happy then to join with you today in the dedication of this building—to present it as the official home of this Court. I hope the past great tradition of this Court shall be sustained and all North Carolina may continue to feel a pardonable pride in its future attainments in the administration of justice, which shall open the way for a larger, richer, fuller life for all the people of this commonwealth and a higher appreciation of our civic institutions. We must preserve the processes of our democracy and the full heritage of liberty and freedom which we have received from the fathers.

I take pleasure in presenting this building to the service of this Court in the administration of justice, and to all those agencies in North Carolina which share the responsibility for maintaining the peace and good order of society and contribute to the well being of our whole citizenship.

ACCEPTANCE OF CHAMBERS IN THE JUSTICE BUILDING BY CHIEF JUSTICE STACY ON 4 SEPTEMBER, 1940.

Your Excellency, Ladies and Gentlemen:

For the first 69 years (1819-1888) the Supreme Court held its sessions in the Capitol, except for the period when the Capitol was being rebuilt following its destruction by fire in 1831. Then for 26 years (1888-1914) the Court was housed in the State Departments Building. For the past 26 years (1914-1940) it has been in the State Administration Building. It now comes to The Justice Building, with appreciation to the PWA and to the Legislative and Executive Departments for these more commodious quarters, and especially to Governor Hoey, who has so graciously presented them. The structure will stand as a monument to his administration.

Our first concern today is with the dedication of this building as a temple of justice: (1) a place where all sorts and conditions of people, regardless of race, color or creed, whether high or low, rich or poor, saint or sinner, may be heard; (2) a sanctuary for the brooding spirit of the law, which knows neither friend nor foe and claims not for itself the special privilege of one-way thinking, but rather sets its course by a

star which it has never seen and digs with a divining rod for springs which it may never reach; (3) a laboratory for the discovery of truth as the law deals with ideas and ideals. The thought world is just as real as the world of trees. It is not every tree in the forest that can be an oak, but every tree can grow. And trees, you know, in a sense, are but rooted men and men walking trees. There is but one life, one law, and one far-off Divine event to which the whole creation moves. Here, the powerful must accept definition of their power and the humblest citizen is to feel secure in his rights.

You have often heard it said that a chain is no stronger than its weakest link. That is true about a chain. It isn't true when applied to an individual, an institution, or a state. A man is as strong as the heights to which he is capable of climbing. We judge a man, not by his weakness, but by his strength. So it is with a government or an administration. Each is as strong as the level of fair play to which it strives and reaches.

The establishment of justice may rightly be denominated the end of all government, if not the end of all human society. It has ever been and ever will be pursued by men until it is attained or until liberty is lost in the pursuit. Justice is not an abstraction, nor yet an ethereal, intangible something, but rather a collective and individual matter, an act of the mind, a positive resolution and will to see that every man shall have his due. No act acquires color or meaning-content until it is brought in judgment, and the correctness of every judgment depends upon its own approximation or nearness to the truth. It is only by the refining process of growth that we are able to approach, if not reach, the ideal of absolute justice—a consummation devoutly to be wished, if happily we may find it.

Your conduct is approved or condemned by your neighbor according to his conception of right, and your neighbor's conduct is approved or condemned by you according to your estimate of right, the correctness of the judgment in each case depending, in its final analysis, upon the correctness of the standard by which it is made. As thus understood, justice is universal in its application, as well as individual, and it likewise imposes an universal obligation. It is as much a duty to see that justice is rendered to others as it is to demand it for one's self, and to fail in either is to fail in the responsibility of deserving. The character of the conduct of a man as he walks along the street is to be judged, in the first instance at least, by those who observe his conduct in the street. In a very real sense, therefore, every man is his brother's keeper and is in duty bound to him according to the precepts of the golden rule.

Stronger than these granite walls, there shall dwell within a determination to see that the right shall prevail, come what may, storm or

sunshine, night or day. In the inner shrine of this temple, not built with hands, is to abide the confidence of a free people, which shall be to them as the shadow of a great rock in a weary land, a shelter in the time of storm. Here, upon the anvil of fair debate is to be hammered out their rights, in an atmosphere of calm, above the pettiness of little men who are themselves the storm. Here the liberties of the commonwealth are to be guarded. Here the principles of human welfare are to be preserved. Here the great traditions of the past are to be exalted as beacon lights for the future. Here the altar fires of conscience are to be kept burning. Here the well-springs of a people's faith are to remain unpolluted. Ours is a sacred trust and it calls for a high order of devotion.

It is not enough to dedicate a building. We ourselves must be quickened for the task. Time alone will tell whether this has been done. Today, at least, the resolve is great.

NOTE: The Fall Term, 1940, of the Supreme Court was convened in The Justice Building on 27 August. Dedicatory exercises were delayed until 4 September to meet the convenience of the Governor.

ADDRESS

BY WILLIAM A. BLAIR

ON

PRESENTATION OF A PORTRAIT

OF THE LATE

GEORGE PIERCE PELL

TO THE

SUPREME COURT OF NORTH CAROLINA

DECEMBER, 1940

"It singeth low in every heart,
We hear it each and all,—
A song for those who answer not,
However we away call;
They throng the silence of the breast,
We see them as of yore,—
The kind, the brave, the true, the sweet,
Who walk with us no more."

It is well for us, for any reason, sometimes to turn away for one brief hour from light or heavy tasks that often tire,—from business, factory, farm or office, and from the "dry drudgery of the desk's dead wood," to meet face to face, forget home and business cares, and feel the great throbbing pulse of humanity beat in common current through the channels of our being. Particularly so if we meet to consider lives worth living, to recite their achievements, to recount and evaluate their services, and

"in the book of fame
The glorious record of their virtues write,
And hold it up to men and bid them claim
A palm like this, and catch from them the hallowed flame."

And yet, it is a difficult, delicate, and indeed dangerous task, in considering any clear, forceful story of human accomplishment, endeavor and high idealism, particularly in the case of a special friend almost from childhood's earliest days, to avoid, on the one hand, the base Scylla of extrava-

gant, excessive, undue and fulsome eulogy, which overshoots the mark,—for "Praise undeserved is satire in disguise." On the other hand, it is likewise difficult to avoid the Carybdis of failing to express due appreciation of the great and outstanding qualities which highly deserve special notice, commendation and proper notes of praise. The difficulties and dangers of the duty, always sufficiently and clearly manifest, are multiplied a hundredfold in the case of the man whose life, services and memory we honor on this good day, so I come simply to lay my humble tribute, with a rose upon the grave, and with deepest and tenderest emotions of the heart,—with you, to drop a tear for the past, rejoice in the present and look forward to the future with the gladness, faith and hope that he whose memory we honor would have us do. Judge Pell was, at heart, one of the most retiring, modest men, impatient of eulogy or of undue praise and compliment. We can almost hear him quote,

"Paint me as I am, said Cromwell,
Rough with age and gnashed with wars;
Show my visage as you find it,
Less than truth my soul abhors."

And particularly in this august presence he would surely enjoin, as the "blind old bard of Scio's rocky isle" makes the wise Ulysses say, "Praise me not too much, nor blame me. Thou speakest to the Greeks who know me."

I think we will agree that,—

"'Tis only noble to be good,
Kind hearts are more than coronets,
And simple faith than Norman blood."

And yet we must admit that there must be something in Oliver Wendell Holmes' statement—"No, my friends I go (always other things being equal), for the man who inherits family traditions and the cumulated humanities of at least four or five generations." According to Renan, "one always retains the traces of one's origin," and "blood will tell" is a common aphorism.

Judge Pell was blessed in having, not only that kind of a heart that is more than coronet, but also distinguished ancestry as well. His great-grandfather came to Currituck County, North Carolina, direct from England in 1745, thirty years before the Revolutionary War, while George II was the reigning monarch and Gabriel Johnson, Governor here. He was a leading and useful citizen of his section and his son Joseph won high place as a gallant soldier in the Continental army under

the leadership of Washington as Commander-in-Chief. Going still further back, we find a noted ancestor, Sir John Pell, the great mathematician, born 1613, who made outstanding records in both Oxford and Cambridge Universities, became a prominent professor in Amsterdam, discovered the Binomial Theorem in Algebra, and was the author of several important books and papers. It was to this ripe and cultured scholar that Sir Isaac Newton turned for consultation, counsel and advice, and to him, first of all, submitted, and explained his invention of Calculus, or "Fluxions," as he gave it name. The Judge's mother, Virginia Carolina Ramsey Pell, traced her ancestry, through the Bollings of Virginia, to Sir Thomas Boleyn, the Viscount Rochford and Earl of Wiltshire, father of the ill-fated Anne Boleyn, wife of Henry the Eighth and mother of Queen Elizabeth. Through the Rolfes, also, her direct line went back to John Rolfe, who married Pocahontas, the daughter of the great Indian Chief Powhatan, and who at the risk of her own life dramatically saved from death Captain John Smith of Colonial fame. Judge Pell's father was the Rev. William Edward Pell, a noted Methodist minister, editor and statesman, who founded and conducted the *Raleigh Sentinel,* now the *News and Observer.* During the sad, dark days of the awful reconstruction period he was a great power in the State, and a tower of strength, making a determined, valiant and successful fight against the corrupt "Carpet Bag" rule and in favor of good government, white supremacy and local control in the State. He was a member of the Governor's Council and intimate and confidential adviser of Jonathan Worth, Zebulon B. Vance, William A. Graham and others known to fame. Governor Worth frequently mentions him in his letters, referring to him "my friend," "my sincere friend," "personally and politically my friend," etc. In a letter to Vance he is referred to as "your ardent friend." His power and influence continued with unabated force and might up to the time of his death in 1870. Into a home of refinement, culture, religious influence and high ideals Judge Pell was born in Raleigh, June 19, 1870, the youngest child of his parents. Both his brothers, still living, became prominent and outstanding men of force, character and reputation. Dr. Edward Leigh Pell, of Richmond, Virginia, author, lecturer and forceful writer, is known everywhere as editor of the popular "Pell's Notes for Sunday Schools." Dr. Robert Paine Pell attended Trinity College and the University, where, upon graduation, he became instructor in English and Secretary of the faculty. Feeling a call to the ministry, he received preparation at the Union Theological Seminary and entered upon a successful ministerial career. In 1902 he was elected president of Converse College, South Carolina, a position which he held for over thirty-one years, and is now president *emeritus.* Degrees from many

colleges and universities have been showered upon him and other honors have crowned his fine, successful, outstanding career. There were also three fine daughters of marked talents in vocal and instrumental music, as well as in intellect, all graduates of the Greensboro College. Alice became the wife of Rev. William A. Puckett, Carrie was married to Dr. J. B. Gunther, and Lula's husband was Mr. Thomas Rouse, the banker of La Grange. But the father had died when George was only six months old and the boy never knew a father's care, direction, training, advice and companionship. Fortunately the accomplished mother—and "happy he with such a mother"—was daring, strong and able enough to face the situation and to accept the holy charge of keeping the family together in unbroken band and of meeting their pressing human needs and such comforts as were most desired. She did even much more than this. She provided ways and means and methods for every opportunity of training, education and culture of body, mind, heart and soul.

"The bravest battle that was ever fought;
Shall I tell you where and when?
On the maps of the world you will find it not;
It was fought by the mothers of men."

Virginia Carolina Ramsey Pell, a little later, accepted a position as teacher of French and music at the "Greensboro Female College," and in her leisure moments personally instructed her children, and particularly young George until he was well prepared to enter college. Arrangements were perfected whereby he could attend classes with the girls and he graduated from this institution at the surprisingly early age of only thirteen years. Later he entered Trinity College, now Duke University, and finished with high standing in his class. He then took a post-graduate course at the George Washington University in Washington, D. C. Having definitely decided on Law as his profession, he entered Georgetown University and, in due course, received the degree of "Bachelor of Law." And now begins the next two score year record of achievement, not in ignoble ease of waiting for clients to come, but in the labor, grind, and drudgery of a full, active, strenuous life.

"Toiling, rejoicing, sorrowing,
Onward through life he goes;
Each morning sees some task begun,
Each evening sees it close.
Something attempted, something done,
He earned a night's repose."

At the age of eighteen, and for three years thereafter, we find the young man joyously serving as associate editor, with his friend Josephus Daniels of the *Raleigh Chronicle,* later absorbed into the *News and Observer.* There must be some strange fascination, charm or witchery about blackening one's fingers in printers' ink, or sitting in the editorial chair. When once experienced, the love for it never fails, fades nor dies, and so we are not surprised, later on, to find young Pell editing at one time the *Winston-Salem Sentinel,* at another, conducting the *Yadkin Valley News* in Mount Airy, and again acting as editor and proofreader in the U. S. Government Printing Office in Washington, meantime contributing articles from his ready pen to various papers inside and outside the State. He had already been admitted to the Bar in the very May-morn of his youth, and practiced his profession with honor and success in Winston-Salem, Raleigh, and in partnership with the noted, brilliant, and original Captain J. R. Todd at Jefferson. This latter experience was often spoken of as a rare one, of great worth and of immense educational and cultural value. Other honors came thick and fast upon him. For three terms Pell was reading clerk in the State Senate, and he also served for five years as assistant librarian of public documents in Washington. Soon after his election, Governor Aycock appointed George one of the directors of the N. C. Railroad, a position that interested him greatly and to which he gave much time, thought and attention at a period when it was sorely needed. In 1908, just when it seemed that an ever-expanding future was well within his reach, it appeared to all that a brilliant career had suddenly been closed in tragedy, sad and deep and dark. A mad dog's savage bite and resultant treatment, possibly improperly applied, brought on a partial paralysis of lower limbs, but even that could not stop the skyward-jutting soul. All was not lost for his unconquerable will and courage would never submit nor yield. He carried this heavy burden to the end, as only the bravest could possibly do, and I doubt if anyone ever heard him utter one single complaining, lamenting or whining word about it.

"He never turned his back, but marched breast forward.
Never doubted clouds would break.
Never dreamed, though right were worsted, wrong would triumph.
Held, we fall to rise, are baffled to fight better, sleep to wake."

Two years later Governor Kitchin appointed him Judge of the Superior Court, a position he held with much honor and success until he took his seat on the State Corporation Commission, which relieved him of the extensive and tiresome travel incident to wearing the ermine and

to a career on the bench. This place of great responsibility Judge Pell continued to hold, by virtue of triumphant elections one after another until the Commission was abolished in 1934.

Then Judge Pell opened in Raleigh an office for the practice of his profession and devoted much time to writing and to his celebrated law school, noted for its thorough work and for the small percentage of its students who failed to pass the bar examinations. How the Judge ever found time in the stress and strain of his full and busy life to write and publish twenty-six volumes of books and monographs is a source of wonder and surprise. His well known "Revisal of N. C. Statutes" is regarded as one of the most important and valuable legal contributions ever made by any man in the State. At the time of his death he had almost completed another volume on the administration of estates. He was always a loyal Democrat, but liberal and broad in his views. A Methodist without narrowness, sectarianism or bigotry, a Sunday School superintendent without sanctimoniousness, affectation or pretense. His sense of duty as a citizen was never dimmed, and education, health, social uplift and welfare seemed ever on his mind. His was a buoyant and friendly soul, had a rare genius for friendship and the highest qualities of companionship, kindliness, cheerfulness and good will. He loved the whole human race and there came back to him from every side just what he gave, for he had warm friends everywhere in all the walks of life without regard to race, color, previous condition of servitude or social standing.

In 1892, on May 25th, at the age of 22, he was happily married to Mary V., the accomplished daughter of Mr. Larkin DeShazo, a tobacco manufacturer-planter, and leading citizen of Virginia. The union was a fortunate and blessed one, for the young wife at once became a real helpmate, comrade, stimulant and inspiration. Three children, the parents' pride, were born to them, and the oldest, Mary, blossomed into fine womanhood, graduated from Salem College, married the noted tobacconist, W. B. Lea, of Danville, Virginia, became the mother of five children, and lost her life in one of those unnecessary automobile accidents that happen far too often in our land. One boy, William Edward, graduated a Phi Beta Kappa at the University of North Carolina, and from the Carnegie Institute of Technology and then took a post-graduate course at Columbia. He served in the Navy during the World War and died suddenly in Troy, N. C., where he was serving with distinction and renown as superintendent of the city schools just as he was about to leave home to receive his doctor's degree at Columbia. Josephus Daniels, the only living child, graduated from the State College, became designer for the Cannon Mills, superintendent of the Mooresville Cotton Mills, built the first rayon weaving mill in the south, and invented chemical

formulæ used in processing rayon yarns. He is now president of the Angle Silk Mills in Virginia and director of the "National Association of Rayon Weavers."

In the World War he served in the Army and was the youngest commissioned officer in the entire armed force. Judge Pell died in Raleigh, May 11, 1938.

And now, Honorable Chief Justice and Associate Justices of the Supreme Court, I have the honor to present you on behalf of Mrs. Mary DeShazo Pell and through her generosity, a life-like portrait of Judge George Pierce Pell to adorn the walls of this grand temple of law and justice. Along the side of the great marketplace in ancient Athens, so he might read who ran, was the "Poecile Stoa," or painted porch, where for half a thousand years the descendants of the men who followed Miltiades to victory, and all other Greeks, might trace the glories of their immortal Marathon, and gain strength, heart and inspiration from the example and lives of great men of former days. On either side and high above the Appian way in Rome stood statues of the Italian great, so that youth and age might upward look as they passed by, and thus be encouraged to write their names high upon the tablets in fame's exalted temple. Such, in ancient days, were some of the noteworthy memorials to the dear, departed dead. But here we have them not—nay, far too few of these! The stars of heaven alone keep solemn watch over the graves of our dead heroes while the evening breezes only chant a mournful requiem in memory of their immortal lives. But gatherings such as this are sweeter, tenderer, grander monuments, methinks, than any work of art or high design from mighty mortals' good-like hands. It is well, therefore, that upon the walls of this courtroom, fine and new, but old in history and tradition, portraits are treasured and preserved of some of North Carolina's great, "Whose names are writ where stars are lit." Among them, this picture of Judge Pell deserves a place.

"The night is darker because his light has gone out. The world is not so warm, because his heart is cold in death."

REMARKS OF CHIEF JUSTICE STACY, UPON ACCEPTING THE PORTRAIT OF GEORGE P. PELL, IN THE SUPREME COURT ROOM, 11 DECEMBER, 1940:

The Court is pleased to receive this splendid portrait of a distinguished member of the bar, former Superior Court Judge, former member of the Corporation Commission, author, lecturer and teacher—George P. Pell. His greatest service to the legal profession was his pioneering in the field of annotations. For this work, the General Assembly assigned to him the important task of recodifying the statute law of the State. This recodification, in annotated form, was published under the name of "Pell's Revisal of 1908."

Nothing can be added to the faithful tribute of his friend and biographer who has spoken today. We are glad to receive his eulogy and just appraisal.

The Marshal will see that the portrait is assigned to its appropriate place, and these proceedings will be published in the forthcoming volume of the Reports.

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ANALYTICAL INDEX.

ACTIONS.

§ 4. Right to Sue When Cause of Action Grows Out of Plaintiff's Own Wrongful Act.

In plaintiffs' action to establish right of ingress and egress over defendant's land from plaintiffs' business property to a public highway, allegations that plaintiffs were using their property for an unlawful purpose or that the operation of plaintiffs' business constituted a nuisance against public morals, do not constitute a defense to plaintiffs' action to establish their property rights, since the rights of the public may be protected by invoking the provisions of the criminal law or by proceedings to abate the maintenance of a nuisance. *Long v. Melton*, 94.

§ 5. Distinction Between Forms of Actions in General.

The distinction between forms of actions has been abolished, and the right to recovery will be determined in accordance with the factual situation established by the evidence, and not by the technical label applied by plaintiff to the cause alleged. *Butler v. Light Co.*, 116.

ADOPTION.

§ 3. Consent of Natural Parents.

Parent must consent to adoption of child, and the consent contemplated by statute is consent that the particular persons seeking to adopt the child may do so, and blanket assent that children's home might procure adoption is insufficient. *In re Holder*, 136.

§ 4. Jurisdiction and Venue.

The mother of an illegitimate child must be made a party to proceedings for the adoption of the child, and her consent to the adoption or proof of abandonment of the child in the statutory or legal sense, must be made to appear as a jurisdictional matter. *In re Holder*, 136.

Parent's consent to adoption must be shown within record and must relate to particular persons seeking to adopt the child. *Ibid.*

Since the laws of inheritance and distribution of property are directly involved in an adoption proceeding, and since the proceeding is in derogation of the common law, it must be strictly construed. *Ibid.*

The evidence disclosed that the child in question was brought by its mother into the juvenile court of the county of their residence charged with being a dependent child, that the court committed it to the custody of a children's home society having its home office in another county of the State, but that the child was immediately taken by the persons seeking to adopt it to their residence in another State. *Held:* The child never resided in the county in which is located the home office of the children's home society, its mere commitment to the children's home not having the effect of making the child's constructive residence there, and adoption proceedings in that county are void since the child was never within its jurisdiction. *Ibid.*

§ 8. Final Decree of Adoption.

Evidence *held* insufficient to show that unsigned order was actually ever entered, and signing of order *nunc pro tunc* was error. *In re Holder*, 136.

ADVERSE POSSESSION.

§ 4a. Adverse Possession by Tenant in Common.

Tenant in common must hold exclusive possession for twenty years in order to ripen title by adverse possession against co-tenant, even though he goes into possession under deed purporting to convey fee, since in contemplation of law his possession conforms to his true and not his purported title. *Cox v. Wright*, 342.

APPEAL AND ERROR.

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§ 1. Nature and Grounds of Appellate Jurisdiction of Supreme Court in General.

Only matters of law or legal inference are reviewable by the Supreme Court upon appeal. Constitution of North Carolina, Art. IV, sec, 8. *Barnes v. Teer*, 122.

§ 2. Judgments Appealable: Premature Appeals.

Defendant's appeal from an order continuing its motion to dismiss is premature, since the order disposes of no substantial right. C. S., 638. *Sanderson v. Ins. Co.*, 270.

§ 3a. Parties Who May Appeal.

Wife is entitled to review by *certiorari* of order releasing husband from jail where he had been committed for willful failure to comply with court order for payment of alimony. *In re Adams*, 379.

§ 6e. Objections and Exceptions to Evidence.

A broadside exception to the admission of evidence, including a number of questions and answers, does not properly present any question for review. *Miller v. Greenwood*, 146.

§ 6f. Objections and Exceptions to Charge.

Party is bound by instructions given in response to his own request, at least to the extent that he may not assign same as error on appeal. *Carruthers v. R. R.*, 377.

APPEAL AND ERROR—*Continued.*

An exception to the charge on the ground that it did not explain the evidence and did not declare and explain the law arising thereon as required by C. S., 564, *is held* ineffective as a "broadside" exception, it being necessary that an exception to the charge specifically refer to the particular point claimed to be erroneous. *Arnold v. Trust Co.*, 433.

Where defendant's request for instructions on a particular aspect of the case is given in a special instruction by the court after recalling the jury, and the instruction is correct and adequate upon the point, defendant may not successfully contend on appeal that the charge was erroneous for the failure of the court to give more particular or slightly different instructions upon the same aspect. *McMillan v. Butler*, 582.

§ 19. Necessary Parts of Record Proper.

The charge of the court is not a part of the record proper but is a part of the *postea* to be settled in the case on appeal. *Carruthers v. R. R.*, 377.

§ 31f. For Absence of Assignments of Error.

Appellee's motion to dismiss the appeal will be allowed when the record contains no assignment of error, Rules of Practice in the Supreme Court, No. 19, sec. 3. *Hobbs v. Hobbs*, 468.

§ 37b. Review of Discretionary Matters.

The competency of a witness as an expert is addressed to the sound discretion of the trial court, and its discretion is ordinarily conclusive. *LaVecchia v. Land Bank*, 35.

Discretionary rulings of the trial court are not ordinarily considered on appeal unless accompanied by some imputed error of law or legal inference. *Gold v. Kiker*, 204.

A motion at trial term to set aside a verdict as contrary to the weight of the evidence is addressed to the discretion of the trial court, and its decision thereon is not subject to review on appeal. *Query v. Ins. Co.*, 386.

Unless contrary is shown, it will be presumed that motion for bill of particulars was denied in exercise of discretion, which discretionary ruling is not ordinarily reviewable. *Ogburn v. Sterchi Bros. Stores, Inc.*, 507.

§ 37e. Review of Findings of Fact.

The referee's findings of fact, approved and adopted by the court below, are conclusive upon appeal when supported by any competent evidence. *Wilkinson v. Coppersmith*, 173.

§ 38. Presumptions and Burden of Showing Error.

The party alleging error has the laboring oar and must overcome the presumption against him. *Gold v. Kiker*, 204.

Since the burden of showing error is on appellant, it will be presumed that court denied motion in its discretion when contrary is not shown, and discretionary ruling is not reviewable. *Ogburn v. Sterchi Bros. Stores, Inc.*, 507.

When the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment of the lower court will be affirmed without becoming a precedent. *Deposit Co. v. Boyce*, 781; *Pafford v. Construction Co.*, 782.

§ 39a. Harmless and Prejudicial Error in General.

A new trial will not be awarded for error which, upon consideration of all circumstances surrounding the trial, could not have misled the jury or prejudiced the parties. *Caldwell v. R. R.*, 63.

APPEAL AND ERROR—*Continued.*

Verdicts and judgments are not to be disturbed except upon a showing of prejudicial error, which is error amounting to the denial of some substantial right. *Gold v. Kiker*, 204.

§ 39d. Harmless or Prejudicial Error in Admission or Exclusion of Evidence.

The exclusion of testimony of two witnesses as to the visibility at the scene of the accident, even conceding their testimony discloses atmospheric conditions similar to those existing at the time of the accident, will not be held for prejudicial error when other witnesses testify without objection to substantially the same effect as the testimony excluded, and surveys, maps and photographs of the *locus in quo* and testimony of witnesses as to the location and surroundings at the scene of the accident, are admitted in evidence. *Caldwell v. R. R.*, 63.

An exception to the exclusion of the testimony of a witness as to the contents of his weather report for the night on which the accident in suit occurred, cannot be sustained when it appears that the weather report was admitted in evidence and that the witness testified as to the weather conditions existing at the time. *Ibid.*

§ 39e. Harmless or Prejudicial Error in Instructions.

Where the court repeatedly states the correct rule of law applicable, an excerpt containing an incomplete statement of the principle will not be held for reversible error when it is apparent that the jury was not misled thereby and that appellants were in no way prejudiced. *Caldwell v. R. R.*, 63.

Failure of court to charge facts that would constitute probable cause *held* not prejudicial to defendant on the record. *Miller v. Greenwood*, 146.

An instruction using the phrase "the reasonable man" instead of the phrase "the reasonably prudent man" in stating the standard of care required by law, *is held* not prejudicial upon the facts of this case. *Williams v. Woodward*, 305.

§ 40a. Review of Exceptions to Judgment or to Signing of Judgment.

An exception to the signing of the judgment presents only the question of whether error appears on the face of the record, and the exception must fail when the judgment is supported by the record. *Query v. Ins. Co.*, 386.

§ 40e. Review of Judgments on Motions to Nonsuit.

On appeal from judgment dismissing the action as of nonsuit, the Supreme Court will review the evidence tending to support plaintiff's cause of action and consider it in the light most favorable to him. *Van Dyke v. Atlantic Greyhound Corp.*, 283.

§ 41. Questions Necessary to Determination of Appeal.

Where it is determined that nonsuit should have been granted on issue of contributory negligence, whether evidence of negligence is sufficient to be submitted to jury need not be determined. *Beck v. Hooks*, 105.

Where, upon the uncontradicted testimony relating to the merits, defendant is entitled to a peremptory instruction in her favor, plaintiff's exceptions to the latitude allowed in the cross-examination of his witness and to the admission of certain expert testimony relating to a matter not germane to the defense, are immaterial and need not be decided. *Foxman v. Hanes*, 722.

APPEAL AND ERROR—*Continued.*

§ 43. Petition to Rehear.

Petition to rehear allowed for that instruction held for error was requested by appellant himself. *Carruthers v. R. R.*, 377.

Petition to rehear allowed in this case in order to modify the former opinion. *Smith v. Mears*, 775.

§ 48. Remand.

Where, in an action against a municipality upon an agreed statement of facts to recover a license tax paid under protest, the facts agreed are ambiguous and conflicting so that it is not clear whether the right to levy the tax was asserted upon the ground that plaintiff was carrying on the business specified within the city, or whether the city contended it had the right to collect the tax on the business located and carried on outside the city limits but within two miles thereof, the case will be remanded so that the statement of facts may be amended to remove the ambiguity or so that, if the parties fail to reach an agreement, the controverted facts may be submitted to a jury. *Weinstein v. Raleigh*, 549.

§ 49a. Law of the Case.

The decision on a former appeal is the law of the case upon the facts then presented both upon the subsequent hearing and upon subsequent appeal. *Fisher v. Fisher*, 42.

§ 49b. Stare Decisis.

The doctrine of *stare decisis* requires that decided cases should be given great weight when the same points again come up in litigation in the same jurisdiction, and that the court should not swerve or depart from the prior decisions from any private sentiments or judgment. *McGill v. Lumberton*, 586.

APPEARANCE.

§ 2. General Appearance.

A demurrer on the grounds that the complaint fails to state a cause of action and that there is a defect of parties constitutes a general appearance and waives the defendant's right to object to the jurisdiction on the ground of invalid process. *Credit Corp. v. Satterfield*, 298.

ASSAULT.

§ 12. Instructions in Prosecutions for Assault.

Defendant's evidence *held* to present question of self-defense, and court should have instructed jury thereon, even in absence of request. *S. v. Greer*, 660.

ASSIGNMENTS.

§ 8. Rights of Third Persons.

The purchaser of a life estate at the execution sale under a judgment against the life tenant takes the estate free from a prior unrecorded assignment of the rents for money advanced for taxes and repairs, and further, the assignment of rents accruing must be registered to pass title as against purchasers for value. *Bank v. Sawyer*, 142.

AUTOMOBILES.

III. Operation and Law of the Road
7. Pedestrians. Williams v. Woodward, 305; Miller v. Motor Freight Corp., 464.
8. Due Care in Operation in General. Murray v. R. R., 392.
9b. Distance between Vehicles Traveling in Same Direction. Murray v. R. R., 392.
9c. Safety Statutes and Ordinances in General. Williams v. Woodward, 305; Murray v. R. R., 392.
9d. Bicycles. Van Dyke v. Atlantic Greyhound Corp., 283.
10. Right Side of Highway. Williams v. Woodward, 305; Coach Co. v. Lee, 320.
11. Passing Vehicles on Highway. Whitehurst v. Williams, 390; Murray v. R. R., 392.
12a. Speed in General. Beck v. Hooks, 105.
12c. Intersections. McMillan v. Butler, 582.
13. Stopping, Starting, and Turning. Bechtler v. Bracken, 515.
14. Parking and Parking Lights. Beck v. Hooks, 105; Leonard v. Transfer Co., 667.
18. Actions to Recover for Negligent Operation.
a. Negligence and Proximate Cause. Coach Co. v. Lee, 320; Whitehurst v. Williams, 390; McMillan v. Butler, 582; Leonard v. Transfer Co., 667.
c. Contributory Negligence. Beck v. Hooks, 105; Barnes v. Teer, 122; Van Dyke v. Atlantic Greyhound Corp., 283; Miller v. Motor Freight Corp., 464; McMillan v. Butler, 582; Leonard v. Transfer Co., 667.
d. Concurring and Intervening Negligence. Murray v. R. R., 392; Bechtler v. Bracken, 515.
e. Last Clear Chance. Van Dyke v. Atlantic Greyhound Corp., 283; Miller v. Motor Freight Corp., 464.
f. Competency and Relevancy of Evidence as to Speed. Barnes v. Teer, 122; Coach Co. v. Lee, 320.
h. Instructions. Barnes v Teer, 122; Williams v. Woodward, 305; Coach Co. v. Lee, 320.

IV. Guests and Passengers
21. Parties Liable to Guest or Passenger. Montgomery v. Blades, 680.

V. Liability of Owner for Driver's Negligence
23. In General. Beck v. Hooks, 105.
24b. Scope of Authority; Course of Employment. McLamb v. Beasley, 308.
24e. Liability of Owner Hiring Trucks and Drivers. Leonard v. Transfer Co., 667.

VI. Criminal Responsibility of Drivers
31. Reckless Driving. S. v. Wilson, 769.

§ 7. Pedestrians.

Instruction that violation of statutes regulating conduct of pedestrians on highway and requiring warning to be given pedestrian, is negligence *per se*, *held* without error. *Williams v. Woodward*, 305.

Evidence *held* to show contributory negligence as matter of law on part of pedestrian turning to left on highway in path of truck. *Miller v. Motor Freight Corp.*, 464.

§ 8. Due Care in Operation of Automobiles in General.

The operator of a motor vehicle, independent of statutory requirements, is required to exercise that degree of care which an ordinarily prudent person would exercise under similar circumstances. *Murray v. R. R.*, 392.

In the exercise of due care, the operator of a motor vehicle is required to keep same under control and to keep a reasonably safe lookout so as to avoid collision with persons and vehicles on the highway. *Ibid.*

§ 9b. Distance Between Vehicles Traveling in Same Direction.

It is negligence *per se* for the operator of a motor vehicle to follow another vehicle on the highway more closely than is reasonable and prudent under the circumstances, with regard to the speed of the vehicles, the traffic, and the condition of the highway. *Murray v. R. R.*, 392.

§ 9c. Safety Statutes and Ordinances in General.

Violation of statutory provisions prescribing that vehicles should be operated on right side of highway and that pedestrians be given proper warning is negligence *per se*. *Williams v. Woodward*, 305.

It is negligence *per se* to fail to keep proper distance between vehicles traveling in same direction or to pass vehicle at railroad grade crossing. *Murray v. R. R.*, 392.

AUTOMOBILES—*Continued.*

§ 9d. Bicycles.

Under our motor vehicle statute a bicycle is deemed a vehicle, and the rider of a bicycle upon the highway is subject to the applicable provisions of the statutes relating to motor vehicles. Public Laws 1939, ch. 275. *Van Dyke v. Atlantic Greyhound Corp.*, 283.

§ 10. Right Side of Highway.

Instruction that violation of statutory provision requiring vehicles to be operated on right side of highway is negligence *per se*, *held* without error. *Williams v. Woodward*, 305.

Evidence *held* sufficient for jury as to whether motor vehicle was being operated on left side of highway. *Coach Co. v. Lee*, 320.

§ 11. Passing Vehicles on Highway.

Evidence that car, in attempting to pass truck traveling in same direction, was driven on the left side of the highway when defendant driver, traveling in opposite direction, had insufficient time or space to avoid collision, *held* to support nonsuit as to defendant driver. *Whitehurst v. Williams*, 390.

It is negligence *per se* for the operator of a motor vehicle to overtake and pass another vehicle traveling in the same direction at a railroad grade crossing. Public Laws of 1937, ch. 407, sec. 112 (c). *Murray v. R. R.*, 392.

§ 12a. Speed in General.

The driver of a car must not drive at a speed in excess of that at which he can stop the car in time to avoid hitting an obstruction within the range of his lights, and when his vision is lessened by the glare of lights from a car approaching from the opposite direction, he must slacken his speed so that he can stop immediately or within the reduced range of his vision, and if completely blinded must then stop completely. *Beck v. Hooks*, 105.

§ 12c. Intersections.

The evidence tended to show that defendant approached the intersection along a hard-surfaced highway at an excessive speed, and that plaintiff, traveling on an intersecting dirt road, stopped before entering the intersection, and that he did not see plaintiff's car although the view was unobstructed for 240 yards. *Held:* Conceding that both drivers may have been negligent, defendant's motion to nonsuit on the ground of contributory negligence was properly overruled, the question of proximate cause being for the jury. *McMillan v. Butler*, 582.

§ 13. Stopping, Starting and Turning.

The failure of the driver of a motor vehicle to give the signal required by statute before stopping or turning on the highway, when the movement of his vehicle may affect other vehicles on the highway, is negligence *per se*, and when the proximate cause of injury, is actionable. *Bechtler v. Bracken*, 515.

§ 14. Parking and Parking Lights.

Defendant stopped his truck partly on hard-surface before colliding with car which had overturned and was blocking the highway, and went to aid of injured persons in the overturned car while his helper went to set out flares. The truck was heavily loaded so that it would have taken time to have driven it safely on wet shoulders of road. Plaintiff's car struck the rear of the truck. Whether defendant "parked" the truck on the highway within the meaning of the statute *held* not necessary to be determined, the nonsuit in the lower court being upheld on the ground of contributory negligence. *Beck v. Hooks*, 105.

AUTOMOBILES—*Continued.*

Questions of negligence in stopping truck on highway without lights at night and contributory negligence of motorist colliding therewith *held* for jury. *Leonard v. Transfer Co.*, 667.

§ 18a. Negligence and Proximate Cause.

Conflicting evidence as to whether vehicle was being operated on right side of highway *held* to take case to jury. *Coach Co. v. Lee*, 320.

The evidence tended to show that plaintiff was riding in an automobile traveling in one direction and that as the automobile approached a truck and another car traveling in the opposite direction, the other car, in attempting to pass the truck, drove on its left side of the highway directly in the path of the car in which plaintiff was riding when distant too short a space to enable the driver to avoid the collision. *Held:* Judgment as of nonsuit was properly entered as to the driver of the car in which plaintiff was riding. *Whitehurst v. Williams*, 390.

Conceding that the drivers of both cars involved in collision at intersection may have been negligent, question of proximate cause was for jury. *McMillan v. Butler*, 582.

The evidence tended to show that defendant's truck was loaded with telephone poles which were approximately the same color as the asphalt highway, that the poles protruded beyond the body of the truck, and that no flag or lantern was placed on the end of the poles, and that the truck was stopped on the highway at night without lights or reflectors, and that plaintiff, who had just passed a car traveling in the opposite direction and had dimmed his lights, ran his car into the rear of the truck resulting in the injuries in suit. *Held:* The questions of negligence in stopping the truck on the highway without lights at night and contributory negligence of plaintiff in colliding therewith were properly submitted to the jury. *Leonard v. Transfer Co.*, 667.

§ 18c. Contributory Negligence.

Plaintiff's evidence was to the effect that his driver was blinded by the glare of lights on a car approaching from the opposite direction, and that his car struck the rear of defendant's truck, which was parked on the highway. *Held:* Plaintiff's driver should have slowed down so that he could have stopped within the reduced range of his vision, and his failure to have slackened speed so that he could have stopped before hitting an object within the range of his lights, or his failure to have kept a proper lookout so that he would have seen the object in time to avoid hitting it, constituted contributory negligence as a matter of law. *Beck v. Hooks*, 105.

Evidence *held* not to disclose contributory negligence as matter of law on the part of plaintiff struck by truck approaching from opposite direction on its left side of highway. *Barnes v. Teer*, 122.

Evidence *held* to disclose contributory negligence as a matter of law on part of cyclist turning in front of bus on highway. *Van Dyke v. Atlantic Greyhound Corp.*, 283.

Evidence *held* to show contributory negligence as a matter of law on part of pedestrian turning to left on highway in path of truck. *Miller v. Motor Freight Corp.*, 464.

Conceding that both drivers may have been guilty of negligence proximately causing collision at intersection, nonsuit on ground of contributory negligence was properly refused, question of proximate cause being for jury. *McMillan v. Butler*, 582.

Questions of negligence in stopping truck on highway without lights at night and contributory negligence of motorist colliding therewith *held* for jury. *Leonard v. Transfer Co.*, 667.

AUTOMOBILES—*Continued.*

§ 18d. Concurring and Intervening Negligence.

Plaintiff employee was injured while working on repairs to surface of grade crossing when he was struck by car attempting to pass another car traveling in same direction. *Held:* Any negligence on part of employer in failing to maintain proper warning signs was insulated by intervening negligence of driver of car. *Murray v. R. R.*, 392.

The evidence tended to show that a truck, which was followed by several cars, suddenly stopped on the highway without warning, and that the following car turned to its left to pass the truck, and collided with the car in which intestate was riding as a guest, which was traveling in the opposite direction. *Held:* Whether the driver of the truck was guilty of negligence constituting one of the proximate causes of the accident is a question for the jury under the evidence, and an instruction that his negligence, if any, was insulated by the negligence of the driver of the other car is erroneous. *Bechtler v. Bracken*, 515.

§ 18e. Last Clear Chance.

Evidence tending to show that a cyclist riding on the shoulder of a highway on his right suddenly and without giving notice of his intention to do so, turned to his left onto the hard surface portion of the highway immediately in front of defendants' bus, without evidence that the driver of the bus had any reason to apprehend that the cyclist was in a position of peril, is insufficient to invoke the doctrine of last clear chance. *Van Dyke v. Atlantic Greyhound Corp.*, 283.

Held further, there being no evidence that the driver of the truck saw intestate's perilous condition in time to have stopped the truck or that the accident would not have occurred if he had turned the truck to the right, the refusal of the court to submit an issue of last clear chance was not error. *Miller v. Motor Freight Corp.*, 464.

§ 18f. Competency and Relevancy of Evidence as to Speed.

Evidence that defendant was driving his car at the rate of 40 miles per hour three or four miles away from the scene of the accident and from fifteen to 45 minutes prior thereto, without evidence tending to show the conditions of the highway at those places, is incompetent to show that defendant was driving at an excessive speed under the conditions prevailing at the scene of the accident. *Barnes v. Teer*, 122.

Testimony that plaintiff on other occasions was seen operating his car dangerously, recklessly and fast is incompetent to show that plaintiff was traveling at an excessive speed at the time of the accident in suit. *Ibid.*

Testimony of a witness as to speed of plaintiff's bus when it passed the witness' car on the highway immediately before the collision in suit *is held* competent as some evidence of the speed of the bus at the time of the collision, the probative force being for the jury. *Coach Co. v. Lee*, 320.

§ 18h. Instructions.

Charge of the court on the questions of negligence, contributory negligence and proximate cause *held* without error in this case. *Barnes v. Teer*, 122.

An instruction that the violation of statutes regulating the operation of motor vehicles and the conduct of pedestrians on the highway would constitute negligence *per se* and would be actionable if the proximate cause of injury, *is held* without error when it appears that the instruction was applied solely to the provisions of the Motor Vehicle Law prescribing that vehicles should be operated on the right-hand side of the highway and that warning should

be given pedestrians, chapter 407, Public Laws of 1937, sections 108, 135, there being no reference in the charge to a violation of speed restrictions which the statute makes merely *prima facie* evidence that the speed is unlawful. Sec. 103. *Williams v. Woodward*, 305.

The accident in suit was caused by the fact that one or the other of the vehicles involved was over the center line of the highway. Plaintiff requested an instruction that if the jury should find that the collision occurred on plaintiff's right of the center of the highway, or that if the automobile ran to its left into the path of plaintiff's bus at a time when the bus was on its right side of the center of the highway, to answer the issues in favor of plaintiff on defendant's counterclaim. *Held:* The refusal to give the instructions requested was not error, since they were not predicated upon the jury's finding of the facts from the greater weight of the evidence, and made no reference to the burden of proof, which constitutes a substantial right. *Coach Co. v. Lee*, 320.

Plaintiff requested instruction as to the right of a motorist to assume that a vehicle approaching from the opposite direction will stay on its right side of the highway *held* substantially given in the charge. *Ibid.*

§ 21. Parties Liable to Guest or Passenger.

A guest in a car, being without fault, is entitled to recover from each defendant whose negligence concurs in producing the injury. *Montgomery v. Blades*, 680.

§ 23. Liability of Owner for Driver's Negligence in General.

Where a car in which the owner is riding is driven at the owner's request and under his direction by his nephew, the negligence of the driver is imputable to the owner. *Beck v. Hooks*, 105.

§ 24b. Scope of Authority: Course of Employment.

The evidence tended to show that defendant permitted his truck driver to use defendant's truck in going to and from his home to work, that after the conclusion of the day's work, the driver drove to a nearby town where he drank some whiskey, and that the accident occurred while he was driving from the town to his home. There was no evidence that transportation to and from work was furnished as a part of the contract of employment. *Held:* The evidence is insufficient to be submitted to the jury on the doctrine of *respondeat superior*, and defendant's motion for judgment as of nonsuit should have been allowed. *McLamb v. Beasley*, 308.

§ 24e. Liability of Owner Hiring Trucks and Drivers for Injuries to Third Persons.

Whether truck owner furnishing truck for hire retained control over driver so as to be responsible to third person for driver's negligence *held* for jury. *Leonard v. Transfer Co.*, 667.

Where a defendant furnishing a truck for hire retains control over the driver so as to be liable to a third person injured by the driver's negligence in stopping the truck on the highway without lights at night, whether the truck was adequately equipped with lights when put into service under the contract is immaterial. *Ibid.*

§ 31. Prosecutions for Reckless Driving.

A warrant charging that defendant "did unlawfully and willfully operate a motor vehicle on a State Highway in a careless and reckless manner and without due regard for the rights and safety of others and their property in

AUTOMOBILES—*Continued.*

violation" of municipal ordinances and contrary to the form of the statute, *is held* sufficient to charge defendant with reckless driving under Michie's Code, 2621 (287), since although the warrant fails to follow the language of the statute in accordance with the better practice, it does charge facts sufficient to enable the court to proceed to judgment, and the charge of violating the municipal ordinances may be treated as surplusage. *S. v. Wilson*, 769.

The State's evidence tending to show that defendant, driving 60 miles an hour, crashed into the rear of a car driven in the same direction on its right-hand side of the highway at 20 or 25 miles an hour, that the driver of the other car saw in his rear-view mirror defendant approaching at an excessive speed but that defendant struck the car before its driver could get on the shoulders of the road, together with physical evidence showing that defendant's car struck the other car with terrific force, *is held* sufficient to be submitted to the jury upon a warrant charging defendant with reckless driving under Michie's Code, 2621 (287). *Ibid.*

Upon conviction of reckless driving, sentence of defendant to six months in the county jail to be assigned to work the roads under the direction of the State Highway and Public Works Commission is within the limitations prescribed by Michie's Code, 2621 (326), and therefore cannot be held excessive. *Ibid.*

BAIL.

§ 4. Forfeiture and Liabilities on Bail Bonds.

Judgment *nisi* may be made absolute against the surety upon the hearing of the *sci. fa.* notwithstanding that the *sci. fa.* has not been served upon the principal. *Bond Co. v. Krider*, 361; *S. v. Eller*, 365; *S. v. Brown*, 368.

Liability of surety on bail bond is primary, direct and equal with that of principal. *Ibid.*

Subsequent arrest of defendant under a *capias* does not discharge original forfeiture of appearance bond. *Bond v. Krider*, 361.

Upon defendant's plea to an offense less than that charged in the warrant, judgment was suspended upon condition that defendant pay the cost. Defendant was given until Monday of the second week of the term in which to pay the cost. Defendant failed to appear when called Monday of the second week of the term. *Held:* Since defendant was permitted to remain at large under the bond until the second Monday of the term, his failure to appear at that time constitutes a forfeiture of his appearance bond, and the judgment *nisi* was properly made absolute against the surety upon the hearing of the *sci. fa. S. v. Brown*, 368.

Where, at time case is called, defendant is in custody of State upon another charge, judgment absolute should not be entered against surety until he has opportunity to produce defendant after his release. *S. v. Eller*, 365.

BANKRUPTCY.

§ 9. Debts Discharged.

A claim provable in bankruptcy is released by the order of discharge even though the debt is not scheduled if the creditor has notice or actual knowledge of the proceeding in bankruptcy. *Westall v. Jackson*, 209.

§ 11. New Promise.

Where the debtor makes a new promise to pay the debt evidenced by a note, subsequent to the filing of the petition in bankruptcy but before the order of discharge is entered, the creditor's action instituted subsequent to the proceed-

ings is upon the new promise and not upon the note, the right to maintain an action upon the note being extinguished by the discharge and the original debt being recognized only to the extent of admitting it as a consideration for the new promise. Whether C. S., 990, is applicable to a promise made subsequent to the filing of the petition in bankruptcy but before the order of discharge is entered, *quære*. *Westall v. Jackson*, 209.

A bankrupt is not estopped to set up the discharge in bankruptcy as a defense to a claim because of a promise not to plead the discharge made after the petition in bankruptcy is filed, since the express and direct provisions of the discharge cannot be waived. In the present cast plaintiff did not allege or prove a promise not to plead the discharge or rely upon waiver or estoppel. *Ibid.*

BANKS AND BANKING.

§ 8a. Duties and Liabilities in Paying Checks.

In an action against a bank by a depositor to recover money deposited, an instruction to the effect that the burden is upon the bank to prove by the greater weight of the evidence the defense of proper disbursement of the funds on checks signed by the depositor or by some person under the depositor's authority and direction, *is held* without error. *Arnold v. Trust Co.*, 433.

Fact that depositor permitted convicted forger to stay in house is not contributory negligence exculpating bank from liability for paying forged checks. *Ibid.*

§ 16. Statutory Liability of Stockholders.

Purchaser of stock prior to 1925 may not be held personally liable for amount by which sale of stock fails to realize assessment to make good impairment of bank's capital. *Bank v. Derby*, 653.

BILL OF DISCOVERY.

§ 1. Nature and Scope of Remedy for Examination of Adverse Party.

An order for the examination of an adverse party is improvidently granted after complaint has been filed and before answer, since in such case the relief is not sought to obtain information to frame the complaint, and until answer is filed and issues joined, the application is premature for the purpose of obtaining evidence for the trial. C. S., 900, 901. *Ogburn v. Sterchi Bros. Stores, Inc.*, 507.

BILLS AND NOTES.

§ 9f. Whether Holder Is Holder in Due Course.

The holder of a check made payable to order who is not the payee, is not a *bona fide* holder in due course when there is no evidence that the check had been endorsed by the payee. *Foxman v. Hanes*, 722.

§ 10f. Rights and Liabilities of Purchasers and Holders Not in Due Course.

The holder of an unendorsed check is merely the equitable owner, even though he paid full value for the check, and the maker's proof that the execution of the check was procured by fraud constitutes a valid defense as against such holder. *Foxman v. Hanes*, 722.

§ 22. Defenses to Actions on Note.

Evidence that the payee of a post-dated check given in part payment of the purchase price of an oil painting, procured its execution by false representa-

BILLS AND NOTES—*Continued.*

tions that the painting was by an old master, whereas in fact the painting was by an unknown artist and comparatively worthless, is sufficient to show that the execution of the check was procured by fraud constituting a defense to an action on the check by the payee or by a holder not a holder in due course. C. S., 3030. *Foxman v. Hanes*, 722.

Defense of failure of consideration *held* not available to makers upon record in this case. *Sineath v. Katzis*, 740.

BOUNDARIES.

§ 3. Definiteness of Description and Admissibility of Parol Evidence.

Specific description *held* not too indefinite to permit parol evidence in aid thereof, and holding as matter of law that description in prior deed to which it referred controlled is error. *Bailey v. Hayman*, 175.

The description of land in a deed or will must be sufficiently definite to identify the property either within itself or by recurrence to something extrinsic to which the instrument refers, so that the description may be made certain under the principle *id certum est quod certum reddi potest. Hodges v. Stewart*, 290.

§ 13. Court Surveys.

The statute empowering the Superior Court to order a court survey of land in dispute in a pending action, C. S., 364, vests in the court a sound discretion within the limits defined. *Vance v. Pritchard*, 273.

Denial of motion for court survey *held* not error upon the facts found. *Ibid.*

BURGLARY AND UNLAWFUL BREAKINGS.

§ 9. Sufficiency of Evidence and Nonsuit.

Evidence that perpetrators of crime used car which defendant customarily used, but failing to directly identify defendant as one of perpetrators, *held* insufficient. *S. v. Shu*, 387.

Fingerprint testimony *held* sufficient to take case to jury. *S. v. Helms*, 592.

§ 10. Instructions.

Failure of the court to submit question of defendant's guilt of nonburglarious breaking, presented by evidence, *held* error. *S. v. Chambers*, 442.

Where all the evidence shows that dwelling was actually occupied, instruction that verdict of burglary in second degree is not permissible, is without error. *S. v. Johnson*, 604.

CARRIERS.

§ 8. Loading and Shipping Facilities.

Railroad company is under duty to exercise due care to locate loading facilities so they will not unnecessarily damage others. *Hosiery Mills v. R. R.*, 277.

CHATTEL MORTGAGES AND CONDITIONAL SALES.

§ 11. Rights and Remedies of Mortgagee.

This action was instituted by a mortgagee against a warehouseman alleging that the defendant sold tobacco subject to the registered chattel mortgage and turned over the proceeds of sale to the mortgagor. Defendant demurred

for defect of parties upon his contention that plaintiff should follow the tobacco into the hands of the purchaser. *Held:* The demurrer was properly overruled, plaintiff being entitled to sue any party liable he deems responsible. *Credit Corp. v. Satterfield*, 298.

CONSPIRACY.

§ 3. Nature and Elements of the Crime.

Conspiracy is a felony. *S. v. Dale*, 625.

§ 4. Indictment.

A charge of conspiracy to defraud by means of false pretense does not merge with the charge of obtaining money by false pretense in execution of the conspiracy, and the indictment charges two separate offenses in one count, but is not bad for duplicity. *S. v. Dale*, 625.

An indictment charging a conspiracy to obtain money by false pretense need not allege that the misrepresentations were such as to cause or induce the payment of money, since an indictment for conspiracy need not define the crime, which is the subject of the conspiracy, with legal and technical accuracy. *Ibid.*

§ 5. Competency of Evidence.

When a *prima facie* case of conspiracy is made out, the acts and declarations of each conspirator in furtherance of the common purpose are admissible against all, and the order of proof within the limitations of the rule rests largely in the discretion of the trial court. *S. v. Dale*, 625.

CONSTITUTIONAL LAW.

§ 4a. Legislative Power in General.

An act of the General Assembly in conflict with the Constitution is void. *Bank v. Derby*, 653.

§ 4c. Delegation of Power.

The making of law is a function of the Legislature which it may not delegate, unless expressly authorized by the Constitution, and while it may grant administrative boards and commissions power within definite, valid limits, to promulgate rules and regulations for the administration of a law or to determine the existence of facts upon which a legislative declaration of policy is to apply, such rules and regulations adopted by administrative agencies do not have the effect of substantial law. *Motsinger v. Perryman*, 15.

§ 4d. Power of Legislature Over Municipal Corporations and Political Subdivisions.

The distribution and allotment of the powers of government to existing agencies or those created by statute is the function of the legislative branch of the Government, and the courts have no power to interfere therewith as long as the General Assembly acts within constitutional limitations. *Utilities Com. v. Coach Co.*, 233.

Municipal corporations are subject to almost unlimited legislative control. *Cox v. Brown*, 350.

§ 6b. Power and Duty of Courts to Determine Constitutionality of Statutes.

The Supreme Court cannot declare a statute unconstitutional and void where there is any doubt. *Fletcher v. Comrs. of Buncombe*, 1; *Hinson v. Comrs. of Yadkin*, 13.

CONSTITUTIONAL LAW—*Continued.*

§ 10. Morals and Public Welfare.

The Flanagan Act, prohibiting the possession or distribution of gaming slot machines, chapter 196, Public Laws of 1937, is a valid and constitutional exercise of the police power of the State. *S. v. Abbott*, 470.

§ 15a. Due Process of Law: Law of the Land.

To give retroactive effect to statute providing for personal liability of bank stockholder for amount sale of stock fails to realize assessment to make good impairment of bank's capital, would violate due process provisions of Federal and State Constitutions. *Bank v. Derby*, 653.

§ 20. Obligations of Contract.

To give retroactive effect to statute providing for personal liability of bank stockholder for amount sale of stock fails to realize assessment to make good impairment of bank's capital would impair obligations of contract. *Bank v. Derby*, 653.

§ 26. Necessity of Indictment or Presentment.

Where a prosecution for unlawfully selling intoxicating liquors is transferred from the recorder's court to the Superior Court, defendant may be there tried upon the original warrant without a bill of indictment. Public Laws of 1929, ch. 115, sec. 2. *S. v. Samia*, 307.

§ 29. Right of Defendant Not to Incriminate Self.

The constitutional provision that a defendant shall not be compelled to testify against himself, Fifth Amendment to the Federal Constitution, does not preclude the prosecution from calling to the jury's attention the physical aspect of defendant when relevant to the inquiry. *S. v. Brackett*, 369.

§ 32. Cruel and Unusual Punishment.

Defendant's contention that he was subjected to cruel and unusual punishment in that the trial court sentenced him to the maximum prison term permitted by statute for the offense of seduction of which he was convicted, and in addition dictated a letter to the Parole Commissioner in which he requested that no clemency be extended defendant, and also directed the solicitor to institute prosecution against defendant for failure to support his illegitimate child, *is held* untenable, since the letter to the Parole Commissioner and the instructions to the solicitor are not parts of the sentence imposed. *S. v. Brackett*, 369.

Where a statute prescribing the punishment for a statutory offense fixes limitations upon the severity of the punishment, the court has discretionary power to fix the punishment within the limitations prescribed, and a sentence of imprisonment for the maximum period allowed by the statute cannot be held excessive or in violation of the constitutional rights of defendant. *S. v. Wilson*, 769.

CONTEMPT OF COURT.

§ 2b. Willful Disobedience of Court Order.

Court must find facts supporting its conclusion that disobedience of court order was willful. *Smithwick v. Smithwick*, 503.

§ 6. Review of Contempt Proceeding.

The facts found by the court in contempt proceedings against a husband for willfully refusing to comply with an order for payment of alimony, are not reviewable on appeal except for the purpose of passing on their sufficiency to warrant the judgment committing him to jail. *In re Adams*, 379.

CONTRACTS.

§ 7a. Contracts in Restraint of Trade.

A contract not to engage in a particular business or trade is valid provided the restraint is reasonable as to both time and space and is reasonably necessary to protect the interest of the covenantee. *Sineath v. Katzis*, 740.

Ordinarily, a covenant not to engage in the same business within a specified time in a particular locality is incidental to the main contract under which the covenantee purchases the business and acquires the interest sought to be protected by the covenant, but it is not required that the covenantor should be the vendor in the contract for the sale of the business, it being sufficient if the covenantor was prominent in the business at the place in question. *Ibid.*

Covenantor was prominent in business at place in question, and covenantee was entitled to enforce covenant against him. *Ibid.*

While a person not a party to a noncompetitive covenant cannot be enjoined from engaging in the business, a stranger to the covenant may be enjoined from aiding the covenantor in violating his covenant or from receiving any benefit from its violation. *Ibid.*

While the covenantor may be restrained from organizing or taking stock in a corporation projected into a business in violation of a noncompetitive agreement, the corporation itself may not be restrained unless it is made to appear that it is substantially the *alter ego* of the covenantor, and in the absence of evidence as to who the stockholders of the new corporation are or what interest any particular person has in it, the covenantee is not entitled to restrain the corporation itself. *Ibid.*

§ 8. General Rules of Construction.

General laws of the State in force at the time of the execution of a contract enter into and become a part of the contract. *Motsinger v. Perryman*, 15.

Rules promulgated by an administrative agency do not constitute part of the law of the State within the meaning of the rule that the laws of the State in existence at the time become a part of the contract as though referred to or incorporated therein. *Ibid.*

§ 23. Sufficiency of Evidence of Breach and Nonsuit.

Evidence of breach of noncompetitive agreement *held* sufficient for jury. *Sineath v. Katzis*, 740.

§ 25b. Measure and Proof of Damages.

Evidence *held* insufficient to support recovery of substantial damage resulting from breach of noncompetitive agreement. *Sineath v. Katzis*, 740.

CORPORATIONS.

§ 25b. Liability of Officers and Agents for Torts.

Complaint *held* sufficient to state cause of action in fraud against officers and agents of corporation. *Cotton Mills v. Mfg. Co.*, 560.

COSTS.

§ 1b. Prosecution of Action as a Pauper.

A typewritten statement, purporting to have been signed by plaintiff, to the effect that plaintiff was unable to comply with C. S., 493, which statement is followed by an unsigned, unsealed and unauthenticated jurat is not an affidavit, and will not support an order allowing plaintiff to prosecute the action

COSTS—*Continued.*

as a pauper, C. S., 494, but the deficiency does not necessarily require the dismissal of the action, since the court may give plaintiff a reasonable time to supply the deficiency. *Ogburn v. Sterchi Bros. Stores, Inc.*, 507.

§ 2b. Taxing of Costs in Actions Against Joint Tort-Feasors.

In this action against joint tort-feasors, the court, upon ascertaining that one defendant had reached a compromise agreement with plaintiff and had agreed to remain in the case solely to prevent the other defendant from fixing it with sole liability, dismissed the action as to the compromising defendant. *Held:* The order of the court taxing plaintiffs with one-half the costs which accrued prior to the dismissal of the actions against the compromising defendant is authorized by C. S., 1242. *Gold v. Kiker*, 204.

COURTS.

§ 1a. Nature and Scope of Jurisdiction in General.

The Superior Court is a court of final jurisdiction and has power to completely determine a controversy properly before it, and its judgment is final as to all matters of fact established in accordance with procedure and is subject to appeal and review only on matters of law. Const. of N. C., Art. IV, sec. 12; C. S., 1439, 639. *Utilities Com. v. Coach Co.*, 233.

§ 1d. Objections to Jurisdiction.

Whenever the court perceives that it is without jurisdiction in the cause it may dismiss the action *ex mero motu* and therefore, *ex necessitate*, may dismiss same upon motion of defendant. *Edwards v. McLauchorn*, 543.

§ 3. Jurisdiction After Order or Judgment of Another Superior Court Judge.

Ordinarily, one Superior Court judge has no power to overrule the judgment or reverse the findings of fact previously made in the cause by another judge of the Superior Court. *In re Adams*, 379.

Where one Superior Court judge has denied a motion to strike certain matter from the complaint, another Superior Court judge is without jurisdiction to hear a motion to strike substantially the same matter from the amended complaint, since no appeal lies from one Superior Court judge to another. *Bank v. Daniel*, 710.

§ 7. Jurisdiction of County, Municipal, and Recorder's Courts.

Demurrer to the jurisdiction, C. S., 511, for that summons was issued out of a recorder's court to another county in an action *ex contractu* involving less than $200.00, Public Laws of 1939, chapter 81, is bad as a speaking demurrer, since the defect does not appear upon the face of the complaint. *Credit Corp. v. Satterfield*, 298.

This action was instituted in a recorder's court against a warehouseman to recover the sum of $134.00 upon allegation that defendant had sold tobacco subject to plaintiff's chattel mortgage and paid the proceeds to the mortgagor. *Held:* Defendant's objection to the jurisdiction on the ground that the action was *ex contractu* for an amount less than $200.00, and that summons was issued out of the county, is untenable, since the complaint is sufficient to allege a cause of action for conversion. *Ibid.*

§ 10. Administration of Federal Acts by State Courts.

An employee may maintain an action in the courts of this State to recover compensation alleged to be due him under the Federal Fair Labor Standards

COURTS—*Continued.*

Act, since State courts of general jurisdiction have power to decide cases involving the rights of litigants under the Constitution or statutes of the United States, unless forbidden by the Federal Constitution or act of Congress. *Hart v. Gregory*, 184.

CRIMINAL LAW.

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- 2. Intent: Willfullness. S. v. Stephenson, 258.

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- 47. Consolidation of Indictments for Trial. S. v. Cotton, 577.
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- 52. Taking Case from Jury.
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- 53. Instructions.
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  - e. Expression of Opinion on Evidence. S. v. Cureton, 491; S. v. Wyont, 505; S. v. Starnes, 539; S. v. Webster, 692.
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- 57. Motions for New Trial for Misconduct of, or Affecting Jury. S. v. Stephenson, 258.
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X. Judgment and Sentence
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- 81d. Questions Necessary to Determination of Appeal. S. v. Cotton, 577.
- 83. Determination and Disposition of Cause. S. v. Cannon, 466.

§ 2. Intent; Willfulness.

The word "willfully" as used in a criminal statute means more than an intention to commit the offense; it implies committing the offense purposely and designedly in violation of law; and the word "knowingly" means that the defendant with knowledge of what he is about to do proceeds to do the act proscribed; and the phrase "willfully and knowingly" means intentionally and consciously committing the offense. *S. v. Stephenson*, 258.

CRIMINAL LAW—*Continued.*

§ 5a. Mental Capacity in General.

Every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes until the contrary is proven to the satisfaction of the jury. *S. v. Cureton*, 491.

§ 5b. Mental Capacity as Affected by Intoxicants. (As precluding premeditation see Homicide § 10.)

Although intoxication is an affirmative defense, no special plea is required. *S. v. Cureton*, 491.

§ 7. Limitations of Prosecutions.

A criminal conspiracy is a felony and therefore no statute of limitations bars a prosecution therefor. *S. v. Dale*, 625.

§ 11. Felonies and Misdemeanors.

Conspiracy is a felony. *S. v. Dale*, 625.

§ 29a. Relevancy and Competency of Evidence in General.

When evidence is relevant and competent, the fact that it may excite sympathy for the accused or create prejudice against him in the minds of the jurors does not require that it be excluded. *S. v. Hudson*, 219.

It is always competent to show the motive for the commission of a crime even though motive does not constitute an element of the offense charged. *Ibid.*

Defendant's aunt testified that defendant come to her house the morning following the homicide, stated in effect that he was afraid he would be connected with the murder and asked her to tell officers of the law that he had spent the night before the homicide at her house and had borrowed money from her. *Held:* The testimony of defendant's aunt was substantive and relative as indicating an attempt on the part of the defendant to frame a defense in advance of accusation and to account for money in his possession. *S. v. Smith*, 334.

§ 31c. Fingerprints.

Testimony of a fingerprint expert as to the identity of the fingerprints of defendant with those found at the scene of the crime, which could have been impressed only at the time the crime was committed, is competent as substantive evidence tending to show that defendant was present when the crime was committed and that he at least participated in its commission. *S. v. Helms*, 592.

Whether fingerprints identified as those of defendant could have been impressed only at time crime was committed *held* for jury. *Ibid.*

§ 32a. Circumstantial Evidence in General.

In order to sustain conviction on circumstantial evidence, the evidence must exclude any reasonable hypothesis of innocence. *S. v. Shu*, 387.

§ 33. Confessions.

The evidence in this case *is held* to disclose that the confessions testified to by the witnesses were made by defendant voluntarily and were not induced by hope or extorted by fear, and the testimony was properly admitted in evidence. *S. v. Hudson*, 219.

Defendant objected to the answer of a witness on the ground that it was not responsive to the solicitor's question and contained matter in the nature of a confession which might or might not have been voluntary. *Held:* De-

fendant's procedure to challenge testimony of a confession on the ground that it was not voluntary is upon the *voir dire* and the exception to the testimony cannot be sustained. *Ibid.*

§ 34c. Silence as Implied Admission of Guilt.

Whether defendant's silence in presence of incriminating statement rendered the circumstance competent as an implied admission of guilt *held* not necessary to be decided, testimony of the statement being competent for the purpose of corroborating declarant who later testified that she had made the statement. *S. v. Smith*, 334.

§ 41e. Evidence Competent to Corroborate or Impeach Witness.

Testimony that defendant's aunt made incriminating statement in defendant's presence *held* competent to corroborate later testimony of the aunt that she had made the statement. *S. v. Smith*, 334.

§ 41h. Competency of Husband or Wife of Accused.

While either husband or wife may testify for the other in a criminal action, neither is competent to testify against the other. C. S., 1802. *S. v. Cotton*, 577.

Where husband and wife are separately indicted for murder of same person, and prosecutions are consolidated for trial over objection, wife's testimony inculpating husband, though admitted solely as to her, necessarily prejudices him and entitles him to a new trial. *Ibid.*

§ 47. Consolidation of Indictments for Trial.

Ordinarily, the court may consolidate separate indictments for trial in proper instances, and has discretionary authority to deal with an application for a severance. *S. v. Cotton*, 577.

Where husband and wife are separately indicted for the same homicide and the prosecutions are consolidated and tried together over their objections, and the wife's testimony, though admitted only as to her, is to the effect that her husband killed deceased and forced her, through fear, to confess and attempt to exculpate him, her testimony is necessarily inculpatory of the husband and impinges C. S., 1802, and his motion for a mistrial and severance at the conclusion of the State's evidence should have been granted. *Ibid.*

§ 48a. Order of Proof.

The order of proof rests largely in the discretion of the trial court, and corroborating testimony may be introduced prior to testimony of witness corroborated. *S. v. Smith*, 334.

§ 48b. Admission of Evidence Competent for Restricted Purpose.

Caution of court that wife's testimony should be considered solely as to her and should not be considered against husband, on trial with her for same offense, *held* not to prevent her testimony from being prejudicial as to him. *S. v. Cotton*, 577.

The admission of evidence generally and without qualification will not be held erroneous, even though the evidence is competent only for the purpose of corroboration, when at the time of its admission defendant does not request that its purpose be restricted. *S. v. Johnson*, 604.

§ 51. Argument and Conduct of Counsel.

Impropriety in the argument of counsel is cured by correction by the court, and ordinarily the court may make such correction in the charge or at any time during the trial, immediate interference by the court being necessarily only in case of gross impropriety. *S. v. Brackett*, 369.

The evidence tended to show that defendant killed deceased by a violent blow with a hammer. Defendant testified that he did not "hit her hard." *Held:* The action of the solicitor in striking his hand upon a table with some violence and asking the defendant if the blows that defendant struck deceased were like that, *is held* not to have seriously prejudiced defendant and was not such as to call for the exercise by the court of its discretionary power of supervision. *S. v. Starnes*, 539.

Solicitor's reference to failure of defendant's wife to testify *held* prejudicial and not properly corrected by court. *S. v. Helms*, 592.

§ 52a. Province of Court and Jury in Regard to Evidence.

The competency, admissibility, and sufficiency of evidence is for the court; its weight, effect and credibility is for the jury. *S. v. Brown*, 415.

§ 52b. Nonsuit.

A motion for judgment as of nonsuit should be denied if there is any evidence tending to prove the fact in issue, or which reasonably conduces the conclusion of guilt as a fairly logical and legitimate deduction, but evidence which merely raises a suspicion or conjecture of the fact of guilt is insufficient to be submitted to the jury. C. S., 4643. *S. v. Stephenson*, 258.

Evidence which raises mere speculation or conjecture of guilt is insufficient to be submitted to jury. *S. v. Shu*, 387.

Upon motion to nonsuit, all the evidence upon the whole record tending to sustain conviction is to be considered in the light most favorable to the State, and it is entitled to every reasonable intendment thereon and every reasonable inference therefrom, and only the evidence favorable to the State will be considered. C. S., 4643. *S. v. Brown*, 415.

The evidence tended to show the breaking and entering of a dwelling and the taking of property therefrom of a value in excess of $20.00, and that entry was effected through a porch window. Fingerprints identified as those of defendant were taken from the window. The evidence also disclosed that defendant was a painter, and prior to the night of the crime had been employed in painting in the house. There was also evidence that after all the painting was finished the windows had been washed on both the inside and outside. *Held:* Whether the evidence establishes beyond a reasonable doubt that the fingerprints could have been impressed on the window only at the time the crime was committed is a question for the jury, and defendant's motions for nonsuit were correctly denied. *S. v. Helms*, 592.

§ 53a. Form and Sufficiency of Instructions in General.

In a prosecution for maintaining a gambling house and for illegal possession of gambling devices, the failure of the court to define "gambling" or "gambling device" will not be held for error in the absence of a prayer for special instructions, since these terms have a definite and well recognized meaning which is the same in law as well as in common usage. *S. v. Webster*, 692.

§ 53b. Statement of Law and Application of Evidence Thereto.

An inadvertence of the court in stating defendant's testimony was called to the court's attention, and the court thereupon stated that it might be in error in regard thereto and that the jury should rely upon its recollection of the evidence upon the point. *Held:* The inadvertence was sufficiently corrected in the absence of a request by the defendant that the court review the evidence on that particular aspect. *S. v. Brown*, 415.

In this prosecution for homicide the State relied principally upon direct evidence, and as to the actual homicide relied mainly upon statements made

by defendant, and relied upon circumstantial evidence only to a small extent in making out its case against the defendant. *Held:* Upon the record it was not the duty of the court to charge upon the law of circumstantial evidence. *S. v. Wall*, 566.

Court must apply evidence to law as substantive part of charge, and failure to do so is error even in absence of request. *S. v. Greer*, 660.

§ 53c. On Burden of Proof and Presumptions. (In homicide prosecutions see Homicide.)

A charge that the burden of proving defendant guilty beyond a reasonable doubt does not require the State to prove defendant guilty beyond all doubt, or a vain or fanciful doubt, but only beyond a reasonable doubt, which is one based upon common sense and reason, and generated by insufficiency of proof, *is held* without error. *S. v. Brackett*, 369.

§ 53d. Instructions on Less Degrees of Crime Charged.

When supported by evidence, court must submit to jury question of defendant's guilt of less degrees of the crime charged. *S. v. Chambers*, 442.

Where all the evidence shows that dwelling was actually occupied, instruction that verdict of burglary in second degree is not permissible, is without error. *S. v. Johnson*, 604.

§ 53e. Expression of Opinion on Evidence.

Where the State has a number of witnesses and only defendant testifies for the defense, the fact that the court necessarily consumes more time in outlining the evidence for the State than that of defendant does not support defendant's contention that the court expressed an opinion upon the facts by laying undue emphasis on the contentions of the State. *S. v. Cureton*, 491.

Charge that evidence relating to essential element of crime should satisfy the jury beyond a reasonable doubt, interjected in stating defendant's contentions, *held* for error as expression of opinion. *S. v. Wyont*, 505.

The court remarked that it was admitting evidence for the purpose of corroboration and that if the evidence did not corroborate the witness it would strike it out. The evidence was competent and was not stricken. *Held:* The remark of the court taken in connection with the failure to strike is not an expression of opinion by the court that the evidence did corroborate the witness, it being apparent that the court was referring to the function of the evidence rather than its effect, and the contention that it amounted to an expression of opinion on the weight of the evidence is too remote to afford an inference of substantial prejudice. *S. v. Starnes*, 539.

In this prosecution for homicide, defendant's testimony tended to show a quarrel between him and deceased and an attack made upon him by deceased. The court charged the jury that the jury might consider the entire absence of provocation and *proof* that there was no quarrel between them prior to the killing upon the question of premeditation and deliberation. *Held:* The instruction is susceptible to the construction that the absence of provocation and of any quarrel before the killing had been proved, and the instruction must be held for prejudicial error as an expression of opinion by the court upon the weight of the evidence. *Ibid.*

A reference in the charge to "these gambling devices" will not be held prejudicial as an expression of opinion on the evidence when it is apparent that the charge referred abstractly to the devices mentioned in the warrant and not to those about which evidence had been taken. *S. v. Webster*, 692.

A charge that a punchboard and a tip book are the same under the statute and "that if you find this defendant guilty" will not be held for error as an

expression of opinion on the evidence when the phrase is immediately followed by an instruction that in order to convict, the jury must find beyond a reasonable doubt that the tip boards were gambling devices and were in defendant's possession. *Ibid.*

§ 53g. Statement of Contentions and Objections and Exceptions Thereto.

A statement of contentions, based on evidence which had not been introduced and concerning which defendant had no opportunity to cross-examine the witnesses, will be held for error notwithstanding the absence of objection at the time. *S. v. Wyont*, 505.

§ 53h. Construction of Instructions.

The charge of the court will be construed contextually as a whole. *S. v. Brackett*, 369.

§ 54c. Rendition and Acceptance of Verdict and Power of Court to Require Redeliberation.

When jury returns verdict of not guilty on the first count and an irresponsive verdict on the second count, and the court requires it to redeliberate, *Held:* Its verdict thereafter rendered of guilty of a less degree of the crime on the first count will be stricken out, since the first verdict of not guilty thereon precludes further consideration thereof. *S. v. Wilson*, 556.

When the jury's verdict on the second count is not responsive, and the court requires it to redeliberate, its later verdict on the second count, correct in form and consistent with law, is properly accepted by the court. *Ibid.*

§ 56. Motions in Arrest of Judgment.

A motion in arrest of judgment is properly denied in the absence of a vital defect appearing upon the face of the record. *S. v. Brown*, 415.

Motion in arrest of judgment allowed for that name of appealing defendant did not appear in body of indictment. *S. v. Finch*, 511, 512.

Motion in arrest of judgment may be made in Supreme Court on appeal. *S. v. Jones*, 734.

An indictment charging possession of gambling devices, but failing to charge that defendant operated the devices or had them in his possession for the purpose of being operated, is fatally defective, C. S., 4437 (b), and defendant's motion in arrest of judgment will be allowed. *Ibid.*

Where the warrant or indictment is not fatally defective, a motion in arrest of judgment cannot be allowed. *S. v. Wilson*, 769.

§ 57. Motions for New Trial for Misconduct of, or Affecting Jury.

Defendant moved to set aside the verdict for that the jury, without defendant's consent, took into its room the complaint in a civil action relating to the subject matter of the prosecution, which had been admitted in evidence without objection, C. S., 533, and typed notes of the argument of counsel for the prosecution containing reference to defendant's failure to testify, C. S., 1799. *Held:* In the absence of defendant's consent, it was error to permit the jury to take such papers into the jury room and retain same while in its deliberations, and defendant's motion to set aside the verdict should have been allowed. *S. v. Stephenson*, 258.

§ 59. Motions to Set Aside Verdict as Being Contrary to Weight of Evidence.

A motion to set aside the verdict as being contrary to weight of the evidence is addressed to the discretion of the trial court. *S. v. Brown*, 415.

CRIMINAL LAW—*Continued.*

§ 61a. Judgment and Sentence in General.

Where a statute prescribing the punishment for a statutory offense fixes limitations upon the severity of the punishment, the court has discretionary power to fix the punishment within the limitations prescribed, and a sentence of imprisonment for the maximum period allowed by the statute cannot be held excessive or in violation of the constitutional rights of defendant. *S. v. Wilson*, 769.

§ 63. Suspended Judgments and Executions.

Upon conviction, defendant was sentenced to six months on the roads, *capias* to issue on motion of the solicitor. *Held:* The judgment was not suspended but the sentence was definitely imposed with execution thereon delayed until the solicitor should make motion in court for *capias*, and the judgment is valid, the time when sentence shall be executed and punishment begun being no part of the judgment, and therefore execution of the sentence may be had at any time thereafter upon motion of the solicitor in open court in the presence of defendant. *In re Smith*, 462.

§ 77b. Form and Requisites of Transcript.

Where the record shows that a true bill was found against defendant by the grand jury, that a petit jury was duly sworn and impaneled to "try the issues joined," and that the jury so impaneled found defendant guilty, the record is sufficient under the presumption of regularity to show that defendant entered a plea to the indictment, and defendant's contention that no judgment could have been rendered against him in the court below because it does not appear of record that defendant entered any plea to the indictment cannot be maintained. *S. v. Barnett*, 454.

§ 77c. Matters Not Appearing of Record.

Where the charge of the court is not in the record it will be presumed that the court charged every aspect of the law applicable to the facts. *S. v. Wilson*, 769; *S. v. Hudson*, 219.

§ 78a. Theory of Trial.

An appeal will be determined in accordance with the theory of trial, and when defendant does not assert a defense in the trial court he may not assert such defense for the first time on appeal. *S. v. Cureton*, 491.

§ 78b. Exceptions and Assignments of Error in General.

Ordinarily, only exceptive assignments of error will be considered on appeal, but where defendant has been convicted of a capital felony the Supreme Court will nevertheless review defendant's contentions as to error in the trial and will review the record for error appearing upon its face. *S. v. Brown*, 415.

Exception to failure of court to charge separately on both counts in indictment *held* not to present contention that defendant could not be convicted both of conspiracy to defraud by means of false pretenses, and of false pretenses. *S. v. Dale*, 625.

A motion in arrest of judgment for insufficiency of the indictment may be made in the Supreme Court on appeal, and it is not necessary that the question be presented by exception taken in the trial court. Rule of Practice in the Supreme Court, No. 21. *S. v. Jones*, 734.

§ 78c. Objections and Exceptions to Evidence and Motions to Strike.

Where a portion of the answer of a witness is not responsive or is improper, defendant waives his exception thereto by failing to move that the answer be stricken out. *S. v. Hudson*, 219.

CRIMINAL LAW—*Continued.*

§ 78e. Objections and Exceptions to Charge.

An exception to the charge on the ground that it failed to state in a plain and concise manner the evidence in the case and declare and explain the law arising thereon, is a broadside exception and does not properly present for review any contention of error in the charge. *S. v. Cureton*, 491; *S. v. Webster*, 692.

Ordinarily, an exception to the charge will be considered only in the light of the stated ground of exception. *S. v. Dale*, 625.

§ 78g. Exceptions to, and Appeal from Judgment.

Where defendant enters a plea of guilty and appeals from the judgment rendered, the appeal presents the single question of whether the facts alleged in the indictment and admitted by the plea are sufficient to constitute a criminal offense. In the present case, defendant having waived bill of indictment, the question of the sufficiency of the indictment is not necessarily presented, but *it is held* to properly charge a criminal offense under our statutes. *S. v. Abbott*, 470.

§ 81a. Matters Reviewable.

A motion to set aside a verdict as being contrary to the weight of the evidence is addressed to the discretion of the trial court and its decision thereon is not reviewable. *S. v. Brown*, 415.

§ 81b. Presumptions and Burden of Showing Error.

Where the charge of the court is not in the record it will be presumed that the court correctly charged the law applicable to the evidence. *S. v. Hudson*, 219; *S. v. Wilson*, 769.

§ 81c. Harmless and Prejudicial Error.

Defendant's exception to testimony of a witness for the State cannot be sustained when defendant himself testifies to the same effect. *S. v. Hudson*, 219.

The failure to instruct the jury on less degrees of the crime charged is not cured by verdict of guilty of crime charged. *S. v. Chambers*, 442.

An excerpt from a portion of the judge's statement of the State's contentions will not be held for prejudicial error when it is apparent that considering the charge contextually, defendant was not prejudiced thereby. *S. v. Henderson*, 513.

Where defendant is convicted upon two counts, and is sentenced by the court upon each, the sentences to run concurrently, and the sentence on the second count is the longer, any error in the return of the verdict upon the first count could not prejudice defendant, the conviction and sentence on the second count being without error. *S. v. Wilson*, 556.

Defendant's exception to the exclusion of evidence which is immaterial cannot be sustained. *S. v. Wall*, 566.

Defendant's exception to the exclusion of testimony which is mere repetition cannot be sustained. *Ibid.*

Defendant's exception to the exclusion of testimony when the record fails to disclose what the answer of the witness would have been had he been permitted to testify cannot be sustained. *Ibid.*

§ 81d. Questions Necessary to Determination of Appeal.

Where a new trial is awarded on one exception, other exceptions relating to matters which may not arise upon another hearing need not be considered. *S. v. Cotton*, 577.

CRIMINAL LAW—*Continued.*

§ 83. Determination and Disposition of Cause.

Where the form of the verdict is insufficient to support the judgment, a *venire de novo* will be ordered. *S. v. Cannon*, 466.

DAMAGES.

§ 12. Sufficiency of Evidence and Proof of Substantial Damage.

In order to recover substantial damage, plaintiff must prove by the greater weight of the evidence the fact of such damage and that it naturally and proximately resulted from the wrong complained of, and evidence which leaves the causal connection between the wrong and the damage in speculation and conjecture is insufficient. *Sineath v. Katzis*, 740.

DEATH.

§ 1. Presumption of Death After Seven Years Absence.

Where a person is absent for a period of seven years without being heard from by those who would naturally be expected to hear from him if he were alive, he will be presumed dead at the end of the seven years, but the presumption is rebuttable. *Deal v. Trust Co.*, 483.

The presumption of death after seven years absence raises no presumption that the absent person died without children him surviving. *Ibid.*

§ 3. Parties, Grounds and Conditions Precedent to Action for Wrongful Death.

Since an action for wrongful death exists solely by virtue of the statute, C. S., 160, it must be maintained and prosecuted in strict accord with the statute, and an administratrix appointed by the court of another state may not maintain an action for wrongful death in this State. Such holding does not impinge Article IV, sec. 1, of, or the 14th Amendment to, the Federal Constitution. *Monfils v. Hazlewood*, 215.

§ 4. Time Within Which Action for Wrongful Death Must Be Instituted.

While the requirement that an action for wrongful death must be instituted within one year, C. S., 160, is a condition annexed to the cause of action rather than a statute of limitations, the provisions of C. S., 415, permitting the institution of an action within one year after nonsuit in an action instituted within the time prescribed, applies to actions for wrongful death. *Blades v. R. R.*, 702.

Where cross action for wrongful death is set up within one year but is dismissed on appeal as not arising out of plaintiff's cause, administratrix may institute another action within one year. *Ibid.*

§ 8. Expectancy of Life and Damages.

The evidence disclosed that intestate was a young man 18 years of age, of sober and industrious habits, that at the time of his death he was a newspaper photographer of skill and ability. The court correctly instructed the jury as to the method of ascertaining the present net worth of deceased to his family. *Held:* The refusal of a requested instruction that since the administrator had not shown the amount of any earnings on the part of the intestate, the jury should not speculate as to what his earnings had been, is not error. *Coach Co. v. Lee*, 320.

DESCENT AND DISTRIBUTION.

§ 16. Right of Heir to Sell and Title and Rights of Transferee.

A deed by an heir executed within two years of intestate's death is ineffective as against creditors of intestate's estate when the personalty is insufficient to pay all debts. *Cox v. Wright*, 342.

DIVORCE.

§ 10. Effect of Decree of Divorce.

The husband's action for divorce on the ground of two years separation was consolidated for trial with the wife's subsequent action for alimony without divorce, C. S., 1667. The decree of divorce was granted in the first action and judgment entered against the wife in the second action upon the verdict of the jury, and the wife appealed in both actions. *Held:* The decree of absolute divorce terminates all the rights arising out of marriage, including the right to alimony, and upon dismissal of the appeal from the judgment of divorce, the judgment in the action for alimony will be affirmed. *Hobbs v. Hobbs*, 468.

§ 14. Enforcing Payment of Alimony. (Habeas Corpus by husband to obtain release see Habeas Corpus.)

The facts found by the court in contempt proceedings against a husband for willfully refusing to comply with an order for payment of alimony are not reviewable on appeal except for the purpose of passing on their sufficiency to warrant the judgment commiting him to jail. *In re Adams*, 379.

In contempt proceedings for willful failure to comply with an order of court, it is required that the court find facts supporting the conclusion of willfulness, and findings of fact that defendant had been ordered to pay, under the provisions of C. S., 1667, a certain sum monthly for the necessary subsistence of his wife and child, and that defendant had failed to comply with the order, without findings as to the property possessed by defendant or his earning capacity, will not support a judgment attaching defendant for contempt. *Smithwick v. Smithwick*, 503.

The mere fact that a defendant ordered to pay a certain sum monthly for the necessary subsistence of his wife and child has a right to move at any time for modification of the order does not support the conclusion that defendant's failure to comply with the order is willful. *Ibid.*

DRAINAGE DISTRICTS.

§ 16. Remedies of Bondholders.

In an action to recover upon bonds of a drainage district, allegations of ownership and amount of the bonds, their maturity, demand for payment and prayer for *mandamus* to require the imposition and collection of assessments for their payment, will support judgment for the recovery of the money due upon the bonds, notwithstanding the absence of a specific prayer for judgment for the money, since the relief to which the plaintiff is entitled is determined by the facts alleged and not by the prayer for relief. *Dry v. Drainage Comrs.*, 356.

In this action by bondholder for *mandamus* to compel levy of assessments for payment of bonds, defendant *is held* to have waived conditions precedent to *mandamus* that petition show resources available for satisfaction of judgment and the necessity for the writ, and that claim had been reduced to judgment; defendant having failed to object and having agreed that the basic issues of fact and of law be submitted to the court. *Ibid.*

DRAINAGE DISTRICTS—*Continued.*

In bondholder's action, questions relating to fiscal management and administrative problems of commissioners, raised in defendant's answer, were properly disregarded by court in trial by it under agreement, even in the absence of a motion by plaintiff to strike the extraneous matter from the answer, and the court properly confined itself to the issues existing solely between plaintiff and defendant district, and judgment on the bonds and order for levy and collection of sufficient assessments to pay the bonds was proper. *Ibid.*

EJECTMENT.

§ 13. Burden of Proof.

Where defendants in an action in ejectment deny in their answer the allegation of the complaint in respect to plaintiff's title and defendants' wrongful possession, nothing else appearing, plaintiff has the burden of proving both title in himself and wrongful possession by defendants. *Mortgage Corp. v. Barco*, 154.

Where defendants deny wrongful possession, and do not claim title to land which may be identified as a matter of law as that described in the complaint, plaintiff must prove possession by defendants. *Ibid.*

§ 15. Sufficiency of Evidence and Nonsuit.

Where defendants deny wrongful possession, and do not claim title to land which may be identified as a matter of law as that described in the complaint, nonsuit should be granted in absence of evidence that defendants were in wrongful possession. *Mortgage Corp. v. Barco*, 154.

ELECTION OF REMEDIES.

§ 3. Election Between Actions in Tort and Ex Contractu.

An exception to the refusal of the court to require plaintiff to elect between an action in contract for breach of warranty and in tort for deceit cannot be sustained when it appears that the action was tried solely upon the theory of fraud or deceit. *Harding v. Ins. Co.*, 129.

§ 7. Bar of Alternate Remedy.

Judgment in an action tried solely upon the theory of fraud or deceit will not bar plaintiff from thereafter pursuing his alternate remedy *ex contractu*, if any he has, for breach of warranty. *Harding v. Ins. Co.*, 129.

ELECTRICITY.

§ 7. Condition of Wires, Poles and Equipment.

The evidence tended to show that defendant power company maintained high tension wires through a tree in proximity to the house in which intestate lived, that the wires rubbed against limbs of the tree so that the insulation had been worn off, and that for a long period before the accident in suit sparks of electricity were seen in and about the branches of the tree, that intestate climbed the tree to saw off limbs which were rubbing against the house, and was electrocuted. *Held:* The refusal of the trial court to submit an issue tendered by plaintiff as to defendant's operation and maintenance of a nuisance is without error, and the judgment for defendant, entered upon the jury's negative finding to the issue of negligence, is upheld. *Butler v. Light Co.*, 116.

EMINENT DOMAIN.

§ 8. Amount of Compensation in General.

In proceedings to take land for a public highway, the measure of damages is the difference in the fair market value of respondent's land immediately before and immediately after the taking, the elements upon which the damages are predicated being the fair market value of the land taken and the injury to respondent's remaining land, less any general and special benefits accruing to respondent from the construction of the highway? *Highway Com. v. Hartley*, 438.

Damages recoverable in condemnation proceedings must be ascertained as of the time of the taking, but evidence of the value of respondent's land within a reasonable time before and after the taking is competent, the reasonableness of the time being dependent upon the nature of the property, its location and surrounding circumstances, and whether the evidence offered fairly points to its value at the time in question. *Ibid.*

Evidence of value of respondent's land some four years subsequent to taking *held* too remote under the facts of the case. *Ibid.*

§ 14. Petition.

This proceeding was instituted by a municipality to condemn an easement over respondent's land for a sewer line, C. S., 2791, 2792, 1705, *et seq.* The petition described defendant's tract of land over which the easement was sought but did not describe the property sought to be condemned. *Held:* Defendant's demurrer to the petition for insufficiency of the description should have been sustained. C. S., 1716. *Gastonia v. Glenn*, 510.

ESTATES.

§ 1. Nature and Incidents of Estates in General.

The term "estate" means any interest in land, from fee simple down to naked possession. *Shoemaker v. Coats*, 251.

ESTOPPEL.

§ 1. Creation and Operation of Estoppel by Deed.

A void deed cannot be the basis of an estoppel. *Fisher v. Fisher*, 42.

The owners of land executed a mortgage on same to secure a note. Thereafter they executed a deed to the husband of the mortgagee. Two years later the mortgagee and her husband executed and delivered full warranty deed for the premises in fee to the male mortgagor. *Held:* At the time of executing the warranty deed, the *feme* grantor owned an inchoate dower right and, as mortgagee, the legal title coupled with an interest, and was thus the grantor of a substantial estate, and the warranty deed estops her, and, upon her death, her administrator, from claiming any interest in the land by virtue of the mortgage, and further, the contention that she joined in the warranty deed merely for the purpose of releasing her inchoate dower is untenable, the deed being general in its terms. The equitable doctrine of feeding an estoppel through an after acquired title has no application. *Tripp v. Langston*, 295.

Even though warranty deed estops grantor from asserting claim under prior mortgage, it does not prevent her from asserting note as unsecured claim. *Ibid.*

§ 7. Estoppel of Married Women.

Since, in this State, the common law disabilities of a married woman to contract, with certain exceptions, have been removed, she is bound by an estoppel the same as any other person. *Tripp v. Langston*, 295.

EVIDENCE.

§ 5. Judicial Notice of Facts Within Common Knowledge.

The court cannot take judicial notice as being matter within common knowledge that a difference exists between slickness of tile and linoleum floors to such a degree as to constitute negligence on part of store proprietor maintaining aisle of mixed surfaces. *Griggs v. Sears, Roebuck & Co.*, 166.

§ 6. Burden of Proof in General.

The burden of proof is a substantial right. *Haywood v. Ins. Co.*, 736.

§ 18. Evidence Competent to Corroborate Witness.

In action for wrongful death, photograph of deceased *held* competent to corroborate witnesses. *Coach Co. v. Lee*, 320.

Plaintiff's bus driver testified that he went to the car involved in the collision with plaintiff's bus and saw "this boy in the car and he was not making any noise." Defendants' witness testified that about 15 minutes after the accident the bus driver made a declaration to the effect that he thought he had killed a man down the road. The court admitted the testimony of the declaration, not as substantive evidence, but solely for the purpose of contradicting or corroborating the testimony of plaintiff's driver. *Held:* Plaintiff's objection thereto cannot be sustained. *Ibid.*

§ 22. Cross-Examination.

The right to cross-examine an opposing witness is a substantial right, but while the latitude for the purpose of impeachment is wide, it must be confined within the bounds of reason and to the questions rationally tending to effect the credibility of the witness. *Foxman v. Hanes*, 722.

§ 26. Similar Facts and Transactions.

Where the visibility under the atmospheric conditions existing at the time of accident in suit is germane, testimony of witnesses as to the distance they were able to see at the place of the accident under similar atmospheric conditions is competent, but where the evidence shows that the night of the accident was foggy, testimony of the witnesses as to visibility at night in a misty rain or overcast sky does not disclose substantially similar conditions. *Caldwell v. R. R.*, 63.

§ 30. Demonstrative Evidence: Photographs.

In this action for wrongful death the admission in evidence of the photograph of intestate for the purpose of corroborating the witnesses, *is held* not error. *Coach Co. v. Lee*, 320.

§ 34. Proof of Records or Former Proceedings.

The court records in a former proceeding may be proven by the original records themselves, and the fact that they are produced from the proper custody and show on their face that they are court records is *prima facie* evidence of their identity, authenticity and genuineness. *Cox v. Wright*, 342.

§ 40. Exceptions to Parol Evidence Rule.

Where action is for fraud and not upon contract, negotiations prior to execution of contract which constitute part of fraud alleged, may be competent. *Cotton Mills v. Mfg. Co.*, 560.

§ 42b. Res Gestæ.

The evidence disclosed that intestate was sawing limbs from a tree through which ran high powered wires from which the insulation had been worn, and that sparks of electricity were seen in the branches near plaintiff. *Held:*

EVIDENCE—*Continued.*

Warnings called out to intestate by bystanders are competent as being within the *res gestæ*. *Butler v. Light Co.*, 116.

The test of whether testimony of a declaration is competent as being a part of the *res gestæ* depends upon the spontaneity of the declaration, it being required that the declaration be the facts talking through declarant rather than the declarant talking about the facts, and the element of contemporaneousness being important merely as bearing on the question of spontaneity. *Coach Co. v. Lee*, 320.

§ 48d. Expert Testimony of Accountants.

An accountant, found by the court to be an expert, may testify from his personal examination of the books and records of a corporation that a corporate check given in partial payment for lands was drawn on funds derived from sale of customers' securities and from cash received from customers, that there was no indication that the president had authority to purchase the land or that the corporation was indebted to him or had authorized any loan of corporate funds to him, and that the corporate books did not disclose the purchase of any land by the corporation. *LaVecchia v. Land Bank*, 35.

§ 51. Competency and Qualification of Experts.

The competency of a witness to testify as an expert is a question primarily addressed to the sound discretion of the court, and its discretion is ordinarily conclusive. *LaVecchia v. Land Bank*, 35.

§ 56. Positive and Negative Evidence.

Testimony of a witness that a fact did not occur may run through all degrees of credibility, depending upon the witness' ability and opportunity to have perceived the fact had it occurred, and therefore a positive statement of a witness that a fact did not occur may have as much probative force as the testimony of a witness for the adverse party that the fact did occur. *Carruthers v. R. R.*, 49.

§ 57. Failure of Party to Testify or Refute Charge by Evidence Within His Control.

Where a witness points out a person in the courtroom and identifies him as defendant's agent, the failure of the alleged agent to testify in contradiction is a circumstance to be considered by the jury, since a party's failure to disprove a charge by testimony within his control is some evidence that he cannot refute the charge. *Smith v. Kappas*, 758.

EXECUTION.

§ 19. Resales.

Where after sale of property under execution the judgment creditor posts an advance bid within ten days and resale is ordered, and no notice of the resale is given the judgment debtor or the purchaser at the first sale, the judgment debtor is entitled to an order for a resale of the property upon his motion aptly made, the requirement of notice to the judgment debtor of sale of his property under execution being applicable to resales as well as to first sales. C. S., 688, 689, as amended by Public Laws of 1927, ch. 255. *Bank v. Gardner*, 584.

Dissolution of restraining order restraining the judgment creditor from interfering with the property bought by the judgment creditor at the execution sales does not preclude the judgment debtor from thereafter making motion in the cause for a resale for want of statutory notice of the sale at which the judgment creditor purchased. *Ibid.*

EXECUTION—*Continued.*

§ 20. Title and Rights of Purchaser.

The purchaser of a life estate in lands at an execution sale under a judgment against the life tenant acquires the life estate free from a prior unrecorded assignment of the rents by the life tenant for money advanced for taxes and improvements. *Bank v. Sawyer*, 142.

EXECUTORS AND ADMINISTRATORS.

§ 1. Designation and Appointment of Executors.

On the first page of the holographic will in question, testatrix made testamentary disposition of her property, and on the second page, labeled "all I have is this," she listed her property and those having same in their possession, and included in the body of the list the words "Mrs. J. Thom Leonard have this in charge." *Held:* The phrase quoted does not designate the person named therein to administer the estate nor commit the execution of the will to her, and she is not entitled to be appointed executrix. *In re Leonard*, 738.

§ 2c. Appointment of Administrators c. t. a.

Since a person to whom letters testamentary have been issued has authority to represent the estate until his death, resignation or until he has been removed or the letters testamentary revoked in accordance with statutory procedure, the appointment by the clerk of an administrator *c. t. a., d. b. n.*, upon petition of the residuary legatee alleging failure of the executor to account to the estate for rents and profits, is void, the clerk being without jurisdiction to make the appointment. *Edwards v. McLawhorn*, 543.

The filing of a "final report" by an executor does not have the effect of removing him from office if in fact the estate has not been fully settled, and therefore the filing of the report does not create a vacancy and does not give the clerk authority to appoint an administrator *c. t. a., d. b. n. Ibid.*

This action was instituted by plaintiff as administrator *c. t. a., d. b. n.*, against the executor for alleged failure of the executor to account to the estate for rents and profits. It appeared that plaintiff's appointment was made before the executor was removed and prior to the termination of the executor's power to represent the estate. *Held:* The clerk was without jurisdiction to appoint plaintiff, and the appointment was void and is subject to collateral attack, and therefore plaintiff's action could have been dismissed by the court *ex mero motu* and the dismissal of the action upon motion of defendant is without error. *Ibid.*

§ 4. Removal and Revocation of Letters.

The procedure to remove an executor or administrator for default or misconduct is by order issued by the clerk to the executor or administrator to show cause, and in such proceeding the respondent must be given notice and an opportunity to be heard, with right of appeal. C. S., 31. *Edwards v. McLawhorn*, 543.

§ 13a. Nature and Grounds of Remedy to Sell Lands to Make Assets.

Court will not object *sua sponte* when parties agree that proceeding to sell lands to make assets is by consent converted into administration suit. *Edney v. Matthews*, 171.

Sale of land by heir within two years of intestate's death cannot defeat right to sell land to make assets. *Cox v. Wright*, 342.

Held: As long as the estate remains unsettled no statute of limitations bars the right and duty of the personal representative to sell lands to make assets to pay the debts of the estate. C. S., 74. *Gibbs v. Smith*, 382.

EXECUTORS AND ADMINISTRATORS—*Continued.*

§ 13e. Validity and Attack of Sale.

The commissioner's deed to the purchaser at the sale of lands of intestate to make assets is *prima facie* evidence of regularity in the sale. *Cox v. Wright*, 342.

§ 24. Distribution of Estate Under Family Settlement.

The will in question created an active trust with provision that the income be paid one of testator's sons, and the *corpus* paid to the son's children, with contingent limitation over to the estate in case the son died without issue him surviving. Other children of the testator and the guardian of their minor children released their interest to the first taker. This action was instituted to terminate the trust and have the *corpus* paid to the son. The minor contingent beneficiaries received no consideration for the purported settlement. *Held:* The family settlement doctrine is not applicable. *Deal v. Trust Co.*, 483.

§ 29. Costs and Attorney Fees.

Testator's son instituted this action in his individual capacity and as executor to recover against testator's daughters for debts alleged to be due by them to him and to charge the distributive shares of the daughters respectively with the debts under provision of the will. *Held:* The action was instituted and maintained for the benefit of plaintiff in his individual capacity, and upon judgment for defendants, the costs of the action must be taxed against plaintiff individually. *Robertson v. Robertson*, 447.

§ 30b. Liability for Wrongful or Unauthorized Payment of Claims or Distribution of Estate.

Judgment was rendered against the estate of plaintiff's deceased guardian for money due the guardianship estate. After reaching his majority plaintiff instituted this action alleging that defendant as executrix of the deceased guardian had paid over to herself, as sole devisee and legatee, money sufficient to discharge plaintiff's claim. *Held:* The action is not against defendant as executrix but against her individually on a liability imposed upon her by statute as legatee and devisee, C. S., 59. *Rose v. Patterson*, 212.

§ 31. Administration Suits.

Agreement *held* to have converted proceeding to sell lands to make assets into an administration suit, and petitioner could not object to being made party in individual capacity. *Edney v. Matthews*, 171.

FALSE PRETENSES.

§ 2. Prosecution.

A charge of conspiracy to defraud by means of false pretense does not merge with the charge of obtaining money by false pretense in execution of the conspiracy, and the indictment charges two separate offenses in one count, but is not bad for duplicity. *S. v. Dale*, 625.

Where the false representations alleged are such as would naturally result in extorting or inducing a man to give up money, in this case that the prosecuting witness was the father of a child by the *feme* defendant, the failure of the indictment to allege a causal relation between the representation and the obtaining of the money is not fatal. *Ibid.*

FOOD.

§ 6. Liability of Manufacturer to Consumer for Harmful and Deleterious Substances.

Evidence that plaintiff was injured as a result of drinking a bottled drink prepared by defendant which contained a foreign, deleterious substance, that on the same date another person purchased a bottle prepared by defendant which contained a like foreign substance, with evidence that other foreign substances were found on other dates in bottles prepared by defendant, and that when plaintiff took the bottle containing the unconsumed portion of the beverage purchased by her to defendant's manager, he undertook to demonstrate how bottles were tested under powerful lights and the light would not come on, *is held* sufficient to be submitted to the jury. *Woody v. Bottling Co.*, 217.

Nonsuit in action to recover for injuries resulting from deleterious substance in bottled drink affirmed on authority of *Enloe v. Bottling Co.*, 208 N. C., 305. *Manning v. Hines Co.*, 779.

§ 11. Nature and Grounds of Liability of Places Selling Food Already Cooked or Prepared.

Allegations to the effect that defendant, through his agents and servants, prepared food for sale to the general public and warranted same to be fresh and to contain no deleterious, poisonous or harmful substances, that plaintiff was damaged by reason of the negligence and carelessness of defendant in preparing food containing foreign, poisonous and deleterious substances and offering same for sale in violation of his warranty, *is held* sufficient, liberally construed, to state a cause of action *ex contractu*, for breach of implied warranty that the food was fit for human consumption. *Williams v. Elson*, 157.

A person preparing and selling food to the public impliedly warrants that it is fit for human consumption at least. *Ibid.*

Where it does not clearly appear from the evidence that the sandwich purchased by plaintiff from defendant's drug store was for immediate consumption on the premises, nor that defendant made or prepared the sandwich, the evidence does not show the basis for the rule followed in some jurisdictions and invoked by defendant that an innkeeper or a person preparing food for the immediate consumption on the premises can be held liable only for negligence and not for breach of warranty, and whether this jurisdiction will follow that rule need not be decided. *Ibid.*

§ 12. Foreign and Deleterious Substances in Food Already Cooked or Prepared.

Evidence that plaintiff found glass in sandwich sold by defendant drug store *held* to sustain allegation of breach of implied warranty that food was fit for human consumption. *Williams v. Elson*, 157.

FRAUD.

§ 1. Elements of Actionable Fraud.

The essential elements of actionable fraud are a definite and specific representation, which is materially false, made with knowledge of its falsity or in culpable ignorance of its truth, with fraudulent intent, which is reasonably relied on by the other party to his deception and damage. *Harding v. Ins. Co.*, 129.

§ 4. Knowledge and Intent to Deceive.

Where evidence discloses that the agent of vendors had no actual knowledge of the condition of the building, but was relying, to the knowledge of the

FRAUD—*Continued.*

purchaser, upon information furnished him by a third person, without evidence that the agent had reason to doubt the reliability of his informant or that his statement was made without a *bona fide* examination of the building, is insufficient to show that representations as to the condition of the building were made with knowledge of their falsity or inculpable ignorance of their truth. *Harding v. Ins. Co.*, 129.

§ 5. Reliance Upon Misrepresentation and Deception.

The purchaser of real estate cannot maintain an action for fraud for misrepresentations concerning the value of the property or its condition and adaptability to particular uses when the purchaser has an opportunity to make full investigation and is not induced to forego investigation by artifice or fraud on the part of the seller. *Harding v. Ins. Co.*, 129.

§ 8. Pleadings in Actions for Fraud.

Where the purchaser of real estate relies upon misrepresentations as to the value of the property or its condition and adaptability to particular uses, he must plead want of opportunity to make investigation or artifice on the part of the seller inducing him not to do so. *Harding v. Ins. Co.*, 129.

The complaint alleged that the corporate defendant procured a contract of agency to sell plaintiff's products, that in fact, instead of selling the products as it represented itself to be doing, it itself purchased same, and directed plaintiff to ship same to dummy purchasers for the purpose of deceiving plaintiff, that plaintiff was deceived to its damage, and that the individual defendants were officers and agents of the corporation and actually caused and participated in the wrongful acts of the corporation. *Held:* The complaint sufficiently alleges a cause of action in fraud against the individual defendants, since the allegation that the individual defendants caused and participated in the wrongful acts of the corporation sufficiently infers that they participated in the fraudulent intent which may be reasonably inferred from the facts alleged. *Cotton Mills v. Mfg. Co.*, 560.

A complaint which alleges facts from which fraudulent intent may reasonably be inferred, or presumed, or necessarily results, is sufficient as against demurrer, it not being required that the word "fraud" be used in the pleading. *Ibid.*

The complaint alleged that plaintiffs intended to convey certain property for a stipulated price, the price to be paid in cash or secured by registered lien, that defendant purchaser and defendant attorney, by fraud and artifice procured plaintiffs to execute a deed describing not only the property intended to be conveyed but also other valuable property, and that defendant grantees executed four unsecured notes aggregating the purchase price of the property intended to be conveyed, and that defendant attorney wrongfully retained one of the said notes, and that the acts of defendants were a part of a fraudulent scheme and conspiracy to deprive plaintiffs of the purchase price of the property intended to be conveyed. *Held:* The complaint is sufficient to allege a cause of action for fraud against defendant attorney, and to connect him with the general scheme alleged. *Griggs v. Griggs*, 574.

§ 11. Sufficiency of Evidence and Nonsuit.

Evidence *held* to show that purchaser of real estate had full opportunity to investigate condition of property, and nonsuit should have been entered in absence of evidence of artifice inducing him not to do so. *Harding v. Ins. Co.*, 129.

FRAUDS, STATUTE OF.

§ 5. Application of Statute Requiring Promise to Answer for Debt of Another to Be in Writing.

A promise is an original promise not coming within the statute of frauds if the extension of credit is made to the promisor or if the contract is made for the benefit of the promisor; but if the contract is made with a third person and the promise constitutes a separate and independent contract under which the promisor agrees to pay upon default of the primary debtor, the promise is a collateral agreement and comes within the statute. C. S., 987. *Balentine v. Gill*, 496.

The complaint alleged that plaintiff reconditioned certain gin machinery on the property under a contract with defendant tenant who had an option to purchase the gin from the defendant landlord, and that the landlord promised to pay for the work if plaintiffs were unable to collect from the tenant-optionee. *Held:* In regard to the liability of the landlord, the complaint alleges a promise to answer for the debt or default of another within the provision of the statute of frauds, C. S., 987, nor does an allegation that the contract was made at the instance and request of the landlord aid plaintiffs in the absence of allegations that the contract was made for the landlord's benefit or that the extension of credit was made to the landlord. *Ibid.*

§ 6. Pleadings.

A defendant may invoke the defense of the statute of frauds either by denying the promise or setting up another and different contract, and objecting to the evidence, without pleading the statute, or he may admit the contract and specifically plead the statute. *Balentine v. Gill*, 496.

§ 7. Exclusion of Parol Evidence.

Where the defense of the statute of frauds is properly presented, only written evidence of the agreement is competent, and parol evidence that the extension of credit was made to the promisor is incompetent. *Balentine v. Gill*, 496.

GAMING.

§ 1. Construction and Operation of Statutes in General.

Revenue Act of 1939 *held* not to repeal Flanagan Act prohibiting gaming slot machines. *S. v. Abbott*, 470.

The mere fact of payment of State and county license on a slot machine does not render the possession or distribution of such machine legal when it is a machine proscribed and made illegal by valid statute. *Ibid.*

The Flanagan Act, prohibiting the possession or distribution of gaming slot machines, chapter 196, Public Laws of 1937, is a valid and constitutional exercise of the police power of the State. *Ibid.*

§ 3. Indictment.

An indictment charging the ownership and distribution of slot machines adapted for use in such a way that as a result of the insertion of a coin the machine may be operated in such a manner that the user may secure additional chances or rights to use such machine and upon which the user has a chance to make various scores upon the outcome of which wagers may be made, follows the language of the statute and is sufficient to charge the offense therein defined. Chapter 196, Public Laws of 1937, Michie's Code, 4437 (t). *S. v. Abbott*, 470.

An indictment charging possession of gambling devices, but failing to charge that defendant operated the devices or had them in his possession for the

GAMING—*Continued.*

purpose of being operated, is fatally defective, C. S., 4437 (b), and defendant's motion in arrest of judgment will be allowed. *S. v. Jones*, 734.

§ 5. Sufficiency of Evidence and Nonsuit.

Evidence *held* sufficient for jury in this prosecution for operation of gambling house and illegal possession of baseball boards and tip boards. *S. v. Webster*, 692.

§ 6. Instructions.

A reference in the charge to "these gambling devices" will not be held prejudicial as an expression of opinion on the evidence when it is apparent that the charge referred abstractly to the devices mentioned in the warrant and not to those about which evidence had been taken. *S. v. Webster*, 692.

A charge that a punchboard and a tip book are the same under the statute and "that if you find this defendant guilty" will not be held for error as an expression of opinion on the evidence when the phrase is immediately followed by an instruction that in order to convict, the jury must find beyond a reasonable doubt that the tip boards were gambling devices and were in defendant's possession. *Ibid.*

In a prosecution for maintaining a gambling house and for illegal possession of gambling devices, the failure of the court to define "gambling" or "gambling device" will not be held for error in the absence of a prayer for special instructions, since these terms have a definite and well recognized meaning which is the same in law as well as in common usage. *Ibid.*

HABEAS CORPUS.

§ 7. Hearings and Decree.

In *habeas corpus* proceedings instituted by a husband to obtain his release from jail where he had been committed for willful violation of an order requiring him to pay alimony, the court is bound by the judgment for contempt and cannot review the facts upon which that judgment was predicated, *habeas corpus* not being available as a substitute for an appeal. *In re Adams*, 379.

In such case the only questions open to review are the sufficiency of the findings to support the order of commitment and the jurisdiction of the court to enter the order, and when order of commitment is valid, the petition for *habeas corpus* must be denied. *Ibid.*

The writ of *habeas corpus* may not be used as a substitute for appeal, and where defendant has been confined upon execution of a valid sentence in a criminal prosecution, his petition is properly denied. *In re Smith*, 462.

§ 8. Appeal and Review.

The wife, a party to the action out of which *habeas corpus* proceedings were instituted by the husband to obtain his release from jail, where he had been committed for willful failure to comply with an order requiring him to pay alimony, is entitled to review by *certiorari* the order releasing the husband. C. S., 632, 638. *In re Adams*, 379.

HIGHWAYS.

§ 12. Abandonment.

The burden is upon the party asserting the discontinuance, abandonment or vacation of a public highway to prove the asserted discontinuance, abandon-

HIGHWAYS—*Continued.*

ment or vacation of the highway, the presumption being in favor of the continuance of the highway with the principles and incidental rights attached to it. *Long v. Melton*, 94.

§ 18. Civil Actions for Obstructing Highways.

The highway in question was relocated to the north of plaintiffs' property so that the property touched the new highway only at its extreme eastern edge. *Held:* Plaintiffs are entitled to an easement for ingress and egress over the old road and right of way to the new highway in front of their property, notwithstanding the existence of a less satisfactory and less valuable means of egress and ingress to the new road at the eastern end of their property, and judgment as of nonsuit was improperly entered in their action to restrain defendant from obstructing the old highway. *Long v. Melton*, 94.

Where a State Highway is relocated so that the right of way of the old and new highway overlap, a person purchasing the fee in property which theretofore constituted the old highway and right of way takes same subject to the rights of property owners abutting the old highway to ingress and egress over the old highway to the new highway. *Ibid.*

In an action to enjoin owner of fee from obstructing highway, burden is upon defendant owner asserting that highway had been abandoned to prove such defense. *Ibid.*

§ 19. Warnings and Signs of Highway Under Construction.

In this action against a road contractor to recover for injury sustained by plaintiff driver while attempting to travel a highway which was under construction, evidence of negligence of defendant in failing to maintain proper warning signs of danger and evidence on the issue of contributory negligence *held* properly submitted to the jury. *Gold v. Kiker*, 204.

A laborer engaged in repairing a highway may assume that motorists will use reasonable care and caution commensurate with visible conditions, will keep their cars under reasonable control, and will obey and observe the rules of the road, and he is not required to anticipate negligence on their part in failing to do so. *Murray v. R. R.*, 392.

A railroad company, engaged in repairing a grade crossing, is under duty to the traveling public and under duty to its employees in providing a safe place to work, to use due care to provide and maintain suitable warning to the traveling public of the presence of its employees at work on the highway crossing, but it has the right to assume that the traveling public will exercise ordinary care and observe the law of the road in the operation of motor vehicles, and the sufficiency of its warning signals must be determined in the light of this circumstance. *Ibid.*

HOMESTEAD AND PERSONAL PROPERTY EXEMPTIONS.

§ 12. Property in Which Personal Property Exemption May Be Asserted.

Plaintiff moved that the judgment rendered against him in this cause on defendant's counterclaim should be offset by a judgment subsequently obtained by plaintiff against defendant in a separate action, contending that defendant is insolvent. Defendant demanded that the judgment rendered in his favor upon the counterclaim in this cause be allowed to him as his personal property exemption. *Held:* To allow offset would amount to "final process" within the meaning of Article X, sec. 1, of the State Constitution, and defendant's demand that the judgment in his favor on the counterclaim be allowed him as his personal property exemption precludes plaintiff's right of offset. *Edgerton v. Johnson*, 300.

HOMESTEAD AND PERSONAL PROPERTY EXEMPTIONS—*Continued.*

A party may not demand that his claim be allowed him as his personal property exemption so as to defeat the adverse party's right of counterclaim or set-off prior to the rendition of the final judgment on his claim, since to permit the party to assert the exemption before judgment would enable him to obtain judgment in instances in which, if a balance were struck, nothing would be due him. *Ibid.*

HOMICIDE.

II. Murder in the First Degree
4c. Premeditation and Deliberation. S. v. Hudson, 219; S. v. Brown, 415.
V. Defenses
10. Intoxication as Defense. S. v. Cureton, 491.
VII. Evidence
16. Presumptions and Burden of Proof. S. v. Howell, 280.
17. Relevancy and Competency of Evidence in General. S. v. Hudson, 219.
18b. Evidence of Threats. S. v. Hudson, 219.
20. Evidence of Motive and Malice. S. v. Hudson, 219.
21. Evidence of Premeditation and Deliberation. S. v. Hudson, 219.
VIII. Trial.
25. Sufficiency of Evidence and Nonsuit. S. v. Hudson, 219; S. v. Brown, 415; S. v. Cureton, 491; S. v. Wall, 566; S. v. Woodard, 572.
27. Instructions.
a. Form and Sufficiency in General. S. v. Brown, 415.
f. Instructions on Defenses. S. v. Cureton, 491; S. v. Wall, 566; S. v. Greer, 660.
h. Instruction on Degrees of Crime and Verdicts Permissible. S. v. Howell, 280.
30. Appeal and Review. S. v. Cureton, 491.

§ 4c. Premeditation and Deliberation.

No fixed length of time is required for the mental processes of premeditation and deliberation constituting an element of the offense of murder in the first degree, it being sufficient if these mental processes occur prior to, and not simultaneously with the killing. *S. v. Hudson*, 219.

The mental processes of premeditation and deliberation do not require any fixed length of time, it being sufficient if these mental processes occur prior to the killing, and the killing be executed in accordance with a previously formed, fixed intent to kill. *S. v. Brown*, 415.

§ 10. Intoxication as Defense.

Defendant's contention that he was too intoxicated to be capable of premeditation and deliberation is an affirmative defense akin to the plea of insanity, and the burden is upon defendant to prove intoxication to such a degree as to render him unable to think out and plan beforehand what he intends to do. *S. v. Cureton*, 491.

Although intoxication is an affirmative defense, no special plea is required. *Ibid.*

§ 16. Presumptions and Burden of Proof.

The presumption arising when a killing with a deadly weapon is admitted or established does not relieve the State of the burden of showing an unlawful killing, and upon defendant's plea of not guilty, and his failure to testify or offer any evidence in his own behalf, the burden is upon the State, notwithstanding plenary evidence of defendant's guilt of murder in the first degree, to prove that defendant fired the shot at deceased and that the shot caused death. *S. v. Howell*, 280.

§ 17. Relevancy and Competency of Evidence in General.

Where evidence is relevant and competent, the fact that it may also excite commiseration and sympathy for deceased in the minds of the jurors does not render it inadmissible, and an exception thereto cannot be sustained. *S. v. Hudson*, 219.

HOMICIDE—*Continued.*

§ 18b. Evidence of Threats.

Defendant excepted to testimony of a witness that defendant stated he was going to "kill a man on the way home." Other evidence disclosed that the threat was made soon after a dispute between defendant and his landlord, and that thereafter the landlord drove defendant to defendant's home and that early the next morning the landlord was found in defendant's front yard dead from a gunshot wound. *Held:* The threat was not too remote in point of time and the other evidence gave it sufficient individuation, and defendant's exception is overruled. *S. v. Hudson*, 219.

§ 20. Evidence of Motive and Malice.

In this prosecution of defendant for murder, the evidence tended to show that there was a dispute between defendant and defendant's landlord in regard to the proceeds of tobacco sold by them. Testimony that the landlord copied the original tobacco slip and handed the copy to defendant, that defendant refused it and stated he wanted the original from the warehouse, *is held* competent as some evidence of motive, the weight of the evidence being for the jury. *S. v. Hudson*, 219.

§ 21. Evidence of Premeditation and Deliberation.

Evidence that defendant robbed his victim *held* competent as tending to show premeditation and deliberation. *S. v. Hudson*, 219.

§ 25. Sufficiency of Evidence and Nonsuit.

Evidence *held* sufficient for jury on question of defendant's guilt of murder in the first degree. *S. v. Hudson*, 219; *S. v. Brown*, 415; *S. v. Cureton*, 491; *S. v. Wall*, 566; *S. v. Woodard*, 572.

§ 27a. Form and Sufficiency of Instructions in General.

In this prosecution for homicide, the charge of the court in defining the degrees of homicide, and premeditation and deliberation, and in charging the law as to voluntary drunkenness, and in applying the law to the facts adduced by the evidence, *is held* complete and accurate and without prejudicial error. *S. v. Brown*, 415.

§ 27f. Instructions on Defenses.

In the absence of evidence of intoxication to degree precluding premeditation and deliberation, court is not required to charge jury upon defense. *S. v. Cureton*, 491.

The court's charge on defendant's defense of intoxication to an extent precluding premeditation and deliberation, *held* without error. *S. v. Wall*, 566.

Defendant testified that he remembered sending his wife for a jar of whiskey and that the last thing he remembered was seeing her standing with a jar in her hand. Defendant did not contend that she actually committed an assault upon him. *Held:* The evidence does not present the question of self-defense, and does not require the court to charge the jury upon the law in respect thereto. *Ibid.*

Evidence *held* to present question of self-defense, and court should have instructed jury thereon, even in absence of request for instructions. *S. v. Greer*, 660.

§ 27h. Instruction on Degrees of Crime and Verdicts Permissible.

Where defendant does not admit killing deceased, jury should be instructed as to circumstances under which it may return verdict of not guilty, the credibility of the evidence of guilt being for the jury. *S. v. Howell*, 280.

HOMICIDE—*Continued.*

§ 30. Appeal and Review.

A general motion to nonsuit does not properly present on appeal defendant's contention of the insufficiency of the evidence on the charge of first degree murder, but defendant having been convicted of the capital felony, the contention is nevertheless considered. *S. v. Cureton*, 491.

Where, upon the trial, defendant does not rely upon the defense of intoxication precluding premeditation and deliberation, he may not assert such defense for the first time upon appeal. *Ibid.*

HUSBAND AND WIFE.

§ 2. Wife's Right to Support and Maintenance.

The duty to support the family is that of the husband and not of the wife, and debts contracted for living expenses are his individual, separate obligation. *Robertson v. Robertson*, 447.

§ 4b. Conveyances from Wife to Husband.

The finding of the court from oral testimony that a deed executed by husband and wife to a trustee for the benefit of the husband was a part of a properly acknowledged separation agreement dated five days before and acknowledged one day before the deed to the trustee, cannot have the effect of curing defective acknowledgment of the deed to the trustee, since it must appear from the certificate of the officer before whom the deed of trust was acknowledged that it was acknowledged as required by the statute or was a part of the properly acknowledged deed of separation. *Fisher v. Fisher*, 42.

A husband and wife conveyed lands owned by them by entireties to a trustee for the benefit of the husband, which deed was void because not acknowledged as required by C. S., 2515. *Held:* The void deed does not estop the husband or his heirs from claiming a one-half undivided interest in the lands vesting in him as tenant in common upon the rendition of an absolute divorce. *Ibid.*

§ 7. Liability for Debts of Spouse.

Wife is not liable for debts contracted by husband for living expenses. *Robertson v. Robertson*, 447.

Where the husband rents land for farming operations from his wife's father, the wife is not liable for debts contracted for necessary farming operation upon any principle of equity, since she is not the owner of the land and the husband cannot be held to have contracted the debts for her under an implied agency. *Ibid.*

INDEMNITY.

§ 2d. Indemnity Contracts of Public Officials.

Indemnity bond of State Highway patrolman *held* to agree to indemnify State for loss of money or other personal property through failure to faithfully discharge duties of office, and person injured by alleged tort of patrolman committed under color of office could not recover thereon. *Woodard v. Hunter*, 780.

§ 4. Liability of Indemnitors to Person Indemnified.

The liability of the indemnitors cannot exceed that of the principal, and all defenses of the principal are available to the indemnitors, and therefore when the person indemnified is entitled only to judgment by default and inquiry against the principal, judgment by default and inquiry against the indemnitors is error. *Chozen Confections, Inc., v. Johnson*, 500.

INDICTMENT.

§ 8. Joinder and Severance of Courts and Merger.

The indictment charged defendants with conspiracy to defraud by means of false pretense and with obtaining money by false pretense. *Held:* The charge of conspiracy does not merge with the statutory offense of obtaining money by false pretense, and the indictment charges two separate offenses and is good. *S. v. Dale*, 625.

§ 9. Charge of Crime.

An indictment for a statutory offense must show upon its face that it is based upon the statute, and must either charge the offense in the language thereof or specifically set forth the facts constituting same. *S. v. Jackson*, 373.

Indictment for statutory offense which follows the language of the statute is sufficient and it need not negative exceptions. *S. v. Abbott*, 470.

A warrant or indictment charging the violation of a statute should follow the language of the statute, but its failure to do so is not a vitiating defect if it charges facts sufficient to enable the court to proceed to judgment. *S. v. Wilson*, 769.

§ 10. Identification of Person Charged.

Where the name of one of defendants does not appear in the indictment, it is fatally defective as to him, notwithstanding that his name appears on the envelope in which his indictment was placed, and that his name was placed on the dockets prepared for the judge, solicitor and the clerk, and that he was fully informed of the charge against him, and his motion in arrest of judgment, made in the Supreme Court upon appeal, will be allowed. *S. v. Finch*, 511, 512.

§ 11. Definiteness and Duplicity.

While ordinarily an indictment charging two separate offenses in one count is bad for duplicity, a charge of conspiracy to defraud by false pretense and a charge of obtaining money by means of false pretense in consummation of the conspiracy may be joined in one count, since the charges grow out of a single transaction or series of transactions relating to a single common design, and the denial of defendant's motion to quash and the denial of his motion to compel the solicitor to elect between the counts, are properly refused. *S. v. Dale*, 625.

An indictment which alleges sufficient matter to enable the court to proceed to judgment will not be quashed for duplicity and indefiniteness, or for mere informality or refinement. C. S., 4623. *Ibid.*

An indictment or warrant will not be quashed for technical objections which do not affect the merits. Michie's Code, 4623. *S. v. Wilson*, 769.

§ 17. Nature and Scope of Bill of Particulars.

The office of a bill of particulars is to furnish, for the better defense of the accused, relevant information not required to be set out in the warrant or indictment, but a bill of particulars cannot supply matter required to be charged as an ingredient of the offense. *S. v. Wilson*, 769.

§ 20. Proof and Variance in General.

Proof of the particular offense charged in the bill of indictment is necessary to support a conviction thereon. *S. v. Jackson*, 373.

Proof of larceny of chattel real will not support conviction on indictment charging common law larceny. *Ibid.*

Indictment alleging murder committed with malice, premeditation and deliberation will support evidence tending to show that robbery was the motive

INDICTMENT—*Continued.*

for the crime, since such evidence is competent upon the question of premeditation and deliberation. *S. v. Hudson*, 219.

§ 21. Conviction on One or More of Several Counts.

Defendants were charged with conspiracy to defraud by means of false pretense and with obtaining money by means of false pretense. A general verdict of guilty was rendered, and appealing defendant contended that he had been prejudiced in being held accountable for both crimes charged in the indictment. *Held:* Defendant should have presented his contention by submitting prayers for special instructions or by objecting to instructions given, or after verdict was entered, he could have caused inquiry to be made as to how the jurors stood upon each of the counts, and his objection to instructions for that the court did not separately charge the law as to each of the counts does not properly present his contention that he could not be held accountable for both crimes. *S. v. Dale*, 625.

INFANTS.

§ 14. Duties and Liabilities of Guardians Ad Litem.

A guardian *ad litem* has no authority, without valid consideration, to relinquish to the immediate beneficiary of the estate the contingent interest of infant defendants in the estate, notwithstanding that their parents having a more immediate contingent interest in the estate, had assigned and conveyed such interest to the immediate beneficiary. *Deal v. Trust Co.*, 483.

INSANE PERSONS.

§ 1. Petition and Procedure.

A proceeding to commit a person to a State Hospital for the Insane under the provisions of C. S., ch. 103, Art. 3 (C. S., 6184, *et seq.*), is strictly neither a civil action nor a special proceeding, notwithstanding C. S., 391, and in such proceeding a jury trial is not contemplated, and the clerk of the Superior Court upon supporting evidence upon the hearing may enter an order of commitment, C. S., 2285, not being applicable in the absence of application for the appointment of a guardian to manage the property of respondent. *In re Cook*, 384.

§ 4. Appeal from Order of Commitment.

There is no provision for appeal to the Superior Court from the order of the clerk committing respondent to a State Hospital in a proceeding under C. S., 6184, *et seq.*, nor may respondent invoke the provisions of C. S., 2302. Whether *certiorari* is available is not presented. *In re Cook*, 384.

INSURANCE.

§ 25c. Evidence and Burden of Proof in Actions on Fire Policies.

In an action on a policy of fire insurance on an automobile, the burden is on plaintiff to prove insurance, loss by fire and damage; and therefore a direction that the jury answer the issues of insurance and loss by fire in favor of plaintiff is error, since the credibility of the evidence is for the jury; and it is also error for the court to fail to place the burden of proof on the issue of damages on plaintiff. *Haywood v. Ins. Co.*, 736.

§ 34f. Actions on Disability Clauses.

Fact that complaint alleges two different dates as the inception of disability is not fatal. *Sanderson v. Ins. Co.*, 270.

INTOXICATING LIQUOR.

§ 9c. Competency and Relevancy of Evidence.

In this prosecution for illegal possession of intoxicating liquor, the admission of testimony that defendant's tavern was a public place where people went to dance and eat *is held* not to constitute prejudicial error. *S. v. Henderson*, 513.

JUDGMENTS.

§ 5. Judgments by Confession.

In an action to have an agreement between the parties made a judgment of the court in accordance with the provisions of the agreement, defendant's demurrer is properly overruled. *Rayburn v. Rayburn*, 514.

§ 10. When Judgment by Default and Inquiry, Rather Than Default Final, Is Proper.

In an action to recover for goods sold under consignment upon allegations that the purchaser failed to properly account and that he was guilty of fraudulent misappropriation, plaintiff is not entitled to judgment by default final upon failure of answer, but only to judgment by default and inquiry. C. S., 595, 596. *Chozen Confections, Inc., v. Johnson*, 500.

The liability of indemnitors cannot exceed that of the principal, and therefore where plaintiff is entitled only to judgment by default and inquiry against the principal, judgment by default final against the indemnitors is irregular. *Ibid.*

§ 11. Time of Default and Right to File Pleading.

Where, in an action for fraud, judgment by default final is rendered against a defendant upon whom no service of summons had been had, it would seem that the defendant should be permitted to enter voluntary appearance thereafter and file answer denying the matters alleged against him. *Chozen Confections, Inc., v. Johnson*, 500.

The action of the court in overruling defendant's demurrer and at the same time rendering judgment for plaintiff as prayed for in the complaint is error, since defendant has ten days after the demurrer is sustained or, if an appeal is taken, ten days after the certificate of the Supreme Court is received, in which to file answer. C. S., 515. *Rayburn v. Rayburn*, 514.

§ 17b. Conformity to Verdict and Pleadings.

The right to recover will be determined in accordance with the theory of the complaint. *Balentine v. Gill*, 496.

Where the court dismisses an action to construe wills and determine the rights and titles of the parties thereunder, there is nothing in the pleadings to support the court's further order giving certain rights to certain of the parties and certain directions to other parties in effecting the terms of one of the wills, and such further order will be stricken out on appeal. *Johnston v. Johnston*, 706.

§ 18. Time and Place of Rendition.

Where the evidence is insufficient to support a finding that an unsigned order or decree of adoption was actually made or entered by the clerk, the signing of the order *nunc pro tunc* is error. *In re Holder*, 136.

§ 22c. For Surprise, Inadvertence, and Excusable Neglect.

Judgment by default was entered against the principal and the sureties on his indemnity contract for goods sold the principal upon consignment. Subsequent to the judgment the principal filed answer alleging that plaintiff had

JUDGMENTS—*Continued.*

refused to accept merchandise returned and had failed to give credit therefor as required by the contract, and appealing surety moved to set aside the judgment. The principal's verified answer was ordered stricken out, but was preserved in the record by defendants' exception and was considered by the court in passing upon the motion to set aside. *Held:* The defenses of the principal are available to the sureties, and the court's denial of the motion to set aside, upon his holding, as a matter of law, that movant had failed to show a meritorious defense, is error. *Chozen Confections, Inc., v. Johnson*, 500.

§ 35. Plea of Bar, Hearings and Determination.

The plea of *res judicata* is an affirmative defense which must be taken by answer and supported by competent evidence, and the defense is not available on motion to dismiss. *Sanderson v. Ins. Co.*, 270.

§ 37b. Right to Assignment Upon Payment by One of Parties Jointly and Severally Liable.

Where one of several judgment debtors, jointly and severally liable, discharges the entire judgment under a compromise agreement with the judgment creditor by payment of a fraction of the amount of the judgment, he is entitled to an assignment of the judgment to a trustee for his benefit under C. S., 618, and is entitled to recover from each of his codefendants the proportionate part of such codefendant's liability in the amount of the compromise settlement, he being entitled to contribution on the basis of the amount actually paid for the full discharge of the judgment even though such amount does not equal his proportionate liability on the original amount of the judgment. *Scales v. Scales*, 553.

§ 45. Set-off of Judgment by Another Judgment in Favor of Adverse Party.

A party may demand that his claim be allowed him as his personal property exemption so as to defeat the adverse party's right to counterclaim or set-off, but he cannot demand this exemption prior to final judgment on his claim. *Edgerton v. Johnson*, 300.

LABORERS' AND MATERIALMEN'S LIENS.

§ 9. Claims and Rights of Third Persons.

The purchaser of a life estate at execution sale under a judgment against the life tenant takes title free from the claim of a person taking a prior unrecorded assignment of rents from the life tenant for money advanced to make repairs when the assignee has not filed any lien or brought any action to enforce a materialman's lien within the statutory period. *Bank v. Sawyer*, 142.

LARCENY.

§ 1. Elements and Offenses.

The common law offense of larceny does not include larceny of chattels real. *S. v. Jackson*, 373.

C. S., 4259, creates the statutory offense of larceny of chattels real. *Ibid.*

A tombstone erected at the grave of a deceased person becomes a chattel real and may not be the subject of the common law crime of larceny. *Ibid.*

§ 4. Indictment.

Defendant was charged with feloniously stealing and carrying away one tombstone erected at the grave of a deceased person, being the goods and

chattels of a named person. The court instructed the jury that the offense charged was larceny, which is the wrongful and felonious taking and carrying away of personal property of some value belonging to another, with felonious intent. *Held:* Neither the indictment nor the theory of trial refer to trespass constituting an element of the statutory crime of larceny of chattels real, C. S., 4259, nor to the distinction of taking with, and taking without felonious intent set forth in the statute, and there is a fatal variance between the indictment for common law larceny and the proof of the statutory larceny of a chattel real, and defendant's motion to nonsuit should have been granted. Nor may conviction be upheld under C. S., 4320, which creates a misdemeanor not defined as larceny. Whether C. S., 4320, and cognate statutes relating expressly to tombstones, graveyards, and graves, excludes such property from C. S., 4259, *quære*. *S. v. Jackson*, 373.

§ 5. Presumptions and Burden of Proof.

Presumption arising from possession of property soon after it was stolen cannot justify submitting issue to jury when State's evidence tends to show that others asported the property and fails to connect defendant with asportation. *S. v. Cannon*, 466.

§ 7. Sufficiency of Evidence and Nonsuit.

Where the State's evidence tends to show the actual theft of the goods in question by others, and fails to connect defendant therewith in any manner until after the goods had been asported, the presumption arising from defendant's possession of the goods a short time thereafter is insufficient to justify the submission of the question of defendant's guilt of larceny to the jury. *S. v. Cannon*, 466.

LIMITATION OF ACTIONS.

§ 2e. Actions Barred in Three Years.

Plaintiff, the payee and holder of a note, alleged that the debtor advised him not to enter claim in bankruptcy, and made a promise after the filing of the petition but before the order of discharge was entered to pay the note. *Held:* Plaintiff's cause of action is on the new promise and not the original note, and the new promise being made more than three years prior to the institution of the action, plaintiff's cause is barred by the statute of limitations. C. S., 441. *Westall v. Jackson*, 209.

§ 10. Death and Administration.

Held: As long as the estate remains unsettled no statute of limitations bars the right and duty of the personal representative to sell lands to make assets to pay the debts of the estate. C. S., 74. *Gibbs v. Smith*, 382.

MALICIOUS PROSECUTION.

§ 1. Nature and Essentials of Right of Action in General.

Allegations and evidence to the effect that defendant procured a warrant for plaintiff and his arrest and trial before a magistrate thereunder, that the warrant was issued maliciously and without probable cause and that the prosecution was terminated in favor of plaintiff, constitute a cause of action for malicious prosecution. *Miller v. Greenwood*, 146.

§ 6. What Constitutes "Prosecution."

Where a person is arrested under a warrant issued against him, there is an interference with his person sufficient to constitute a "prosecution" within the meaning of the law. *Miller v. Greenwood*, 146.

MALICIOUS PROSECUTION—*Continued.*

§ 7b. Burden of Proof.

In an action for malicious prosecution, plaintiff has the burden of showing want of proper cause. *Miller v. Greenwood*, 146.

§ 8a. Competency and Relevancy of Evidence on Issue of Malice.

The absence of grounds for the prosecution or want of probable cause is evidence to be considered by the jury on the question of malice or malicious motive. *Miller v. Greenwood*, 146.

§ 8b. Competency and Relevancy of Evidence on Question of Want of Probable Cause.

Plaintiff was arrested on a warrant charging him with temporary larceny of automobile delivered to him to try out. Evidence that at time of issuance of warrant defendant knew that plaintiff had attempted to notify defendant of the wreck and had offered to pay damage *held* competent to show want of probable cause. *Miller v. Greenwood*, 146.

§ 8c. Competency and Relevancy of Evidence on Issue of Damages.

In an action for malicious prosecution, the testimony of plaintiff that the fact that he had been indicted and charged with temporary larceny was generally known in the town in which he lived and the town in which he worked is competent. *Miller v. Greenwood*, 146.

§ 10. Instructions.

Failure of court to charge facts that would constitute probable cause *held* not prejudicial to defendant on the record. *Miller v. Greenwood*, 146.

MANDAMUS.

§ 1. Nature and Grounds of Writ.

Mandamus is no longer a high prerogative writ, and the court has no discretionary power to refuse to issue the writ when plaintiff seeks to enforce a clear legal right against those under legal duty to perform the act. *Dry v. Drainage Comrs.*, 356.

§ 2c. To Compel Levy of Taxes or Assessments to Pay Obligation of Municipality.

Municipality may waive condition precedent to *mandamus* that claim be reduced to final judgment and that resources for its satisfaction be shown. *Dry v. Drainage Comrs.*, 356.

MARRIAGE.

§ 2a. Age of Parties.

The marriage of a party under the minimum age required by statute is voidable and not void. *Parks v. Parks*, 245.

§ 2e. Ratification of Voidable Marriage.

Parties were residents of this State. They were married in State of Virginia when the male was under the legal age, but returned to this State and cohabited here, the male being above the minimum age required by our statute. *Held:* The husband ratified the voidable marriage and is not entitled to annulment. *Parks v. Parks*, 245.

MASTER AND SERVANT.

I. The Relation
1. Creation of the Relation. Wilkinson v. Coppersmith, 173.
7d. Liability of Third Person for Procuring Discharge of Employee. Langley v. Russell, 216.
III. Employer's Liability for Injuries to Employee
12. Liability of Main Contractor for Injury to Employee of Subcontractor. Cathey v. Construction Co., 525; Mack v. Marshall Field & Co., 697.
14a. Tools, Machinery and Appliances and Safe Place to Work. Murray v. R. R., 392.
IV. Liability for Injury to Third Persons
21a. "Employees" within Meaning of Rule. Leonard v. Transfer Co., 667.
21b. Source of Employment. McLamb v. Beasley, 308.
V. Federal Employers' Liability Act
27. Negligence of Railroad Employer. Hill v. R. R., 563.
VII. Workmen's Compensation Act
37. Nature and Construction in General. Logan v. Johnson, 200; Thomas v. Gas Co., 429.
39b. Distinction between Employees, Independent Contractors and Jobbers. Cloninger v. Bakery Co., 26.
40d. Whether Injury Results from "Accident." McGill v. Lumberton, 586.
41a. Amount of Recovery. Logan v. Johnson, 200.
43. Persons Entitled to Award. Thomas v. Gas Co., 429.
45c. Cancellation of Compensation Insurance. Motsinger v. Perryman, 15.
47. Notice and Filing of Claim. Lineberry v. Mebane, 737.
49. Original Jurisdiction of Commission and Superior Courts. Cathey v. Construction Co., 525; Cooke v. Gillis, 726.
52a. Rules and Procedure before Industrial Commission. Motsinger v. Perryman, 15; Lineberry v. Mebane, 737.
52b. Evidence before Industrial Commission. Logan v. Johnson, 200.
55. Appeal and Review of Award.
c. Notice and Docketing Appeals. Summerell v. Sales Corp., 451.
d. Review. Cloninger v. Bakery Co., 26; Logan v. Johnson, 200; Thomas v. Gas Co., 429; McGill v. Lumberton, 586.
IX. Federal Wages and Hours Act: Fair Labor Standards Act
63. Employers within Purview of Act. Hart v. Gregory, 184.
64. Employees within Purview of Act. Hart v. Gregory, 184.

§ 1. Creation of the Relation.

Contract providing that defendant should buy certain property and that plaintiff should salvage and sell it, and that parties should divide profits, but that defendant should bear any loss alone, *is held* to make the division of profits merely a means of ascertaining compensation, and contract was one of employment and did not create partnership. *Wilkinson v. Coppersmith*, 173.

§ 7d. Liability of Third Person for Procuring Discharge of Employee.

In an action to recover damages for maliciously causing plaintiff's employer to breach the contract of employment with plaintiff, evidence merely that defendant, as president of the employer, signed the letter advising plaintiff of his discharge, is wholly insufficient to establish the allegation that defendant maliciously procured the employer to breach the alleged contract of employment. *Langley v. Russell*, 216.

§ 12. Liability of Main Contractor for Injury to Employees of Independent Subcontractor.

Contractor furnishing scaffold for subcontractor may be held liable by employee of subcontractor for injuries resulting from defect existing by reason of negligence of main contractor. *Cathey v. Construction Co.*, 525.

Evidence of owner's negligence proximately causing injury to employee of subcontractor *held* sufficient for jury, but nonsuit should have been entered as to main contractor. *Mack v. Marshall Field & Co.*, 697.

§ 14a. Tools, Machinery and Appliances and Safe Place to Work.

A master is not an insurer of the safety of his servant and his duty to provide a reasonably safe place to work and to furnish reasonably safe and suitable machinery, implements and appliances is not absolute, but he is required to exercise that degree of care which an ordinary prudent man would exercise under like circumstances for his own safety in furnishing himself a reasonably safe place to work and reasonably safe and suitable machinery, implements and appliances. *Murray v. R. R.*, 392.

A railroad company, engaged in repairing a grade crossing, is under duty to the traveling public and under duty to its employees in providing a safe place to work, to use due care to provide and maintain suitable warnings to the traveling public of the presence of its employees at work on the highway crossing, but it has the right to assume that the traveling public will exercise ordinary care and observe the law of the road in the operation of motor vehicles, and the sufficiency of its warning signals must be determined in the light of this circumstance. *Ibid.*

Negligence, if any, on part of employer in failing to maintain proper warnings of the presence of its employees at work on highway crossing *held* insulated by negligence of driver of car striking plaintiff employee. *Ibid.*

§ 21a. "Employees" Within Meaning of Rule of Liability to Third Persons.

An employer who lends or hires an employee to another is not relieved of responsibility to third persons for the negligence of the employee unless the original employer surrenders control over the employee. *Leonard v. Transfer Co.*, 667.

§ 21b. Course of Employment: Scope of Authority. (Master's liability for negligent driving of servant see Automobiles.)

The master is liable for a negligent injury inflicted on a third person by the servant when the servant is acting in the course of his employment and is at the time about the master's business, but is not liable for such injuries when the servant is acting outside of the legitimate scope of his authority and is engaged in some private matter of his own, it being necessary that the relation of master and servant exist at the time of, and in respect to the very transaction out of which injury arises. *McLamb v. Beasley*, 308.

As a general rule, the servant is not in the course of his employment while going to and returning from his work. *Ibid.*

§ 27. Negligence of Railroad Employer Resulting in Injury to Employee.

Plaintiff alleged that his intestate, who was an experienced switchman in defendant's employ, fell or was thrown from the rear of a freight train while it was engaged in switching operations over a bridge. Plaintiff's nonexpert witness testified that the train stopped suddenly when it got over the bridge and that he then heard a splash in the water. Two members of the train crew, as witnesses for plaintiff, testified that there was no sudden or unusual movement of the train. *Held:* Taking plaintiff's evidence in its entirety, it is insufficient to make out a case of actionable negligence against the defendant. *Hill v. R. R.*, 563.

§ 37. Nature and Construction of Compensation Act in General.

In construing the Workmen's Compensation Act the words of the statute must be taken in their natural or ordinary meaning. *Logan v. Johnson*, 200.

The Workmen's Compensation Act must be liberally construed and liberally applied. *Thomas v. Gas Co.*, 429.

§ 39b. Distinction Between Employees, Independent Contractors and Jobbers.

Evidence *held* sufficient to support finding that deceased was an employee of defendant and not a jobber. *Cloninger v. Bakery Co.*, 26.

§ 40d. Whether Injury Results from "Accident."

Claimants' evidence tended to show that deceased was employed as chief of police of defendant municipality and that deceased died as a result of a shot from a pistol while he was in his office. *Held:* Proof of death by violence

MASTER AND SERVANT—*Continued.*

raises a presumption of accidental death, casting the burden of going forward with the evidence upon the employer and insurance carrier to show that deceased killed himself, when relied on by them, sec. 13 of the Compensation Act (Michie's Code, 8081 [t]), and claimants' 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, and such finding is upheld in accordance with the former decision in this case. *McGill v. Lumberton*, 586.

§ 41a. Amount of Recovery.

Loss of eye and loss of vision of eye mean total, as distinguished from partial, loss of vision. *Logan v. Johnson*, 200.

Evidence *held* not to support finding that claimant had suffered total loss of vision of one eye. *Ibid.*

§ 43. Persons Entitled to Award.

Evidence *held* to sustain finding that claimant was totally dependent upon deceased employee, notwithstanding small sums earned by claimant in casual employment. *Thomas v. Gas Co.*, 429.

§ 45c. Cancellation of Compensation Insurance.

Under the provisions of the policy in suit, cancellation depended upon receipt of notice and not the reading and ascertainment of effect thereof by insured, and tender of unearned premiums was not condition precedent. *Motsinger v. Perryman*, 15.

Rule of Industrial Commission requiring notice to it of cancellation of policy does not become a part of the policy contract. *Ibid.*

A rule of the North Carolina Rating Bureau requiring notice to it of cancellation of a compensation insurance policy does not affect the contractual rights of the parties, the bureau being merely an organization or association of insurance companies and not a State agency. *Ibid.*

§ 47. Notice and Filing of Claim.

The requirement that an injured employee file notice of his claim within twelve months from the date of injury, sec. 24, ch. 120, Public Laws of 1929, is not a statute of limitations, but a condition precedent to the right to compensation. *Lineberry v. Mebane*, 737.

The time within which notice of injury must be filed is not tolled because of the infancy of the employee, the only provision for the tolling of time being in favor of mental incompetents and minor dependents, sec. 49, ch. 120, Public Laws of 1929. In this case, whether the provision should be extended to include injured employees under 18 years of age is not presented, since more than twelve months expired after claimant became 18 years of age before claim was filed. *Ibid.*

§ 49. Original Jurisdiction of Commission and Superior Courts.

An employee of the subcontractor is not precluded by the Workmen's Compensation Act from maintaining an action at common law against the main contractor for injuries resulting from alleged negligence on the part of the main contractor, since the action is not against plaintiff's employer but against a third person. *Cathey v. Construction Co.*, 525.

Under the facts alleged, the parties were presumed to have accepted the provisions of the Compensation Act, Michie's Code, 8081 (k), but the complaint further alleged that in respect to the employee's work defendants "were not operating under the Compensation Act." *Held:* The allegation that defendants were not operating under the act involves both law and fact, and

the allegation is sufficient to admit of proof of nonacceptance of the provisions of the act, Michie's Code, 8081 (1), and it was error for the court to sustain defendants' demurrer on the ground that the Industrial Commission had exclusive jurisdiction, it being a question of law for the court, when the plaintiff introduces his evidence, whether defendant employer was not operating under the act. *Cooke v. Gillis*, 726.

§ 52a. Rules and Procedure Before Industrial Commission.

Administrative rules of the Industrial Commission do not have the force and effect of law, and do not become a part of the contract between the parties. *Motsinger v. Perryman*, 15.

A proceeding before the Industrial Commission for compensation is not a lawsuit in the strict sense, and many of the prerequisites of an action at law are not required. Thus, an infant employee may prosecute his claim directly without the appointment of a next friend or guardian. *Lineberry v. Mebane*, 737.

§ 52b. Evidence Before Industrial Commission.

An unsigned copy of a letter from one physician to another as to the extent or percentage of loss of vision claimant had sustained, is incompetent and has no place in the record and evidence in the cause. *Logan v. Johnson*, 200.

§ 55c. Notice of and Docketing Appeals.

Since the Workmen's Compensation Act does not provide any specific machinery governing appeals to the Superior Court, resort may be had to statutes regulating appeals in analogous cases, ordinarily those regulating appeals from a justice of the peace, so far as same are reasonably applicable and consonant with the language of the statute and the legislative intent. *Summerell v. Sales Corp.*, 451.

Appellant from Industrial Commission may docket appeal at next term of Superior Court, civil or criminal, beginning after the expiration of the 30 days allowed by the act for appeal. *Ibid.*

§ 55d. Review.

The findings of the Industrial Commission that deceased was an employee of defendant at the time of his fatal injury is conclusive on the courts if supported by competent evidence, notwithstanding that the Court might have reached a different conclusion if it had been the fact finding body. *Cloninger v. Bakery Co.*, 26.

The findings of fact of the Industrial Commission, when supported by competent evidence, are binding upon the courts upon appeal, but findings not supported by competent evidence are not conclusive and must be set aside. *Logan v. Johnson*, 200.

While it may be admitted that in some instances the question of dependency may be a mixed question of fact and of law, where the facts admitted or found by the Commission upon competent evidence support the conclusion of the Commission in regard thereto, its award is binding on the Court. *Thomas v. Gas Co.*, 429.

The findings of fact of the Industrial Commission are conclusive on the courts when the findings are supported by any competent evidence, notwithstanding that the court, if it had been the fact finding body, might have reached a different conclusion, the finding of facts from the evidence being the exclusive function of the Industrial Commission. *McGill v. Lumberton*, 586.

MASTER AND SERVANT—*Continued.*

§ 63. Employers Within Purview of Fair Labor Standards Act.

Evidence that defendant operated a lumber mill, located in this State, and that he sold and shipped lumber on repeated occasions to out-of-State customers in the regular course of his business, *is held* sufficient to show that defendant is engaged in interstate commerce within the purview of the Federal Fair Labor Standards Act. 29 U. S. C. A., secs. 201-219. *Hart v. Gregory*, 184.

§ 64. Employees Within Purview of Fair Labor Standards Act.

Night watchman having duty to keep water in boilers *held* engaged in occupation necessary to production of goods within meaning of Federal Fair Labor Standards Act. *Hart v. Gregory*, 184.

MONEY RECEIVED.

§ 1. Nature and Essentials of Cause of Action.

A person knowingly accepting corporate checks in payment of the individual obligation of the president of the corporation, the president having no authority to issue the checks, may be held liable by the receiver of the corporation for the amount of corporate funds thus obtained under the provisions of the Uniform Fiduciaries Act, Michie's Code, 1864 (d) (g). *LaVecchia v. Land Bank*, 35.

§ 3. Sufficiency of evidence and Nonsuit.

Evidence *held* for jury upon question of liability of payee accepting corporate check in payment of personal obligations of its president. *LaVecchia v. Land Bank*, 35.

§ 4. Trial.

In this action by the receiver of a corporation to recover corporate funds used by its president to pay a personal obligation to defendant, issues relating to the making of the contracts with the individual, the delivery of the corporation's checks in payment of the individual's obligation under the contracts, acceptance of the checks by the payee with knowledge that they were in payment of obligations under the contracts, and want of authority in the individual to draw the checks are sufficient to present all the questions determinative of the rights of the parties. *LaVecchia v. Land Bank*, 35.

Where defendant admits that it entered into a contract for the sale of lands to an individual, that in satisfaction of the obligations thereunder it accepted checks on corporate funds drawn by the individual as president of the corporation, and all the evidence tends to show that the individual was without authority to draw the checks, a peremptory instruction in favor of the receiver of the corporation is not error. *Ibid.*

MORTGAGES.

§ 16. Mortgagors and Trustors.

While subsequent warranty deed executed by mortgagor will estop mortgagor from claiming under the mortgage, it does not prevent him from maintaining an action on the notes secured by mortgage. *Tripp v. Langston*, 295.

§ 27. Payment and Satisfaction and Right to Cancellation Upon Tender of Amount Due.

In order to constitute a valid tender, the debtor must offer or pay into court the principal due plus interest thereon to the date of the tender, and where

MORTGAGES—*Continued.*

there is a controversy between the parties as to the balance due on the mortgage indebtedness, and it appears from the mortgagor's own testimony that the amount tendered by him as the full amount of the debt with interest, failed to include interest for the entire period prior to the tender, the failure of the court to call this phase of the case to the attention of the jury is prejudicial error, since even though the discrepancy is small, the mortgagee is entitled thereto, and may not be required to cancel and surrender his note and mortgage for less than the full amount due. *Duke v. Pugh*, 580.

MUNICIPAL CORPORATIONS.

§ 5. Powers of Municipalities in General: Legislative Control and Supervision.

A municipality is an agency created by the State and has no power or authority except that granted by the General Assembly, and is subject to almost unlimited legislative control. *Cox v. Brown*, 350.

§ 8. Private or Corporate Powers.

The powers of a municipality have been greatly enlarged so that, in many respects, it is authorized to act officially outside its corporate limits, and since a municipality may act only through its officers and agents, its officers and agents are empowered to act officially outside its limits in discharging their duties relating to the extra-territorial powers conferred upon the municipality. *Murphy v. High Point*, 597.

§ 14. Defects and Obstructions in Streets and Sidewalks.

A municipality is required to exercise due care to keep its streets, sidewalks and grass plots between sidewalks and curbs in a reasonably safe condition for the purposes of travel for which they are respectively intended. *Gettys v. Marion*, 266.

A municipality is not liable for injury caused by water hydrants, gas plugs, and other necessary obstructions unless they are negligently constructed or maintained or are in an improper place. *Ibid.*

A municipality is not an insurer of safety of pedestrians and travelers along public ways but is liable only for defects or obstructions of which it has actual or constructive notice and from which injury may be reasonably anticipated in the exercise of reasonable care and prudence. *Ibid.*

The mere fact of injury to a traveler or pedestrian along public ways of a municipality does not raise the presumption of negligence, the doctrine of *res ipsa loquitur* not being applicable. *Ibid.*

Evidence *held* insufficient to show that meter box was improperly constructed or maintained or that city had actual or constructive notice of any defect. *Ibid.*

The complaint alleged that defendant municipality blocked the sidewalk and part of the street with dirt from an excavation and that when plaintiff attempted to walk around same, she stepped into the traveled portion of the street and was struck and injured by a motorist. *Held:* Defendant's demurrer was properly sustained under authority of *Darnell v. Winston-Salem*, 209 N. C., 254. *Mills v. Charlotte*, 564.

Where as a part of the original construction of a railroad overpass, supports for the overpass rest in the center of a street and create a dangerous condition, both the municipality and the railroad company may be held liable for negligence in so maintaining the supports. *Montgomery v. Blades*, 680.

In this action by guest, alleged negligence of driver crashing into supports of railroad overpass *held* not to insulate alleged negligence of municipality and railroad. *Ibid.*

MUNICIPAL CORPORATIONS—*Continued.*

§ 33. Validity, Objections to, and Appeal from Assessments.

The wife owned the *locus in quo*, and the petition for public improvements was signed by the husband and by the wife. C. S., 2706. *Held:* The signature of the wife as the owner of the property along with the signature of the husband is sufficient evidence to be submitted to the jury on the issue of whether the wife constituted her husband her agent to subsequently act for her in the premises, rendering the listing of the property in his name on the assessment roll, C. S., 2711, and the special assessment book, C. S., 2722, and the giving of the statutory notices to him, sufficient, thus rendering the lien against the property valid and enforceable as against her and as against her subsequent grantee. *Wadesboro v. Coxe*, 729.

§ 42. Levy and Collection of Taxes.

Municipality may not levy license tax on use of passenger vehicle for hire. *Cox v. Brown*, 350.

§ 46. Notice and Filing of Claim as Prerequisite to Right of Action.

Where a municipality contends that no notice of claim against it had been given its city council as required by its charter as a condition precedent to the right to maintain an action on the claim, testimony that after delivery of claim to its city manager, the mayor and two members of the council had visited the *locus in quo* and discussed the claim, is competent as tending to show that they had been given notice. *Perry v. High Point*, 714.

Evidence that notice of claim against defendant municipality, sufficient in form and addressed to the city council, was filed in the office of the city manager, that subsequently at a meeting of the city council, consideration of the claim was denied because it had not been given the city council as required by the charter (sec. 2, ch. 171, Private Laws of 1931), and that subsequent to the filing of the notice the mayor and two city councilmen visited the *locus in quo* and discussed the claim, *is held* sufficient evidence to be submitted to the jury on the question of substantial compliance with the charter provisions requiring notice to be given the city council, and the granting of the city's motion to dismiss is error. *Ibid.*

The provisions of a city charter that notice of a claim against the city be given as a condition precedent to the right to maintain an action on the claim, is in derogation of the common law, and a substantial compliance is sufficient. *Ibid.*

NEGLIGENCE.

I. Acts and Omissions Constituting Negligence
- 1. In General. Murray v. R. R., 392.
- 4. Condition and Use of Land and Buildings.
  - a. Liability of Owner in General. Mack v. Marshall Field & Co., 697.
  - d. Liability to Invitees. Griggs v. Sears, Roebuck & Co., 166; Pratt v. Tea Co., 732.

II. Proximate Cause
- 5. In General. Murray v. R. R., 392; Bechtler v. Bracken, 515; McMillan v. Butler, 582.
- 7. Intervening Negligence. Murray v. R. R., 392; Montgomery v. Blades, 680.
- 9. Foreseeability and Anticipation of Injury. Murray v. R. R., 392.
- 10. Last Clear Chance. Miller v. Motor Freight Corp., 464; Mercer v. Powell, 642.

III. Contributory Negligence
- 11. In General. Beck v. Hooks, 105; Van Dyke v. Atlantic Greyhound Corp, 283; Gold v. Kiker, 204.
- 12. Contributory Negligence of Minors. Van Dyke v. Atlantic Greyhound Corp., 283.

IV. Actions
- 17b. Questions of Law and of Fact. Murray v. R. R., 392.
- 19. Sufficiency of Evidence and Nonsuit.
  - a. On Issue of Negligence. Carruthers v. R. R., 49; Murray v. R. R., 392.
  - b. On Issue of Contributory Negligence. Beck v. Hooks, 105; Van Dyke v. Atlantic Greyhound Corp., 283; Gold v. Kiker, 204; McMillan v. Butler, 582.
  - d. On Ground of Intervening Negligence Murray v. R. R., 392.
- 20. Instructions Carruthers v. R. R., 49; Williams v. Woodward, 305; Mack v. Marshall Field & Co., 697.

NEGLIGENCE—*Continued.*

§ 1. Acts and Omissions Constituting Negligence in General.

In negligent injury actions, plaintiff must show: First, that defendant failed to exercise proper care in the performance of some legal duty which defendant owed plaintiff under the circumstances in which they are placed; and second, that such negligent breach of duty was the proximate cause of the injury. *Murray v. R. R.*, 392.

§ 4a. Liability of Owner for Condition of Land in General.

The owner of lands letting construction work to an independent contractor who sublets part of the work to an independent subcontractor, cannot be held liable for negligence of the contractor or the subcontractor which causes injury to an employee of the subcontractor, but may be held liable only for negligence of its own which is a proximate cause of the injury. *Mack v. Marshall Field & Co.*, 697.

Owner was obligated to turn premises over to independent contractor in reasonably safe condition and owner undertook to move transmission line and substation. Owner connected temporary transmission line to prevent stoppage of work in mill. The evidence tended to show that the temporary line was not elevated sufficiently to be out of way of workers, and that owner gave no warning of danger. *Held:* Evidence is for jury in action for wrongful death of employee of subcontractor, electrocuted while engaged in work of erecting steel columns, and *further*, evidence did not disclose contributory negligence on part of employee as matter of law. *Ibid.*

§ 4d. Liability to Invitees.

Evidence that floor of aisle was partly tile and partly linoleum waxed in ordinary manner *held* insufficient to show negligence. *Griggs v. Sears, Roebuck & Co.*, 166.

A store proprietor is not an insurer of the safety of his customers and is not held to the standard of the perfectly prudent man, but is required only to exercise that degree of care which would be used by an ordinarily prudent man under the circumstances. *Ibid.*

A store proprietor is not an insurer of the safety of its customers, and the doctrine of *res ipsa loquitur* does not apply to an injury sustained by a customer in a fall on the aisle of the store, but the customer must prove negligence in construction or maintenance, resulting in a condition from which injury is reasonably foreseeable, and that the proprietor had express or implied notice thereof. *Pratt v. Tea Co.*, 732.

Evidence that plaintiff slipped on a greasy, dusty substance on the aisle of defendant's store, and fell to her injury, without evidence that defendant's employees had put the substance on the floor, and without evidence that defendant had express or implied notice thereof, is insufficient to overrule defendant's motion to nonsuit. *Ibid.*

§ 5. Proximate Cause in General.

Proximate cause is that cause which produces the result in continuous sequence and without which it would not have occurred, and one from which a man of ordinary prudence could have foreseen that such result was probable under all the facts as they existed. *Murray v. R. R.*, 392; *Bechtler v. Bracken*, 515.

It is not required that the negligence of defendant be the sole proximate cause of the injury in order to hold defendant liable therefor, it being sufficient if defendant's negligence is one of the proximate causes. *Bechtler v. Bracken*, 515.

NEGLIGENCE—*Continued.*

It is not required that the negligent act of defendant itself inflict the injury, it being sufficient if defendant is guilty of an act of negligence which places a third party in a position of peril so that under the circumstances injury of the nature produced could have been reasonably anticipated, and if defendant's negligence produces the injury in a natural and unbroken sequence, defendant is not exculpated from liability for the injury even though the third party thus placed in a position of peril is also guilty of negligence constituting one of the proximate causes of the injury. *Ibid.*

Conceding both parties may have been negligent, question of proximate cause was for jury. *McMillan v. Butler*, 582.

§ 7. Intervening Negligence.

The intervening act of a third person will not insulate the primary negligence if such intervening act and the resulting injury could have been reasonably foreseen. *Murray v. R. R.*, 392.

Intervening negligence becomes the independent and sole proximate cause of injury so as to prevent the original negligence from being actionable when the original negligence does not join with the intervening negligence in logical sequence in producing the injury, or when the intervening negligence is of such an extraordinary nature that it could not be reasonably foreseen by the author of the original negligence. *Montgomery v. Blades*, 680.

§ 9. Foreseeability and Anticipation of Injury.

A person is not required to foresee negligence on the part of another. *Murray v. R. R.*, 392.

§ 10. Last Clear Chance. (See, also, Automobiles § 18e, Railroads § 10.)

The burden on the issue of last clear chance is upon plaintiff, and the court properly refuses to submit the issue in the absence of evidence on the part of plaintiff that defendant saw the perilous situation in time to have avoided the accident and that he failed to take appropriate action which would have avoided the injury. *Miller v. Motor Freight Corp.*, 464.

Burden is upon party invoking doctrine of last clear chance to prove beyond speculation or conjecture every material fact necessary to support the issue. *Mercer v. Powell*, 642.

It is only when the person injured has been guilty of contributory negligence that the doctrine of last clear chance may be invoked. *Ibid.*

§ 11. Contributory Negligence in General.

It is not required that contributory negligence be the sole proximate cause of injury in order to bar recovery, it being sufficient if it is one of the proximate causes. *Beck v. Hooks*, 105; *Van Dyke v. Atlantic Greyhound Corp.*, 283.

Contributory negligence, *ex vi termini*, presupposes negligence on the part of the defendant, and contributory negligence will bar recovery if it is one of the proximate causes of the injury. *Gold v. Kiker*, 204.

§ 12. Contributory Negligence of Minors.

Where a boy 14 years of age is shown by the evidence to be exceptionally smart, well grown and intelligent for his age, with good hearing and eyesight, he is amenable to the ordinary rules relating to contributory negligence. *Van Dyke v. Atlantic Greyhound Corp.*, 283.

§ 17b. Questions of Law and of Fact.

Where the facts are admitted or established, it is for the court to determine as a matter of law whether negligence exists, and if negligence does exist, whether it was the proximate cause of the injury. *Murray v. R. R.*, 392.

NEGLIGENCE—*Continued.*

§ 19a. Sufficiency of Evidence and Nonsuit on Issue of Negligence.

Since in negligent injury actions plaintiff must often prove that defendant failed to perform a duty imposed by law, and therefore must rely upon negative evidence to prove his cause, and since testimony of a witness of the nonexistence of a fact may run through all degrees of credibility, depending upon the witness' ability and opportunity to have perceived the fact had it occurred, his degree of attention, memory and veracity, a positive statement of a witness that a fact did not occur may have as much probative force as the testimony of a witness for the adverse party that the fact did occur, and the conflicting testimony raise merely a question of the credibility of the witnesses. *Carruthers v. R. R.*, 49.

A nonsuit should be granted in negligent injury actions when all the evidence, taken in the light most favorable to plaintiff, fails to show any actionable negligence on the part of defendant. *Murray v. R. R.*, 392.

§ 19b. Nonsuit on Issue of Contributory Negligence.

When contributory negligence appears from plaintiff's evidence, a motion for nonsuit is properly granted, but not when such evidence is from defendant. *Beck v. Hooks*, 105.

Plaintiff's evidence *held* to disclose contributory negligence as matter of law. *Ibid. Van Dyke v. Atlantic Greyhound Corp.*, 283.

The fact that plaintiff's testimony-in-chief and his testimony upon cross-examination is not wholly consistent, his testimony-in-chief being weakened by his testimony upon cross-examination, does not warrant the granting of defendants' motion to nonsuit on the ground of contributory negligence, the testimony being sufficiently equivocal to require its submission to the jury. *Gold v. Kiker*, 204.

When more than one legitimate inference can be drawn from the evidence, the question of proximate cause is for the jury and defendant's motion to nonsuit on the ground of contributory negligence is properly overruled. *McMillan v. Butler*, 582.

§ 19d. Nonsuit on Ground of Intervening Negligence.

A nonsuit should be granted in negligent injury actions when it clearly appears from the evidence that the injury was independently and proximately caused by the wrongful act, neglect or default of an outside agency or responsible third person. *Murray v. R. R.*, 392.

§ 20. Instructions.

Instruction upon credibility to be given negative evidence *held* for error. *Carruthers v. R. R.*, 49.

An instruction using the phrase "the reasonable man" instead of the phrase "the reasonably prudent man" in stating the standard of care required by law, *is held* not prejudicial upon the facts of this case. *Williams v. Woodward*, 305.

A charge defining negligence and proximate cause and stating the contentions of the parties and properly placing the burden of proof, but which fails to apply the law to the evidence, will be held for error as failing to comply with C. S., 564, since the application of the law to the facts as the jury may find them to be from the evidence, is a substantive feature of the charge which must be given even in the absence of a prayer for instruction. *Mack v. Marshall Field & Co.*, 697.

NUISANCE.

§ 1. Acts and Conditions Constituting Nuisances in General.

While a nuisance may exist irrespective of any act of negligence, and a party injured thereby may recover the damages sustained, where the condition complained of arises solely by reason of alleged negligence, the gravamen of the action is negligence and the failure to submit an issue as to the existence of a nuisance is not error. *Butler v. Light Co.*, 116.

§ 11. Forfeitures and Sale of Property.

In this proceeding to abate a public nuisance, a third party, claiming title to certain of the personal property seized by the sheriff, made a motion in the cause seeking to restrain the sale. *Held:* Even conceding that the court has authority to find the facts upon the motion, the court has the power to submit the determinative issue to a jury and to restrain the sheriff from proceeding further under the execution pending the trial of the issue. *Barker v. Humphrey*, 389.

PARENT AND CHILD.

§ 7. Liability of Parent for Torts of Child.

The mere fact of the relationship does not render the father liable for the torts of his child, and the parent may be held liable only if the child commits the tort while acting as his agent or servant, or if the parent procures, commands, advises, instigates or encourages the commission of the tort, or is guilty of negligence in permitting the child to have access to some dangerous instrumentality. *Bowen v. Mewborn*, 423.

Allegation that son used father's car with father's permission, that father had advised son to have illicit sexual relations *held* insufficient to support liability of father for lustful assault committed by son on date while parked in car. *Ibid.*

Mere fact of the relationship does not render father liable for torts of child. *Staples v. Bruns*, 780.

PARTITION.

§ 5b. Burden of Proof.

In partition, upon a plea of sole seizin by respondent, petitioners have the burden of proving their title as alleged as tenants in common with respondent. *Bailey v. Hayman*, 175.

§ 5c. Competency of Evidence.

Defendants claimed sole seizin as owners of undivided interest and as heirs at law of their brother of the remaining undivided interest. Plaintiff claimed as purchaser of the brother's interest at the sale to make assets to pay the debts of the brother's estate. *Held:* Plaintiff is entitled to prove title by records relating to the sale to make assets and plaintiff's purchase at the sale and deed executed to him by the commissioner. *Cox v. Wright*, 342.

§ 5d. Sufficiency of Evidence, Nonsuit and Directed Verdict.

Respondent claimed sole seizin under a deed to him, and it was admitted that respondent is the sole owner of the land conveyed by that deed, but petitioners denied that the description of the land in that deed embraced the *locus in quo* and introduced evidence in support of their contention. *Held:* The specific description in the deed not being too indefinite to admit parol evidence in aid thereof, the court's holding that the description in the deed to defendant was controlled by the description in a prior deed to which it

PARTITION—*Continued.*

referred and which embraced the *locus in quo*, and thereupon directing a verdict for defendant, is error. *Bailey v. Hayman*, 175.

PARTNERSHIP.

§ 1. Creation and Existence.

While division of profits is one of the tests of partnership, a contract providing that defendant should buy certain property and that plaintiff should salvage and sell it, and that the parties should divide any profits but any loss should be borne by defendant alone, *is held* a contract of employment and does not create a partnership, the provision for division of profits being merely to ascertain the compensation, and upon the destruction of part of the property by fire, plaintiff is not entitled to any part of the proceeds of the fire insurance, nor does plaintiff have any title to property remaining unsold *Wilkinson v. Coppersmith*, 173.

PERJURY.

§ 1c. Making False and Fraudulent Claims Upon Insurance Policy.

The gravamen of the offense defined by C. S., 4369, as rewritten in Public Laws of 1937, chapter 248, is the willfully and knowingly presenting a false or fraudulent proof of claim for a loss upon a contract of insurance; and in a prosecution thereunder the burden is upon the State to prove that the claim for loss was false, that defendant knew it was false, and, with such knowledge, proceeded to make the claim. *S. v. Stephenson*, 258.

§ 3. Prosecution and Punishment.

Evidence *held* to raise only conjecture or suspicion that defendant willfully and knowingly made false claim on fire insurance policy. *S. v. Stephenson*, 258.

PLEADINGS.

I. The Complaint
- 5. Scope of Relief to Which Plaintiff is Entitled on Complaint. Dry v. Drainage Comrs., 356.

II. The Answer
- 10. Counterclaims. Barber v. Edwards, 731.

IV. Demurrer
- 14. To Jurisdiction of Court. Credit Corp. v. Satterfield, 298.
- 15. For Failure of Complaint to State Cause of Action. Thomas v. R. R., 292; Cotton Mills v. Mfg. Co., 560.
- 16a. For Misjoinder of Parties and Causes. Griggs v. Griggs, 574.
- 16b. For Want of Legal Capacity of Plaintiff to Sue. Monfils v. Hazlewood, 215.
- 18. Defects Appearing on Face of Complaint and "Speaking Demurrers."
- 19. Times of Filing Demurrer and Waiver of Right to Demur. Monfils v. Hazlewood, 215.
- 20. Office and Effect of Demurrer. Adams v. Cleve, 302; Cooke v. Gillis, 726; Cathey v. Construction Co., 525; Penick v. Bank, 686; Griggs v. Griggs, 574.

V. Amendment
- 21. Amendment before Trial. Biggs v. Moffitt, 601.
- 23. Amendment after Judgment Sustaining Demurrer. Adams v. Cleve, 302; Gastonia v. Glenn, 510; Barber v. Edwards, 731.

VII. Motions Relating to Pleadings
- 27. Motions for Bill of Particulars or That Pleadings be Made More Definite and Certain. Bank v. Daniel, 710.
- 28. Motions for Judgment on Pleadings. Adams v. Cleve, 302.
- 29. Motions to Strike. Cotton Mills v. Mfg. Co., 560; Bank v. Daniel, 710.

§ 5. Determination of, and Scope of Relief to Which Plaintiff Is Entitled.

The relief to which the plaintiff is entitled is determined by the facts alleged and not by the prayer for relief. *Dry v. Drainage Comrs.*, 356.

§ 10. Counterclaims.

When the answer sets up as a counterclaim a judgment against plaintiff which had been purchased by defendant, but fails to allege that defendant was

PLEADINGS—*Continued.*

the owner of the judgment at the time of the institution of the action, plaintiff's demurrer *ore tenus* to the answer will be sustained, even in the Supreme Court on appeal, since it is required that a counterclaim not arising out of plaintiff's claim must be one existing at the commencement of the action. C. S., 521 (2). *Barber v. Edwards*, 731.

§ 14. Demurrer to Jurisdiction of Court.

Demurrer to the jurisdiction, C. S., 511, for that summons was issued out of a recorder's court to another county in an action *ex contractu* involving less than $200.00, Public Laws of 1939, chapter 81, is bade as a speaking demurrer, since the defect does not appear upon the face of the complaint. *Credit Corp. v. Satterfield*, 298.

§ 15. For Failure of Complaint to State Cause of Action.

If the complaint states facts sufficient to entitle plaintiff to recover on any aspect of the case, or on any theory of liability, a demurrer thereto cannot be sustained. *Thomas v. R. R.*, 292.

Upon demurrer the complaint will be liberally construed with a view to substantial justice, C. S., 535, and every reasonable intendment and presumption will be given the pleader, and the demurrer overruled unless the pleading is wholly insufficient. *Cotton Mills v. Mfg. Co.*, 560.

§ 16a. For Misjoinder of Parties and Causes.

The complaint alleged fraud and conspiracy on the part of defendants inducing plaintiffs to sign a deed describing not only the property intended to be conveyed by plaintiffs, but also other valuable property, and that further, pursuant to fraud and conspiracy to deprive plaintiffs of the purchase price of the property intended to be conveyed, which was to be paid in cash or secured by registered lien, defendant grantees executed unsecured notes therefor and defendant attorney wrongfully withheld one of the notes so executed, and prayed for reformation of the deed and for judgment on the notes. *Held:* Defendants' demurrer on the ground of misjoinder of parties and causes of action was properly overruled, since all the matters alleged arose out of the same transaction or transactions connected with the same subject of action. C. S., 507. *Griggs v. Griggs*, 574.

§ 16b. Demurrer for Want of Legal Capacity of Plaintiff to Sue.

Where an action for wrongful death is instituted in this State by an administratrix appointed by the court of another state, the defect may be taken by demurrer, since such plaintiff does not have legal capacity to sue and the complaint does not state facts sufficient to constitute a cause of action. C. S., 511 (1) (2). *Monfils v. Hazlewood*, 215.

§ 18. Defects Appearing on Face of Pleading and "Speaking Demurrers."

Demurrer to the jurisdiction, C. S., 511, for that summons was issued out of a recorder's court to another county in an action *ex contractu* involving less than $200.00, Public Laws of 1939, chapter 81, is bad as a speaking demurrer, since the defect does not appear upon the face of the complaint. *Credit Corp. v. Satterfield*, 298.

§ 19. Time of Filing Demurrer and Waiver of Right to Demur.

Where an action is removed to the county of defendants' residence upon motion aptly made, C. S., 470, defendants have 30 days after final determination of their motion to remove in which to answer or demur. C. S., 509. *Monfils v. Hazlewood*, 215.

PLEADINGS—*Continued.*

§ 20. Office and Effect of Demurrer.

Plaintiff's demurrer to the answer challenges the sufficiency of the answer to allege facts sufficient to constitute a defense, taking its allegations as true and construing them in the light most favorable to the pleader. *Adams v. Cleve*, 302.

Upon demurrer, the allegations of the complaint will be taken as true and will be construed with a view to substantial justice. *Cooke v. Gillis*, 726.

Defendant's allegation that the judgment sued on was void for want of valid service states a defense, and the principle that return of process cannot be collaterally attacked is not available upon demurrer to the answer, but must be involved by reply and introducing of the officer's return in evidence. *Ibid.*

A demurrer challenges the sufficiency of the pleading, taking as true the facts alleged and the relevant inferences of facts deducible therefrom, but the demurrer does not admit inferences or conclusions of law. *Cathey v. Construction Co.*, 525; *Penick v. Bank*, 686.

In passing upon the sufficiency of a pleading as against demurrer, the facts alleged will be taken as true, but only for the purposes of the demurrer. *Griggs v. Griggs*, 574.

§ 21. Amendment Before Trial.

After time for filing answer has expired, the defendant is not entitled to amend as a matter of right, even though the amendment is not sought for the purpose of delay and even though it will not result in the loss of the benefit of a term of court at which the case might otherwise be docketed for trial, the matter of amending after the time for filing the pleading has expired being addressed to the discretion of the court. C. S., 545. *Biggs v. Moffitt*, 601.

§ 23. Amendment After Judgment Sustaining Demurrer.

Ordinarily, when a demurrer is sustained, the opposing pleader will be permitted to amend if he so desires. C. S., 515. *Adams v. Cleve*, 302.

Where it is determined on appeal that respondent's demurrer to the petition in condemnation proceedings should have been sustained, petitioner may apply to the court below for leave to amend the petition if so advised. C. S., 515. *Gastonia v. Glenn*, 510.

When a demurrer to the answer is sustained, defendant has the right to amend, if he so elects. C. S., 515, 525. *Barber v. Edwards*, 731.

§ 27. Motions for Bill of Particulars or That Pleading Be Made More Definite and Certain.

Where plaintiff files an amended complaint pursuant to the court's order to make the complaint more definite and certain, and the court holds that the amended complaint is sufficient and denies defendant's second motion that the plaintiff be required to make the pleading more definite and certain, the denial of the second motion will not be held for error, the sufficiency of the bill of particulars filed being in the sound discretion of the trial court. *Bank v. Daniel*, 710.

Where plaintiff in an action on a fidelity bond, in response to an order to make the pleadings more definite and certain, files an amended complaint alleging that the defalcations or misconduct of the principal occurred between certain dates, the amended complaint is in effect a bill of particulars, and plaintiff is confined to proof of defalcations occurring between the dates specified. *Ibid.*

PLEADINGS—*Continued.*

§ 28. Judgment on the Pleadings.

Plaintiff's motion for judgment on the pleadings challenges the sufficiency of the answer to allege facts sufficient to constitute a defense, taking its allegations as true and construing them in the light most favorable to the pleader. *Adams v. Cleve*, 302.

Defendant's allegation that the judgment sued on was void for want of valid service states a defense precluding judgment on the pleadings in favor of plaintiff; and the principle that return of process cannot be collaterally attacked is not available by motion for judgment on the pleadings but can be raised only by reply and introducing the officer's return in evidence. *Ibid.*

§ 29. Motions to Strike.

This action was instituted to recover for alleged fraud on the part of defendants in purchasing plaintiff's products for the corporate defendant while deceiving plaintiff into believing that the corporate defendant was acting as plaintiff's selling agent. *Held:* The action was not based upon the contract of agency but was in tort for fraud, and plaintiff's allegations relating to preliminary negotiations and representations prior to the execution of the contract of agency constituted a part of the cause alleged, and defendants' motion to strike was properly denied. *Cotton Mills v. Mfg. Co.*, 560.

Where the court grants defendants' motion for bill of particulars but denies their motions to strike certain matter from the complaint, and neither defendant excepts or appeals from the denial of the motions to strike, defendants are bound thereby, and a motion made after the filing of the amended complaint to strike like matter therefrom is properly denied, and this conclusion is unaffected by the fact that the amended complaint makes it more clearly appear that the matter sought to be stricken is immaterial to the cause. *Bank v. Daniel*, 710.

PRINCIPAL AND AGENT.

§ 7. Evidence and Proof of Agency.

Where a witness points out a person in the courtroom and identifies him as defendant's agent, the failure of the alleged agent to testify in contradiction is a circumstance to be considered by the jury, since a party's failure to disprove a charge by testimony within his control is some evidence that he cannot refute the charge. *Smith v. Kappas*, 758.

A business card with the name of a certain person thereon as agent of the defendant company is some evidence that the person named was defendant's agent, and although it is not competent unless evidence of agency *aliunde* is offered, the order of proof is largely in the discretion of the trial court. *Ibid.*

A wide latitude is allowed in proving the fact of agency and, as a general rule, any evidence logically tending to establish the fact in issue is competent. *Ibid.*

§ 10a. Liability of Principal for Wrongful Acts of Agent.

The principal is liable to a third person injured by the negligence of the agent while the agent is engaged in the performance of duties actually conferred on him under express authority, or while performing acts usual or incidental to the proper performance of the duties actually conferred, which are within the agent's implied authority. *Smith v. Kappas*, 758.

Evidence that agent was acting in scope of authority in directing installation of new cafe fixtures and removal of old, and that plaintiff was injured when old fixtures which were piled on sidewalk fell on her, *held* for jury. *Ibid.*

PRINCIPAL AND SURETY.

§ 17. Pleadings and Evidence in Actions on Surety Bonds.

Where plaintiff in an action on a fidelity bond, in response to an order to make the pleading more definite and certain, files an amended complaint alleging that the defalcations or misconduct of the principal occurred between certain dates, the amended complaint is in effect a bill of particulars, and plaintiff is confined to proof of defalcations occurring between the dates specified. *Bank v. Daniel*, 710.

PROCESS.

§ 5. Service by Publication and Attachment.

Where the complaint fails to state a cause of action against the nonresident defendant, the service of process by publication and attachment is void, and the warrant of attachment will be dismissed upon motion of defendant aptly made upon special appearance. *Bank v. Derby*, 653.

§ 6d. Service on Local Agent of Nonresident Corporation.

A "local" agent of a foreign corporation for the purpose of service of summons under C. S., 483, is an agent residing in this State permanently or temporarily for the purpose of the agency. *Service Co. v. Bank*, 533.

An "agent" of a foreign corporation for the purpose of service of summons under C. S., 483, is a person or corporation given power to act in a representative capacity with some discretionary supervision and control over the principal's business committed to his care, and one who may be reasonably expected to notify his principal that process had been served on him. *Ibid.*

In the absence of any express authority, the question of whether a person or corporation in this State is the local agent of a foreign corporation for the purpose of service of summons under C. S., 483, depends upon the surrounding facts and the inferences which the Court may properly draw from them. *Ibid.*

Depository bank *held* not local agent of foreign bank for the purpose of service of process under C. S., 483. *Ibid.*

§ 10. Proof of Service.

The principal that the officer's return cannot be collaterally attacked cannot be invoked by demurrer or by motion for judgment on the pleadings alleging invalid process, but must be invoked by introducing the officer's return in evidence. *Adams v. Cleve*, 302.

A summons containing an acceptance of service signed by the defendants is *prima facie* evidence of service and is competent evidence without proof of the signatures. *Cox v. Wright*, 342.

RAILROADS.

§ 9. Accidents at Crossings. (Evidence of visibility see Evidence § 26.)

In this action to recover for the death of plaintiff's intestates, killed in a crossing accident, plaintiff's witness testified that he was near the scene of the accident and did not hear the engineer blow the whistle or ring the bell as the train approached the crossing. There was no evidence that the witness' hearing was defective, or evidence of any circumstances rendering it difficult for him to have heard warning signals had they been given. Defendant's witness testified he heard the bell ring and the whistle blow. *Held:* The conflicting testimony raised the question of the credibility of the witness for the determination of the jury, and an instruction containing a long, metaphysical discussion of the weight and credibility to be given negative testimony is error. *Carruthers v. R. R.*, 49.

In this action to recover for a crossing accident, plaintiff's evidence *held* not to establish contributory negligence as matter of law. *Caldwell v. R. R.*, 63.

Ordinarily, where no unusually dangerous or hazardous conditions exist at a grade crossing, timely signals by sounding the bell or blowing the whistle are sufficient warning of the approach of a train. *Ibid.*

Where crossing is unusually hazardous, railroad company may be under duty in exercise of due care to provide warning devices. *Ibid.*

Failure to provide signal devices at hazardous crossing does not in itself constitute negligence. *Ibid.*

In an action to recover for a crossing accident, a requested instruction that plaintiff would be guilty of contributory negligence unless his view was obstructed by fog or mist is properly refused when plaintiff's evidence also tends to show that his view was obstructed by buildings and other objects along the tracks. *Ibid.*

Plaintiff's evidence tended to show that defendant's railroad tracks crossed at grade one of the main thoroughfares of a city, that the crossing was obstructed by small buildings and vegetation on the right of way, that no gongs or signal devices were maintained thereat, that defendant's train operated at an excessive speed and without warning signals by bell or whistle, approached the crossing and struck an automobile which was attempting to cross the tracks, that the driver of the car was not guilty of negligence, that the train carried the car some 75 feet down the track and dropped it on plaintiff, who was working in her flower garden, causing her injury. *Held:* The evidence was sufficient to overrule defendant's motion to nonsuit, notwithstanding evidence introduced by defendant contradicting plaintiff's evidence on every material aspect. *Watson v. R. R.*, 457.

§ 10. Injuries to Persons on or Near Tracks.

Complaint in this action to recover for death of intestate, a minor killed while under or around boxcars standing on a spur track near a grade crossing, *held* sufficient as against demurrer. *Thomas v. R. R.*, 292.

No presumption of negligence on the part of a railroad company arises from the mere fact that the mangled body of a man is found along the track. *Mercer v. Powell*, 642.

A pedestrian voluntarily using a railroad track as a walkway is required to exercise due care for his own safety, and his failure to avoid a moving train is contributory negligence. *Ibid.*

Where plaintiff invokes the doctrine of last clear chance in an action to recover for the death of his intestate, killed when struck by a train, the burden is upon plaintiff 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 in the exercise of due care could have seen him in such condition in time to have stopped the train before striking him, and that there was a failure to keep a proper lookout, which failure was a proximate cause of the injury; and plaintiff must offer legal evidence in support of each of these material facts and evidence leaving any one of them in mere speculation or conjecture is insufficient. *Ibid.*

The doctrine of last clear chance does not apply unless the licensee or trespasser upon the tracks is in an apparently helpless condition, since otherwise the engineer has the right to expect, up to the moment of impact, that he will exercise due care for his own safety and leave the track in time to avoid injury. *Ibid.*

RAILROADS—*Continued.*

Whether intestate was lying on track when struck, and if so, whether he had been in such position for length of time sufficient to invoke doctrine of last clear chance, *held* conjectural upon the evidence. *Ibid.*

§ 11. Accidents at Underpass.

Where as a part of the original construction of a railroad overpass, supports for the overpass rest in the center of a street and create a dangerous condition, both the municipality and the railroad company may be held liable for negligence in so maintaining the supports. *Montgomery v. Blades*, 680.

In this action by guest, alleged negligence of driver crashing into supports of railroad overpass *held* not to insulate alleged negligence of municipality and railroad. *Ibid.*

RAPE.

§ 1. Obtaining Carnal Knowledge of Girl Between Ages of 12 and 16.

Evidence that the prosecutrix at the time alleged was an innocent, virtuous woman, under sixteen years of age, and that defendant is the father of her illegitimate child, which was born shortly after she arrived at the age of sixteen, *is held* sufficient to be submitted to the jury in a prosecution under C. S., 4209. *S. v. Wyont*, 505.

In this prosecution under C. S., 4209, the court, in summarizing the contentions of defendant, charged that defendant insisted that the jury should not find beyond a reasonable doubt that the prosecutrix was under sixteen years of age, "whereas the Biblical records and the testimony of her father and mother should satisfy you beyond a reasonable doubt that she is under sixteen years of age." *Held:* The instruction constitutes an expression of opinion on an essential element of the crime charged, prohibited by C. S., 564, and the error is not mitigated by construing the charge as a whole, nor may it be upheld as charging that the jury should find that the prosecutrix was under sixteen years of age if they believed the uncontradicted testimony. *Ibid.*

RECEIVING STOLEN GOODS.

§ 8. Verdict.

A verdict of guilty of "receiving" is insufficient to support judgment for receiving stolen goods with knowledge that they had been stolen, C. S., 4250, "receiving," without more, not being a crime. *S. v. Cannon*, 466.

REFERENCE.

§ 2. Compulsory Reference.

This action was instituted to recover for services rendered defendant county by plaintiff as an attorney, plaintiff alleging as a basis of recovery services rendered in a certain civil action and services rendered relating to twenty-one different transactions extending over a period of more than a year, subsequent to the termination of the civil action. *Held:* It cannot be said as a matter of law that the cause of action does not require the consideration of a long account, and defendants' exception to the order of compulsory reference on this ground cannot be sustained. C. S., 573. *Grimes v. Beaufort County*, 164.

§ 3. Pleas in Bar.

A plea in bar such as will preclude a compulsory reference is one which extends to the whole cause of action so as to defeat it absolutely and entirely,

REFERENCE—*Continued.*

and which if found in favor of the pleader will put an end to the case, leaving nothing further to be determined. *Grimes v. Beaufort County*, 164.

Plaintiff brought suit for services rendered as attorney, the bases for the claim being services rendered in a civil action and in 21 other separate transactions. *Held:* Defendant's plea of the statute of limitations related solely to the civil action, and since the plea does not go to plaintiff's entire cause, it is not a plea in bar preventing a compulsory reference. *Ibid.*

REFORMATION OF INSTRUMENTS.

§ 7. Pleadings.

The complaint alleged fraud and conspiracy on the part of defendants to defraud plaintiffs, that plaintiffs intended to convey to one of defendants certain property, but that defendants, with intent to deceive, and by means of fraud and trickery, particularly set out, induced plaintiffs to execute deed describing not only the property intended to be conveyed, but also other valuable property, to plaintiffs' deception and damage. *Held:* The complaint sufficiently alleges a cause of action for correction of the deed by striking therefrom the description of the property alleged to have been fraudulently included therein. *Griggs v. Griggs*, 574.

REGISTRATION.

§ 1. Instruments Required to Be Recorded.

While rents accrued are choses in action and an assignment thereof need not be recorded, rents accruing are incorporeal hereditaments which, if for a period of more than three years, must be registered to pass any property as against purchasers for valuable consideration. C. S., 3309. *Bank v. Sawyer*, 142.

§ 4b. Rights of Third Persons Under Unrecorded Instruments.

Purchaser of life estate at execution sale under judgment against life tenant takes title free from claim of assignee in assignment of rents for money advanced to pay taxes and repairs. *Bank v. Sawyer*, 142.

SCHOOLS.

§ 3. Establishment, Enlargement and Alteration of Districts.

The General Assembly may set up machinery under which a county may establish special tax school districts within its boundaries. *Fletcher v. Comrs. of Buncombe*, 1; *Hinson v. Comrs. of Yadkin*, 13.

Chapter 279, Public-Local Laws of 1937, providing for the establishment of special tax school districts in Buncombe County *is held* not repealed by implication by the School Machinery Act of 1937, since the special statute prevails as an exception to the general statute. *Ibid.*

§ 27. State and County Obligations in Maintenance of Schools.

The School Machinery Act of 1933, while providing for State maintenance of the public schools in all of the counties of the State, left the duty to provide for necessary capital outlay upon the several counties. *Fletcher v. Comrs. of Buncombe*, 1; *Hinson v. Comrs. of Yadkin*, 13.

SEDUCTION.

§ 1. Definition and Elements of the Offense.

The essential elements of the offense of seduction are the innocence and virtue of the prosecutrix, the promise of marriage, and intercourse induced by such promise. *S. v. Brackett*, 369.

§ 7. Competency and Relevancy of Evidence.

In a prosecution for seduction, the paternity of the child is in issue, and when the child has been introduced in evidence but not "exhibited" to the jury, and the defendant is in court and observable by the jury, although not a witness in his own behalf, the resemblance of the child to defendant is some evidence of paternity, which may be considered by the jury. *S. v. Brackett*, 369.

§ 8. Sufficiency and Requisites of Supporting Testimony.

Unqualified testimony that the character of prosecutrix was good at the time of the alleged seduction is sufficient supporting evidence upon the question of the innocence and virtue of the prosecutrix. *S. v. Brackett*, 369.

Testimony of the mother of prosecutrix that defendant had asked her approval of their marriage, and subsequent to the birth of the child, had acknowledged paternity of the child and reiterated his intention to marry prosecutrix, is sufficient supporting evidence upon the question of the promise of marriage. *Ibid.*

Evidence that defendant had asked the approval of prosecutrix' mother to their marriage, that he paid prosecutrix assiduous attention, and gave her a ring, a watch and a dress, is sufficient supporting evidence on the question of intercourse induced by promise of marriage. *Ibid.*

§ 10. Instructions.

In this prosecution for seduction, the court's charge to the jury as to the character and requirements of evidence in support of the testimony of prosecutrix, *is held* without error. *S. v. Brackett*, 369.

STATUTES.

§ 2. Constitutional Inhibition Against Passage of Special, Private or Local Acts.

Art. II, section 29, prohibits the Legislature from passing any special, private or local act which *ex proprio vigore* undertakes to establish or change the boundaries of a school district, but the section does not proscribe the Legislature from passing an act applicable to one county only which sets up machinery under which the county may establish special tax school districts within its boundaries. *Fletcher v. Comrs. of Buncombe*, 1; *Hinson v. Comrs. of Yadkin*, 13.

§ 5a. General Rules for Construction.

Where the language of a statute is clear and unambiguous, resort may not be had to anything extrinsic for the purpose of interpretation. *Cox v. Brown*, 350.

A statute will be construed to effectuate the intent of the Legislature. *S. v. Abbott*, 470.

The rule that certain statutes must be strictly construed does not require that they be stintingly or even narrowly construed, but only that everything shall be excluded from their operation which does not come within the scope of the language used, taking their words in their natural and ordinary meaning. *Harrison v. Guilford County*, 718.

STATUTES—*Continued.*

§ 7. Prospective and Retroactive Effect.

A statute will be presumed to be prospective in effect, especially if a construction giving it retroactive effect would be in derogation of common law rights or would render the statute unconstitutional, and a statute will not be construed to have retroactive operation unless the intent to make it retroactive is expressed in clear, strong and imperative language. *Bank v. Derby*, 653.

§ 10. Repeal by Implication and Construction.

An act applicable to one county alone is not repealed by implication as being contrary to the public policy enunciated in a statute having State-wide application and dealing with the same subject matter, passed at the same session of the Legislature, since the stronger indication of policy lies in the exception rather than the rule. *Fletcher v. Comrs. of Buncombe*, 1; *Hinson v. Comrs. of Yadkin*, 13.

Where a special and a general statute dealing with the same subject matter are passed at the same session of the Legislature the acts are to be considered *in pari materia* and ordinarily the special statute will prevail as an exception to the general statute. *Ibid.*

TAXATION.

§ 3a. Limitation on Tax Rate.

Ordinarily, expenses of holding courts, maintaining county jail and caring for prisoners are general expenses, and tax levy therefor in addition to fifteen cents for general county expenses already levied, is void. *R. R. v. Cherokee County*, 169.

§ 19. Exemption of Property of State and Political Subdivisions.

The provision of Article V, section 5, of the State Constitution exempting from taxation property belonging to the State and to municipal corporations is self-executing. *Hospital v. Guilford County*, 673.

§ 20. Exemption of Property of Charitable and Educational Institutions.

The provision of Article V, section 5, of the State Constitution that the General Assembly may exempt from taxation property held for educational, scientific, literary, charitable or religious purposes, is a grant of power and is not self-executing, and the power of the Legislature to prescribe such exemptions is limited by the terms of the grant. *Hospital v. Guilford County*, 673.

Statutes exempting property from taxation because of the purposes for which the property is held must be construed strictly against exemption and in favor of taxation. *Hospital v. Guilford County*, 673; *Harrison v. Guilford County*, 718.

Construing the statutory provisions relating to exemption of property from taxation in connection with the constitutional restrictions upon the power of the Legislature to exempt property from taxation, *it is held* that the real property of private hospitals is made a separate and distinct classification under section 602 (a) of chapter 310, Public Laws of 1939, and it is the legislative intent that the provisions of this section should control rather than the provisions of section 600 (7), exempting from taxation property of churches, religious societies and charitable institutions and orders, the language of section 600 (7), strictly construed, not being sufficiently broad to include property of private hospitals in view of the fact that section 602 (a) specifically deals with property of such institutions. *Hospital v. Guilford County*, 673.

TAXATION—*Continued.*

In determining the question of exemption from taxation, a nonprofit hospital established solely for charitable purposes through individual donations and which is governed by a self-perpetuating board of trustees named by the incorporators, is a private hospital as contradistinguished from a public hospital, which is one supported, maintained and controlled by public authority, and the distinction observed between charitable hospitals and those operated for gain or profit in determining liability for negligence, has no bearing in determining the question of tax exemption. *Ibid.*

The first floor of plaintiff's building is rented out for stores and shops, the second floor is rented for offices for physicians and surgeons, the third and fourth floors are used for a hospital. *Held:* As to the first two floors, the General Assembly is without authority to grant any exemption from taxation, and as to the third and fourth floors, section 602 (a) of chapter 310, Public Laws of 1939, is applicable, and in accordance with its provisions, bills for services rendered the indigent poor may be allowed as a credit on taxes levied against this part of its property, but it is not exempt from taxation. *Ibid.*

Plaintiff's hospital was organized solely for charity but collected from patients able to pay. Defendant county levied personal property taxes on plaintiff's hospital beds, equipment and furnishings. *Held:* Only the personal property used exclusively for charitable purposes is exempt from taxation under section 601 (5), chapter 310, Public Laws of 1939. *Ibid.*

A lot purchased by trustees of a church for the purpose of erecting a new church and Sunday school thereon adequate for the needs of the congregation, and, pending the accumulation of sufficient funds to build the new church, used exclusively for open air Sunday school and church meetings, is property held for religious purposes within the meaning of Article V, section 5, of the State Constitution, and the Legislature has power to exempt such property from taxation. *Harrison v. Guilford County*, 718.

A lot purchased by trustees of a church for the purpose of erecting a new church, and pending the accumulation of sufficient funds to erect the new church, used exclusively for religious purposes, is property adjacent to the church property and reasonably necessary for the convenient use of the church property within the meaning of ch. 310, sec. 600 (3), Public Laws of 1939, exempting such property from taxation, even though the lot purchased, because of unavailability of adjoining land, is four or five blocks distant from the church, the word "adjacent" meaning lying close together but not necessarily in contact. *Ibid.*

§ 40d. Limitations.

Action to enforce lien for taxes under C. S., 7990, for year 1926 and years prior thereto, *held* barred by ch. 181, Public Laws of 1933. *Raleigh v. Jordan*, 55.

The Legislature has the power to deal with the lien of taxes as it sees fit, and may determine when there should be a lien, when it should attach, and when it should cease. *Ibid.*

TENDER.

§ 1. Requisites and Validity of Tender.

Debtor must tender principal due with interest thereon to date of tender. *Duke v. Pugh*, 580.

TORTS.

§ 6. Right to Contribution.

Upon defendant's demand of contribution against codefendant, plaintiff may not take voluntary nonsuit as to codefendant. *Smith v. Kappas*, 758.

TORTS—*Continued.*

§ 8a. Fraud and Duress in Procuring Release.

Where a literate man signs a release from liability for negligent injury, he may not thereafter, upon attacking the release for fraud and misrepresentation, assert that he did not read the release and was ignorant of its purport unless he was prevented from reading the release by artifice or fraud, since it is his duty to read the instrument before executing it unless prevented from doing so. *Presnell v. Liner*, 152.

§ 8c. Acceptance of Benefits and Ratification of Release.

Plaintiff's evidence disclosed that after discovering the import of a release from liability signed by him, he endorsed and cashed the draft given in accord with the release, and used a portion thereof for his own use and allowed the balance to be paid the hospital and his physician, and made no further demand on defendant until the institution of this action nearly two years thereafter. *Held:* Plaintiff's own evidence discloses ratification of the release estopping him from attacking its validity even conceding that its original execution was obtained by fraud and misrepresentation, since plaintiff will not be allowed to accept the benefits any deny the liabilities of the instrument. *Presnell v. Liner*, 152.

TRESPASS.

§ 1a. Definition.

Every unauthorized, and therefore unlawful, entry into the close of another is a trespass. *Lee v. Stewart*, 287; *Cotton Co. v. Henrietta Mills*, 294.

§ 4. Sufficiency of Evidence of Trespass and Nonsuit.

Evidence showing a trespass is sufficient to defeat a motion for judgment as of nonsuit, since upon such a showing the party aggrieved is entitled to nominal damages at least. *Lee v. Stewart*, 287.

The evidence tended to show that defendant had been notified to stay off the *locus in quo*, that nevertheless he entered upon the land and went into a tobacco barn thereon. One plaintiff was the tenant of the other plaintiff. Defendant testified that before going on the premises he got the permission of the tenant's wife, but she testified that she did not give him permission to do so. It further appeared that the tenant was a share cropper. *Held:* The evidence is not only conflicting as to whether the tenant's wife consented to defendant's entry, there was no evidence that she had authority to permit him to go on the premises, and therefore nonsuit on the ground that the entry was authorized, is error. *Ibid.*

Where evidence shows unauthorized entry, contention that nonsuit should be sustained for want of evidence of negligent injury is untenable. *Ibid.*

§ 5. Instructions.

This action was instituted to recover damages to plaintiff's land resulting from the construction and operation of defendant's milldam. Plaintiff abandoned its cause of action for negligent construction and operation of the dam, and elected to stand solely on its cause of action for trespass. *Held:* Since plaintiff is entitled to recover nominal damages if he only show that the defendant broke his close, without reference to negligence or wrongful taking, an instruction to answer the issue of liability in the negative if the jury should find that defendant made no unreasonable uses of its riparian rights or, if reasonable, has not taken in whole or in part any of plaintiff's land, is error, as placing too heavy a burden on plaintiff. *Cotton Co. v. Henrietta Mills*, 294.

TRESPASS—*Continued.*

§ 7. Damages.

A trespasser is liable for all damages which proximately result from his wrongful act, whether produced intentionally or through negligence, and the mere fact of wrongful entry entitles the party aggrieved to nominal damages at least, and therefore conflicting evidence as to whether the trespasser was guilty of negligence resulting in actual damage merely raises a question for the jury. *Lee v. Stewart*, 287.

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§ 6. Conduct and Acts of Court and Supervisory Power in General.

The record disclosed that at the conclusion of all the evidence the court ruled favorably on defendant's motion to nonsuit and stated that there was a serious defect in the record and that if plaintiff wished to reopen the case and supply the deficiency the court would permit him to do so, that there followed a 10-minute recess after which the court told plaintiff he had not introduced the summons which was very material, and that upon plaintiff's request the deficiency in the record was supplied. *Held:* The remarks of the court did not constitute an expression of opinion upon the evidence inhibited by C. S., 564, but were within the court's sound discretion in discharging its duty to see to it that each side has a fair and impartial trial. *Miller v. Greenwood*, 146.

§ 12. Allowing Jury to Visit Locus in Quo.

Whether the jury should be allowed to view the *locus in quo* is within the discretion of the trial court, although a jury view is usually had by consent of the parties rather than over the objection of one of them, but appellant's exception to the action of the trial court in permitting a jury view need not be determined on this appeal, since a new trial is awarded on other exceptions. *Highway Com. v. Hartley*, 438.

§ 13. Order of Proof.

Even after conclusion of the evidence and the court's ruling in favor of defendant upon defendant's motion for judgment as of nonsuit, the court has

the discretionary power to reopen the case and permit plaintiff to introduce the summons in evidence, and to overrule the motion after the deficiency has been supplied, since the admission of such evidence does not take the defendant by surprise or prejudice his cause. *Miller v. Greenwood*, 146.

A business card with the name of a certain person thereon as agent of the defendant company is some evidence that the person named was defendant's agent, and although it is not competent unless evidence of agency *aliunde* is offered, the order of proof is largely in the discretion of the trial court. *Smith v. Kappas*, 758.

§ 19. Province of Court and Jury in Regard to Evidence.

The competency, admissibility and sufficiency of the evidence is for the court; the weight, effect and credibility is for the jury. *Barnes v. Teer* 122; *Coach Co. v. Lee*, 320.

§ 22b. Consideration of Evidence on Motion to Nonsuit.

Upon a demurrer thereto, the evidence must be construed in the light most favorable to plaintiff and he is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom. C. S., 567. *Caldwell v. R. R.*, 63; *Barnes v. Teer*, 122; *Coach Co. v. Lee*, 320; *Watson v. R. R.*, 457; *Bechtler v. Bracken*, 515; *Smith v. Kappas*, 758.

Only the evidence in support of the cause of the action will be considered upon motion to nonsuit. *Coach Co. v. Lee*, 320.

§ 22d. Form of Judgment of Nonsuit.

In granting defendant's motion for nonsuit it is not error for the court to refuse to incorporate in its judgment an excerpt from the minutes disclosing defendant's reasons for the motion, or in refusing to insert in detail the reasons upon which the nonsuit is granted. *Gettys v. Marion*, 266.

§ 25. Voluntary Nonsuit.

Plaintiff sued defendants as joint tort-feasors. Appealing defendant in its amended answer denied negligence but also alleged that if appealing defendant were negligent, its negligence concurred with the negligence of its codefendant, and asked for such relief against its codefendant as it was entitled to under C. S., 618. *Held:* It was error for the court, over appealing defendant's objection, to permit plaintiff to take a voluntary nonsuit as to the codefendant before the close of plaintiff's evidence, since under the pleadings, appealing defendant requested affirmative relief against its codefendant and is entitled to hold the codefendant as a party under the statute. *Smith v. Kappas*, 758.

§ 27b. Directed Verdict and Peremptory Instructions in Favor of Party Having Burden of Proof.

While ordinarily a verdict may not be directed in favor of the party having the burden of proof, when only one inference can be drawn from the facts admitted or established, the court may draw the inference and peremptorily instruct the jury. *LaVecchia v. Land Bank*, 35.

Directed verdict may not be given in favor of party upon whom rests the burden of proof. *Haywood v. Ins. Co.*, 736.

§ 29b. Statement of Evidence and Application of Law Thereto.

Court must apply the law to the evidence as substantive part of charge. *Mack v. Marshall Field & Co.*, 697.

§ 29c. Charge on Burden of Proof.

While the burden of proof is a substantial right, the failure of the court to define the terms "greater weight" or "preponderance of the evidence" in its

TRIAL—*Continued.*

charge correctly placing the burden of proof, will not be held for error in the absence of a prayer for special instructions. *Arnold v. Trust Co.*, 433.

The burden of proof is a substantial right, and the failure of the charge to properly place the burden of proof is reversible error. *Haywood v. Ins. Co.*, 736.

§ 31. Expression of Opinion by Court on Weight or Credibility of Evidence.

Since the Supreme Court is not precluded from expressing an opinion on the evidence, its decisions frequently may not be embodied in instructions to the jury *in ipsissimis verbis* without danger of resulting in an expression of an opinion on the evidence by the trial court. *Carruthers v. R. R.*, 49.

A charge characterizing plaintiff's evidence as negative and weak *is held* erroneous as an expression of opinion on the weight of the evidence, entitling the plaintiff to a new trial. *Ibid.*

§ 32. Requests for Instructions.

A requested instruction is properly refused when the instruction requested fails to conform to the evidence. *Caldwell v. R. R.*, 63.

Where requests for instructions, embodying applicable principles of law, are substantially given in the charge, it is sufficient. *Ibid.*

Where defendant's request for instructions on a particular aspect of the case is given in a special instruction by the court after recalling the jury, and the instruction is correct and adequate upon the point, defendant may not successfully contend on appeal that the charge was erroneous for the failure of the court to give more particular or slightly different instructions upon the same aspect. *McMillan v. Butler*, 582.

It is not error to refuse to give requested instructions which are not predicated on the jury's finding of the essential facts by the greater weight of evidence. *Coach Co. v. Lee*, 320; *Arnold v. Trust Co.*, 433.

Where requested instructions are substantially given, it is sufficient. *Coach Co. v. Lee*, 320.

§ 33. Statement of Contentions and Objections Thereto.

A misstatement of the contentions of the parties must be brought to the court's attention in apt time. *Barnes v. Teer*, 122.

§ 37. Form and Sufficiency of Issues in General.

Objection to the issues submitted cannot be sustained when they present to the jury all determinative facts in dispute and afford the parties opportunity to introduce all pertinent evidence and to apply it fairly. *LaVecchia v. Land Bank*, 35.

§ 39. Tender of Issues.

Where the issues submitted are sufficient to present all determinative facts in dispute and to afford the parties opportunity to introduce all pertinent evidence and to apply it fairly, the refusal to submit other issues tendered will not be held for error. *LaVecchia v. Land Bank*, 35.

§ 48. Motions for New Trial for Misconduct of, or Affecting Jury.

In this action against joint tort-feasors, one defendant entered into a compromise agreement, but remained in the case to prevent the appealing defendant from placing sole responsibility on it. Appealing defendant moved for a mistrial on the ground that it had been prejudiced by the acts of its codefendant and the fact that the compromise agreement had been admitted in evidence. *Held:* Under the facts of the case, the appealing defendant having sought and obtained credit on the issue of damages for the amount of the

TRIAL—*Continued.*

settlement, and the court having charged that the jury should not consider the matter except on the issue of damages, the overruling of the motion is not held for error. *Gold v. Kiker*, 204.

§ 49. Motions to Set Aside Verdict as Being Against Weight of Evidence.

A motion at trial term to set aside the verdict as being contrary to weight of evidence is addressed to discretion of trial court. *Query v. Ins. Co.*, 386.

§ 54. Findings and Judgment Upon Agreement to Trial by Court.

When the parties agree to trial by the court, the jurisdiction of the court is limited by the agreement, and where the parties agree only to the submission of the issue of whether plaintiff was estopped by warranty deed from claiming under her prior mortgage, the determination of the issue of estoppel in favor of defendants is without error, but the further adjudication that defendants are not indebted to plaintiff is error, the parties having reserved their right to trial by jury on the issue of indebtedness. *Tripp v. Langston*, 295.

TRUSTS.

§ 1d. Creation and Validity of Charitable Trusts.

Charitable trusts are not subject to the rule against perpetuities. Public Laws of 1925, ch. 264. *Penick v. Bank*, 686.

§ 8c. Merger of Legal and Equitable Titles.

C. S., 1740, merges the legal and equitable titles in the beneficiary of a passive trust, but as to active trusts, the legal title vests and remains in the trustee for the purposes of the trust. *Fisher v. Fisher*, 42; *Deal v. Trust Co.*, 483.

§ 8e. Active and Passive Trusts.

A conveyance of property to a trustee with provision that the rents and profits should be paid to the beneficiary or to any person he might designate, but granting power to the trustee to mortgage or sell the property and to reinvest the proceeds of sale, *is held* to create an active trust, and title remains in the trustee, and the beneficiary is without power to require a conveyance to him, and a conveyance to the beneficiary is void. *Fisher v. Fisher*, 42.

A devise and bequest of property to a trustee with direction that the income therefrom be paid to a named beneficiary for life, and at his death to his children, share and share alike, with further provision that the share of each child should be paid him in fee upon his majority and that if the first taker should die without children him surviving the property should revert to the estate, *is held* to create an active trust requiring the trustee to hold the property and pay over the income and finally distribute the *corpus* of the estate in accordance with the terms of the trust, and the legal and equitable titles do not merge in the first taker. *Deal v. Trust Co.*, 483.

§ 10. Conveyance of Property to Cestui.

Husband and wife owned lands as tenants in common upon the rendition of an absolute divorce. Both remarried. The wife and her second husband conveyed her one-half interest by properly acknowledged deed to a trustee for the husband's benefit. The trust was an active trust. The trustee thereafter conveyed the interest to the husband and his second wife as tenants by the entireties. *Held:* The trustee of an active trust may not convey the trust property to the *cestui*, and the deed to the husband and his second wife is void,

TRUSTS—*Continued.*

and upon his death the trust terminates, and the land descends to his heirs subject only to her dower rights. *Fisher v. Fisher*, 42.

§ 11. Termination or Modification of Trust by Equity.

Release signed by contingent beneficiaries cannot destroy active trust, and judgment that trustee should continue to hold the property for the purposes of the trust, is upheld. *Deal v. Trust Co.*, 483.

Courts of equity have the power to modify the terms of a trust in exceptional cases when necessity or expediency impels, but they should not exercise this power to destroy the trust or defeat the purposes of the donor. *Penick v. Bank*, 686.

Beneficiary *held* not entitled to modification of provision that property be held for accumulation of income for period of 99 years. *Ibid.*

UTILITIES COMMISSION.

§ 1. Nature and Functions of Utilities Commission in General.

The Utilities Commission is a State administrative agency of original and final jurisdiction, and its orders require no confirmation by any court to be effective. *Utilities Com. v. Coach Co.*, 233.

§ 4. Appeals to Superior Court.

Petitioner has the right to appeal to the Superior Court from the denial of its petition for the removal from its franchise of a restriction prohibiting it from transporting passengers between two cities along its route in purely local traffic between the said cities. C. S., 1097. *Utilities Com. v. Coach Co.*, 233.

Petitioner's exceptions *held* to raise issues of fact, and appeal was properly transferred to civil issue docket for trial by jury. *Ibid.*

While on appeal from the denial of a petition to remove certain restrictions from petitioner's franchise, the point at issue is the reasonableness of the commissioner's order, which is a question of law, nevertheless the reasonableness of the order depends upon the attendant facts, and exceptions to the commissioner's findings upon which his order is predicated raise issues of fact for the determination of the jury. *Ibid.*

Appeals from the Utilities Commissioner are analogous to appeals from a justice of the peace rather than appeals from a referee, and since the trial in the Superior Court is *de novo* upon issues of fact raised by the exceptions, the Superior Court properly refuses to pass upon appellant's exceptions to the findings of fact *seriatim*. *Ibid.*

Upon appeal from the denial of a petition the question for decision is whether petitioner is entitled to the relief sought, and Superior Court, upon jury's verdict, may enter judgment granting the relief, and need not remand the case to the Utilities Commission. *Ibid.*

The provision of statute that the decision of the Utilities Commissioner shall be deemed *prima facie* just and reasonable, Michie's Code, sec. 1098, merely raises a presumption of law, and places the burden of going forward with the proof upon the party appealing from the decision, but even if the statute should be construed to raise a presumption of fact, an instruction that the findings and decision of the commissioner were *prima facie* just and reasonable gives appellee the benefit of a presumption of fact when the evidence fully apprises the jury of the substance and purport of the order. *Ibid.*

VENDOR AND PURCHASER.

§ 25. Remedies of Purchaser for Breach of Warranty or Misrepresentation.

Action *held* one for fraud for misrepresentations as to condition of water, heating and plumbing systems in building purchased, and in such action plaintiff must show that he had no opportunity to make investigation, or that he was prevented from doing so by artifice or fraud, and nonsuit was proper in absence of evidence to this effect. *Harding v. Ins. Co.*, 129.

VENUE.

§ 1b. Executors and Administrators.

Action *held* against defendant individually as legatee and devisee and not in her capacity as executrix, and defendant's motion to remove from the county of plaintiff's residence, C. S., 469, to the county in which she qualified as executrix, was properly denied. *Rose v. Patterson*, 212.

§ 1c. Action Against Public Officers and Political Subdivisions.

Since a municipality may act only through its officers and agents, an action against a municipality is an action against "a public officer" within the meaning of the provisions of C. S., 464. *Murphy v. High Point*, 597.

The proper venue of an action against a municipality is the county where the cause of action, or some part thereof, arose. C. S., 464. *Ibid.*

The complaint alleged damage to plaintiff's land resulting from the negligent operation of defendant municipality's sewage disposal plant. The action was instituted in the county in which the land lies and in which the municipality maintained and operated its sewage disposal plant. The municipality made a motion that the action be removed to the county in which it is located. *Held:* The alleged negligent acts resulting in the injury to the land occurred at the point where defendant municipality maintained its sewage disposal plant and the cause of action there arose, and therefor the municipality's motion for change of venue was erroneously granted. C. S., 463, 464. *Ibid.*

WAREHOUSEMEN.

§ 4. Liens and Claims of Third Persons.

The public laws regulating warehousemen do not require them to receive and sell mortgaged property without the knowledge and consent of the mortgagee, nor relieve them of their common law liability to a mortgagee for such conversion. *Credit Co. v. Satterfield*, 298.

WATERS AND WATER COURSES.

§ 7. Damages for Construction and Operation of Dam in General.

This action was instituted to recover damages to plaintiff's land resulting from the construction and operation of defendant's milldam. Plaintiff abandoned its cause of action for negligent construction and operation of the dam, and elected to stand solely on its cause of action for trespass. *Held:* Since plaintiff is entitled to recover nominal damages if he only show that the defendant broke his close, without reference to negligence or wrongful taking, an instruction to answer the issue of liability in the negative if the jury should find that defendant made no unreasonable uses of its riparian rights or, if reasonable, has not taken in whole or in part any of plaintiff's land, is error, as placing too heavy a burden on plaintiff. *Cotton Co. v. Henrietta Mills*, 294.

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§ 9. Handwriting of Testator and Sufficiency of Instrument.

Held: Words in handwriting of testator *held* not to constitute complete instrument and not to disclose *animus testandi*, and the instrument was improvidently admitted to probate as holograph codicil to will. *In re Will of Smith*, 161.

§ 16b. Probate of Lost or Destroyed Wills.

In an action to probate a lost or destroyed will, propounder must show by satisfactory proof that the instrument once existed and was lost or destroyed under circumstances that would defeat an inference of cancellation by testator, and upon failure of proof of an instrument such as could be admitted to probate, there is a failure of proof of the *res*, and therefore a nonsuit is properly entered notwithstanding that the proceeding is *in rem*. *Hewett v. Murray*, 569.

Propounder's evidence tended to show that the instrument sought to be probated as a will had been destroyed in an accidental fire. Propounder's witness testified that she had seen the instrument, that it was written in ink with the signature of the deceased at the bottom. *Held:* There is failure of proof that the instrument and every part thereof was in the handwriting of deceased, and the evidence is insufficient to establish the alleged holographic will. Whether it is necessary that the handwriting of testator should be proved by three witnesses, *quære*. *Ibid.*

In an action to probate a destroyed will, propounder's contention that even in the absence of sufficient evidence to establish the instrument as a will, he should recover from the heirs at law at least the value of the property which his evidence tended to show deceased intended to bequeath and devise to him, is untenable, first because the remedy is inappropriate to his declaration, and second, because he has sustained no wrong at the hands of the heirs at law who inherit the property upon failure of proof of testamentary disposition. *Ibid.*

§ 17. Vacation of Order of Probate.

The clerk of the Superior Court, in his probate jurisdiction, has the power to vacate a previous order admitting a will to probate in common form on motion aptly made when it is clearly made to appear that the order of probate was improvidently granted, or that the court had been imposed upon and misled as to the essential and true conditions of the case. *In re Will of Smith*, 161.

WILLS—*Continued.*

§ 21c. Undue Influence.

Undue influence which will justify the setting aside of a will is a fraudulent influence or such an overpowering influence as substitutes the will of the person exercising the influence for that of the testator so that the testator is constrained to act against his will. *In re Will of Harris*, 459.

§ 22. Burden of Proof.

The burden on the issue of undue influence rests upon caveators. *In re Will of Harris*, 459.

§ 24. Sufficiency of Evidence, Nonsuit and Peremptory Instructions.

The evidence viewed in the ilght most favorable to caveators tended to show only that testator's sole heirs at law were his nephews and niece, that he left more of his property to some of them with whom he had lived and associated more closely than to others, that he was a sporadic drinker, and that the will in question was executed by him in the office of an attorney, and that the day the will was executed he came home intoxicated, *is held* insufficient to support caveators' allegations of undue influence, and a peremptory instruction on the issue in favor of the propounders is not error. *In re Will of Harris*, 459.

§ 31. General Rules of Construction.

The cardinal principle in the interpretation of wills is that the intention of the testator as expressed in the language of the instrument shall prevail, and that the application of technical rules will not be permitted to defeat an intention which substantially appears from the entire instrument, although accepted canons of construction which have become settled rules of law and property cannot be disregarded. *Williamson v. Cox*, 177; *Shoemaker v. Coats*, 251.

The guiding star in the interpretation of wills, to which all rules must bend, unless contrary to some principle of law or public policy, is the intent of the testator, and this is to be ascertained from the language used by him, "taking it from its four corners," and considering the instrument as a whole. *Smith v. Mears*, 193.

A codicil is a supplement to a will, annexed for the purpose of expressing the testator's afterthought or amended intention, and the will and any codicil or codicils are to be considered as constituting a single instrument and read together in ascertaining the intent of the testator. *Ibid.*

Since each will must be construed to ascertain the intent of the testator as expressed in the particular language used by him, interpreted according to the circumstances of its use, with no two situated exactly alike, the law of will is *sui generis*, yet the adjudicated cases will be assiduously pursued for any gleam of light that may help with the problem in hand. *Ibid.*

The rule that a will should be interpreted from its four corners to carry out the intent of testatrix as gathered therefrom does not permit the writing into the will by the court essential words not appearing therein. *In re Leonard*, 738.

§ 33b. Rule in Shelley's Case.

A devise to testator's son "to have and to hold to him and his bodily heirs born in wedlock, if any, if no such heirs then to go back to his nearest of kin," *is held* to disclose that the words "bodily heirs" were not used in their technical sense as heirs general, but were used in the sense of children or issue, and the rule in *Shelley's case* does not apply. *Williamson v. Cox*, 177.

WILLS—*Continued.*

§ 33c. Vested and Contingent Estates and Defeasible Fees.

Under the statute of uses, a fee simple may be limited after a fee simple by executory devise under the doctrine of springing or shifting uses, but in order for this doctrine to apply it is necessary that there be a supervening contingency to limit or cut down the first estate and make room for the limitation over. *Williamson v. Cox*, 177.

A devise to testator's son "to have and to hold to him and his bodily heirs born in wedlock, if any, if no such heirs then to go back to his nearest of kin," *is held* to devise a determinable fee to the first taker upon the supervening contingency of his death without children or issue him surviving, it being apparent that the words "bodily heirs" were not used in their technical sense, but meant issue or children, C. S., 1739, and upon the death of the first taker without issue him surviving, his surviving sister takes as his next of kin to the exclusion of his nephews and nieces, children of deceased brothers and sisters. *Ibid.*

§ 33f. Devises With Power of Disposition.

A devise to a person generally or indefinitely, with power of disposition or appointment, carries the fee; but when such power is annexed to a life estate, the express limitation for life will control the operation of the power and prevent it from enlarging the estate into a fee. *Smith v. Mears*, 193.

Testator devised certain property to his daughter and certain property to named sons, for life, and by codicil stipulated that each should have power to dispose of the interest devised to him. *Held:* The power of disposition, being annexed to the life estates, did not enlarge the life estates into estates in fee simple. *Ibid.*

Whether a devise of a life estate with power of disposition empowers the devisee to dispose of the property by will depends upon testamentary intent as gathered from the instrument. *Ibid.*

Testator devised certain property to his sons for life, and by codicil provided that they should have "full power to sell or dispose of any or all of the property in this will devised to them in fee and receive the proceeds thereof as to them seems best or proper." *Held:* The clause "and receive the proceeds thereof as to them seems best or proper" indicates that testator contemplated a sale or disposition by act *inter vivos*, and not by will, and the attempted disposition by will on the part of two of the sons in favor of others of them is without effect. *Ibid.*

Exercise of power of disposition by deed *held* to convey fee simple to grantee. *Ibid.*

§ 33g. Determination of Particular Estate and Time at Which Remainder Vests.

Where a contingent limitation over is made to depend upon the death of the first taker without children or issue, the limitation takes effect when the first taker dies without issue or children living at the time of his death. C. S., 1737. *Williamson v. Cox*, 177.

§ 33h. Charitable Trusts. (Modification of, see Trusts § 11.)

Charitable trusts are not subject to the rule against perpetuities. Public Laws of 1925, ch. 264. *Penick v. Bank*, 686.

§ 34a. Determination of Whether Devise Is for Life or in Fee.

Husband and wife executed reciprocal wills. The wife predeceased her husband and this action was instituted after the death of the husband. The wife owned the *locus in quo* and devised same to her husband "in fee simple,

my entire estate as long as he lives, he to use only the rents and interest which may accrue on said estate," and by later item provided, "at my beloved husband's death I give and devise" to one of their two daughters "the balance of my estate." *Held:* The husband took only a life estate in the land, it being apparent from the construction of the instrument as a whole that the words "in fee simple" were not used in their technical sense; but *held further*, if it should be construed that the husband took the fee simple, the said daughter acquired the fee simple under the corresponding item in his will. *Shoemaker v. Coats*, 251.

§ 34b. Sufficiency of Description of Land Devised.

Testator devised to his son twenty-five acres out of the home tract of 82 acres, the land devised to include the "building and outhouses," and the will provided that the remainder of the real estate should be divided among all of testator's children, naming them, including the devisee of the twenty-five acres. *Held:* The will does not fix a beginning point or boundaries of the twenty-five-acre tract, or furnish any means by which the tract may be identified and set apart from the other land within the boundaries of the home tract, the mere reference to the "building and outhouses" being insufficient for this purpose, and the description is too vague to be aided by parol, nor does it refer to anything extrinsic by which the description might be made definite and certain, and the devise is void for indefiniteness, and the entire acreage must be equally divided among all the children of testator. *Hodges v. Stewart*, 290.

Where a devise is void for indefiniteness of the description of the property, the devise cannot be given effect as an expression of testamentary intent, since it affords no legal evidence of an intention of testator to devise, and since the courts cannot make a will for testator by supplying provisions which are necessary to give the language used testamentary effect. *Ibid.*

§ 39. Action to Construe Wills.

A complaint in an action to determine the rights and titles of the parties in lands by construction of the wills of deceased persons who had title or claimed interests therein, states a cause of action and is not premature. *Johnston v. Johnston*, 706.

Where the court dismisses an action to construe wills and determine the rights and titles of the parties thereunder, there is nothing in the pleadings to support the court's further order giving certain rights to certain of the parties and certain directions to other parties in effecting the terms of one of the wills, and such further order will be stricken out on appeal. *Ibid.*

§ 45. Direction That Devisee Pay Other Beneficiaries Certain Sum as Constituting Charge on Land or Against Bequest.

Debts of husbands of beneficiaries *held* not chargeable against beneficiaries under provision of will that debts of beneficiaries *inter se* should be chargeable against their respective shares. *Robertson v. Robertson*, 447.

CONSOLIDATED STATUTES AND MICHIE'S CODE CONSTRUED.

(For convenience in annotating.)

SEC.

31. Procedure to remove executor or administrator for default or misconduct is by order issued by clerk to executor or administrator to show cause, and in such proceeding the *respondeat* must be given notice and an opportunity to be heard. *Edwards v. McLawhorn*, 543.

59, 469. Action *held* against defendant individually as legatee and devisee and not in her capacity as executrix, and defendant's motion to remove to county in which she qualified as executrix was properly denied. *Rose v. Patterson*, 212.

74. No statute of limitations bars right and duty of personal representative to sell lands to make assets to pay debts of estate. *Gibbs v. Gibbs*, 382.

76. Deed executed by heir within two years after intestate's death is ineffectual as against creditors of the estate. *Cox v. Wright*, 342.

135, 547, 626. Agreement *held* to have converted proceeding to sell land to make assets to pay debts of estate into an administration suit, and petitioner could not object to being made party in her individual capacity. *Edney v. Matthews*, 171.

160. Action for wrongful death may not be maintained by administratrix appointed by the court of another state. *Monfils v. Hazlewood*, 215.

160, 415. Where cross action for wrongful death is set up within one year but is dismissed on appeal as not arising out of plaintiff's cause, administratrix may institute another action within one year of dismissal. *Blades v. R. R.*, 702.

219 (f). Purchaser of bank stock prior to 1925 may not be held personally liable for amount by which sale of stock fails to realize assessment to make good impairment of bank's capital. *Bank v. Derby*, 653.

364. Statute empowering court to order a court survey vests a sound discretion in the court within the limits defined. *Vance v. Pritchard*, 273.

441. Plaintiff's cause of action *held* to be on new promise of bankrupt to pay and not original note under seal, and three-year statute applies. *Westall v. Jackson*, 209.

464. An action against municipality is action against "public officer" within meaning of statute, and proper venue is county in which cause of action, or some part thereof, arose. *Murphy v. High Point*, 597. Complaint *held* to allege tort committed in county in which municipality maintained sewage disposal plant, and action was properly institute therein. *Ibid.*

483. Depository bank *held* not local agent of foreign bank for purpose of service of process. *Service Co. v. Bank*, 533.

494. Typewritten statement that defendant was unable to comply with C. S., 493, signed by plaintiff, followed by unsigned, unsealed and unauthenticated jurat is not affidavit and will not support order allowing plaintiff to sue *in forma pauperis*. *Ogburn v. Sterchi Bros. Stores, Inc.*, 507.

CONSOLIDATED STATUTES—*Continued.*

SEC.

507. Complaint *held* not demurrable for misjoinder of parties and causes. *Griggs v. Griggs*, 574.

509, 470. Where action is removed to county of defendant's residence, defendant has 30 days after final determination of his motion to remove in which to answer or demur. *Monfils v. Hazlewood*, 215.

511. Demurrer to jurisdiction for that summons was issued out of a recorder's court to another county in an action *ex contractu* involving less than $200.00 is bad as a speaking demurrer, since the defect does not appear upon the face of the complaint; and further, the complaint was sufficient to allege a cause of action in tort for conversion. *Credit Corp. v. Satterfield*, 298.

511 (1) (2). Where action for wrongful death is instituted by administratrix appointed by court of another state, demurrer will lie, since plaintiff has no legal capacity to sue, and complaint fails to state cause of action. *Monfils v. Hazlewood*, 215.

515. Ordinarily, when a demurrer is sustained, the opposing party will be permitted to amend if he so desires. *Adams v. Cleve*, 302; *Gastonia v. Glenn*, 510.

515, 525. When demurrer to answer is sustained, defendant has the right to amend, if he so elects. *Barber v. Edwards*, 731.

521 (2). Where answer fails to allege that counterclaim existed at time of institution of action, demurrer to counterclaim will be sustained. *Barber v. Edwards*, 731.

533, 1799. Permitting jury to take into its room complaint in civil action and notes of argument of solicitor containing reference to defendant's failure to testify, *held* to entitle defendant to new trial. *S. v. Stephenson*, 258.

535. Upon demurrer, complaint will be liberally construed with view to substantial justice, and every reasonable intendment will be given pleader. *Cotton Mills v. Mfg. Co.*, 560.

545. After time for filing answer has expired, defendant is not entitled to amend as a matter of right, even though amendment will not result in loss of benefit of term of court. *Biggs v. Moffitt*, 601.

564. Charge defining negligence, proximate cause, and correctly placing burden of proof, but failing to apply the law to the evidence will be held for reversible error. *Mack v. Marshall Field & Co.*, 697. Charge of court on questions of negligence, contributory negligence, and proximate cause *held* without error. *Barnes v. Teer*, 122. Court, in exercise of duty to see that parties are given fair trial, has discretionary power to take any action to this end not inhibited by this statute. *Miller v. Greenwood*, 146. Defendant's evidence *held* to present question of self-defense, and court should have instructed jury thereon even in absence of request. *S. v. Greer*, 660. Exception to charge on ground that it failed to state evidence and declare and explain law arising thereon is bad as a "broadside" exception. *Arnold v. Trust Co.*, 433; *S. v. Webster*, 692. Charge that evidence relating to essential element of crime should satisfy the jury beyond a reason-

CONSOLIDATED STATUTES—*Continued.*

SEC.

able doubt, interjected in stating defendant's contentions, *held* for error as expression of opinion. *S. v. Wyont*, 505.

567. Upon motion to nonsuit, evidence will be considered in light most favorable to plaintiff. *Barnes v. Teer*, 122; *Coach Co. v. Lee*, 320; *Watson v. R. R.*, 457; *Bechtler v. Bracken*, 515; *Smith v. Kappas*, 758.

573. Action *held* to involve long account within meaning of compulsory reference statute. *Grimes v. Beaufort County*, 164.

573, 442. Plea of statute of limitations is not plea in bar of precluding compulsory reference unless plea of statute of limitations goes to each and every item constituting basis of plaintiff's cause of action. *Grimes v. Beaufort County*, 164.

595, 596. In action to recover for goods sold under consignment upon allegations that purchaser failed to properly account and that he was guilty of fraudulent misappropriation, plaintiff is not entitled to judgment by default final for want of an answer, but only to judgment by default and inquiry. *Chozen Confections, Inc., v. Johnson*, 500.

618. Upon defendant's demand for contribution against codefendant, plaintiff may not take voluntary nonsuit as to codefendant. *Smith v. Kappas*, 758. Where one of judgment debtors, jointly and severally liable, discharges judgment under compromise agreement, he is entitled to contribution on basis of amount paid. *Scales v. Scales*, 553.

632, 638. Wife *held* entitled to review by *certiorari* of order releasing husband from jail where he had been committed for willful failure to pay alimony. *In re Adams*, 379.

638. Defendant's appeal from order continuing its motion to dismiss is premature, since the order disposes of no substantial right. *Sanderson v. Ins. Co.*, 270.

688, 689. As amended by Public Laws of 1927, ch. 255. The requirement of notice to judgment debtor of sale of property applies to resales after advanced bid. *Bank v. Gardner*, 584.

867, 5356. Condition precedent to *mandamus* to enforce money demand *ex contractu* against municipality that claim be reduced to final judgment and that resources for satisfaction of demand be shown, may be waived. *Dry v. Drainage Comrs.*, 356.

900, 901. Order for examination of adverse party is improperly granted plaintiff after complaint has been filed and before answer. *Ogburn v. Sterchi Bros. Stores, Inc.*, 507.

978, 984, 1667. In *habeas corpus* proceedings to obtain release from jail where petitioner had been confined for willful failure to pay alimony, prior order of commitment for contempt is conclusive. *In re Adams*, 379.

987. Complaint *held* to allege collateral promise to answer for debt or default of another within provision of statute of frauds. *Balentine v. Gill*, 496.

CONSOLIDATED STATUTES—*Continued.*

SEC.

990. Whether this statute is applicable to a promise made subsequent to the filing of petition in bankruptcy but before the order of discharge is entered, *quære*. *Westall v. Jackson*, 209.

1097. Petitioner has right to appeal to Superior Court from denial of petition for removal of restrictions from franchise, and petitioner's exceptions *held* to raise issues of fact, and appeal was properly transferred to civil issue docket for trial by jury on issue of whether petitioner was entitled to removal of restriction from its franchise. *Utilities Com. v. Coach Co.*, 233.

1242. Order taxing plaintiffs with one-half the costs which accrued prior to dismissal of action against compromising defendant *held* authorized by statute. *Gold v. Kiker*, 204.

1439, 639. Judgment of Superior Court is final as to all matters of fact established in accordance with procedure, and is subject to appeal and review only on matters of law. *Utilities Co. v. Coach Co.*, 233.

1667. Decree of absolute divorce terminates all rights to alimony. *Hobbs v. Hobbs*, 468. Court must find facts supporting its conclusion that failure to pay alimony as ordered was willful. *Smithwick v. Smithwick*, 503.

1716, 2791, 2792. Petition seeking condemnation of right of way for sewer line, describing respondent's land, but failing to describe easement sought to be condemned, is insufficient. *Gastonia v. Glenn*, 510.

1731. Where contingent limitation over is made to depend upon death of first taker without children or issue, the limitation takes effect when the first taker dies without children living at the time of his death. *Williamson v. Cox*, 177.

1739. Devise to testator's son "to him and his bodily heirs born in wedlock, if any, if no such heirs then to go back to his nearest of kin," *held* to show that "bodily heirs" were not used in technical sense, but meant issue or children. *Williamson v. Cox*, 177.

1802. Solicitor's reference to failure of defendant's wife to testify *held* prejudicial and not properly corrected by court. *S. v. Helms*, 592. While either husband or wife may testify for the other in a criminal prosecution, neither is competent to testify against the other. *S. v. Cotton*, 577. Where husband and wife are separately indicted for murder, and indictments are consolidated for trial, wife's testimony tending to incriminate husband, even though admitted against her solely, entitles him to new trial. *Ibid.*

1864 (d) (q). Evidence *held* sufficient to be submitted to the jury under provisions of this act upon question of liability of payee accepting corporation's check in payment of personal obligation of its president. *LaVecchia v. Land Bank*, 35.

2433. Where remainderman advances money for repairs, but fails to file any lien or bring action to enforce materialman's lien within time allowed by statute, he may not claim priority therefor as against purchaser of life estate at execution sale. *Bank v. Sawyer*, 142.

CONSOLIDATED STATUTES—*Continued.*

SEC.

2494. Plaintiff having cohabited with defendant in this state when he was of marriageable age under our law, *held* to have ratified marriage and was not entitled to annulment on ground that he was under age prescribed by state in which marriage took place. *Parks v. Parks*, 245.

2515. It must appear from certificate of officer that deed from wife to husband, or to trustee for husband's benefit, was acknowledged as required by statute. *Fisher v. Fisher*, 42. When deed is void because not so acknowledged, it cannot be the basis for an estoppel. *Ibid.*

2621 (66). Whether defendant's truck was parked on highway in violation of this section, *quære*. *Beck v. Hooks*, 105.

2621 (275) (301). The evidence tended to show that defendant did not have truck equipped with rear-view mirror, and that driver stopped truck on highway without giving statutory warning signal, that car following truck attempted to pass and struck car traveling in opposite direction. *Held:* Whether violation of statutes was one of proximate causes of accident was for jury. *Bechtler v. Bracken*, 515.

2621 (287). Warrant *held* sufficient to charge reckless driving. *S. v. Wilson*, 769. Evidence of defendant's guilt of reckless driving *held* for jury. *Ibid.*

2621 (320). Evidence *held* to show contributory negligence as matter of law on part of pedestrian walking on right side of highway and turning to left in path of defendant's truck. *Miller v. Motor Freight Corp.*, 464.

2621 (326). Sentence to six months in county jail to be assigned to work roads under direction of State Highway and Public Works Commission is not excessive upon conviction of reckless driving. *S. v. Wilson*, 769.

2677. Municipality may not levy license tax on use of passenger vehicle for hire. *Cox v. Brown*, 350.

2706, 2711, 2722. Signing of petition for public improvements by husband and wife *held* sufficient evidence that husband was wife's agent in regard thereto, and notice to the husband was notice to the wife. *Wadesboro v. Coxe*, 729.

3010, 3030. Holder of check made payable to order which has not been endorsed by payee is merely equitable owner notwithstanding he may have paid full value, and defense that check was procured by fraud is available against such holder. *Foxman v. Hanes*, 722.

3309. Assignment of rents accruing for period in excess of three years must be recorded. *Bank v. Sawyer*, 142.

4200, 4643. Evidence *held* sufficient for jury on question of defendant's guilt of murder in first degree, and motions to nonsuit were properly denied. *S. v. Hudson*, 219; *S. v. Brown*, 415; *S. v. Wall*, 566; *S. v. Woodard*, 572.

CONSOLIDATED STATUTES—*Continued.*

SEC.

4209. Evidence of guilt of carnal knowledge of girl between ages of fourteen and sixteen *held* sufficient for jury. *S. v. Wyont*, 505.

4250. Verdict of guilty of "receiving" is insufficient to support sentence for receiving stolen goods with knowledge that they had been stolen. *S. v. Cannon*, 466.

4259. Creates statutory offense of larceny of chattels real, and proof of larceny of chattel real will not support conviction on indictment charging common law larceny. *S. v. Jackson*, 373.

4339. Elements of the offense of seduction, and requisites and sufficiency of supporting testimony. *S. v. Brackett*, 370.

4369. As rewritten in Public Laws of 1937, ch. 248. Evidence *held* to raise only conjecture or suspicion that defendant willfully and knowingly made false claim on fire insurance policy. *S. v. Stephenson*, 258.

4437 (b). Indictment charging possession of gambling devices, but failing to charge that defendant operated the devices or had them in his possession for purpose of being operated, is fatally defective. *S. v. Jones*, 734.

4437 (t). Indictment *held* sufficient to charge illegal possession of slot machines. *S. v. Abbott*, 470. This section not repealed by Revenue Act of 1939. *Ibid.*

4585. Judgment may be had upon *sci. fa.* against surety on appearance bond prior to service of *sci. fa.* on principal. *Bond Co. v. Krider*, 361; *S. v. Eller*, 365; *S. v. Brown*, 368. Subsequent arrest of defendant under *capias* does not discharge original forfeiture, C. S., 4594, having no application. *Bond Co. v. Krider*, 361. Motion that forfeiture be stricken out for that defendant had been subsequently arrested is addressed to discretion of court under C. S., 4588. *Bond Co. v. Krider*, 361. Where at time case is called, defendant is in custody of State upon another charge, judgment absolute against the surety should not be entered until it has an opportunity to produce the defendant after his release, C. S., 791, 4594. *S. v. Eller*, 365. Failure of defendant to appear on second Monday of term to pay cost constitutes forfeiture of appearance bond. *S. v. Brown*, 368.

4614. Evidence that defendant robbed his victim *held* competent even though indictment charged only murder with premeditation and deliberation, since evidence was competent as tending to show premeditation and deliberation. *S. v. Hudson*, 219.

4623. An indictment alleging sufficient matter to enable the court to proceed to judgment will not be quashed for mere informality or refinement. *S. v. Dale*, 625. Indictment or warrant will not be quashed for technical objections which do not affect the merits. *S. v. Wilson*, 769.

4640. Failure of court to submit question of defendant's guilt of nonburglarious breaking, presented by evidence, *held* error. *S. v. Chambers*, 442.

CONSOLIDATED STATUTES—*Continued.*

SEC.

4641. Where all the evidence shows that dwelling was actually occupied at time crime was committed, instruction that verdict of burglary in second degree is not permissible, is without error. *S. v. Johnson*, 604.

4643. Upon motion to nonsuit, evidence must be considered in light most favorable to State. *S. v. Brown*, 415. Nonsuit should be denied if there is any evidence reasonably conducing conclusion of guilt, but evidence which raises mere speculation or conjecture is insufficient. *S. v. Stephenson*, 258.

6184, *et seq.* In proceeding under statute a jury trial upon question of sanity is not required, C. S., 2285, not being applicable in the absence of application for appointment of guardian to manage property. Nor does statute give right of appeal to Superior Court. *In re Cook*, 384.

7990. Action to enforce lien for taxes under this section for year 1926 and years prior thereto *held* barred by ch. 181, Public Laws of 1933. *Raleigh v. Jordan*, 55.

8081 (k) (1). Where complaint alleges that defendants were not operating under Compensation Act, demurrer on ground that Industrial Commission had exclusive jurisdiction, is bad. *Cooke v. Gillis*, 726.

8081 (t). Evidence of death by violence raises presumption of death by accident. *McGill v. Lumberton*, 586.

CONSTITUTION OF NORTH CAROLINA, SECTIONS OF, CONSTRUED.
CONSTITUTION, SECTIONS OF, CONSTRUED.

(For convenience in annotating.)

ART.

I, sec. 17. To give statute providing for personal liability of stockholder for amount by which sale of stock fails to realize sum sufficient to pay assessment to make good impairment of bank's capital, retroactive effect, would violate due process of law. *Bank v. Derby*, 653.

II, sec. 29. Does not prohibit Legislature from setting up machinery under which county may establish special tax school districts. *Fletcher v. Comrs. of Buncombe*, 1.

IV, sec. 8. Only matters of law or legal inference are reviewable by Supreme Court upon appeal. *Barnes v. Teer*, 122.

IV, sec. 12. Judgment of Superior Court is final as to all matters of fact established in accordance with procedure, and is subject to appeal and review only on matters of law. *Utilities Com. v. Coach Co.*, 233.

V, sec. 5. Provision exempting property belonging to State and political subdivisions from taxation is self-executing; provision relating to exemption of property of charitable and educational institutions merely grants permissive power to Legislature. *Hospital v. Guilford County*, 673. General Assembly has power under this section to exempt prop-

CONSTITUTION, SECTIONS OF, CONSTRUED—*Continued.*

ART.

erty used for hospital purposes, and under this provision General Assembly has provided that taxes levied on real property of private hospital used for hospital purposes are subject to credit for services rendered indigent poor. *Ibid.* Lot purchased by church trustees for purpose of erecting new church, and pending accumulation of sufficient funds to erect new church, used exclusively for religious purposes is exempt from taxation. *Harrison v. Guilford County*, 718.

V, sec. 6. Ordinarily, expenses of holding courts, maintaining county jail and caring for prisoners are general county expenses. *R. R. v. Cherokee County*, 169.

X, sec. 1. Judgment creditor is entitled to claim judgment as his personal property exemption so as to defeat judgment debtor's right to set-off. *Edgerton v. Johnson*, 300.